Massachusetts Department of Revenue
Division of Local Services

Current Developments in Municipal Law

2008

Telecommunications Case Decisions & Orders

Book 2B

Navjeet K. Bal, Commissioner
Robert G. Nunes, Deputy Commissioner

www.mass.gov/dls

Telecommunications Case Decisions & Orders

Table of Contents

Book 2B **Page**

Bell Atlantic Mobile of Massachusetts Corporation, LTD v. Commissioner of Revenue, 451 Mass. 280 (2008) – *Central Valuation – Telephone & Telegraph Company – Wireless Telecommunications* 1

In Re MCI Consolidated Central Valuation Appeals: Boston and Newton, ATB 2008-255, Docket No. C269462 (March 13, 2008) – *Central Valuation – Telephone & Telegraph Company – Valuation Methodology – Construction Work In Progress – Dark Fiber – Personal Property Tax Exemption Qualifying Date* 6

In Re Verizon New England, Inc. Consolidated Central Valuation Appeals FY2003 – FY2008, ATB Docket No. C273560 (Order of March 3, 2008) – *Taxation of Poles & Wires Over Public Ways – Incorporated Telephone Companies* 75

BELL ATLANTIC MOBILE OF MASSACHUSETTS CORPORATION, LTD. [1] vs. COMMISSIONER OF REVENUE & others [2] (and a companion case [3]).

1 Doing business as Verizon Wireless.
2 Boards of assessors of 220 cities and towns.
3 Board of Assessors of Newton *vs.* Commissioner of Revenue & another.

SJC-10047

SUPREME JUDICIAL COURT OF MASSACHUSETTS

451 Mass. 280*; *884 N.E.2d 978*; *2008 Mass. LEXIS 234

March 6, 2008, Argued
April 28, 2008, Decided

PRIOR HISTORY: [***1]
Suffolk. Appeal from a decision of the Appellate Tax Board. The Supreme Judicial Court granted an application for direct appellate review.

DISPOSITION: Decision of the Appellate Tax Board affirmed.

COUNSEL: Helgi C. Walker, of the District of Columbia (Elbert Lin, of the District of Columbia, & Kathleen King Parker with her) for Bell Atlantic Mobile of Massachusetts Corporation, Ltd.

Richard G. Chmielinski, Assistant City Solicitor, for Board of Assessors of Newton.

Daniel J. Hammond, Assistant Attorney General (Daniel A. Shapiro, Special Assistant Attorney General, with him) for Commissioner of Revenue.

The following submitted briefs for amici curiae: Rosemary Crowley, David J. Martel, & Thomas J. Urbelis for Massachusetts Association of Assessing Officers & another.

Anthony M. Ambriano for Board of Assessors of Boston & another.

Michael E. Malamut, Martin J. Newhouse, & Jo Ann Shotwell Kaplan for New England Legal Foundation & another.

JUDGES: Present: Greaney, Ireland, Spina, Cowin, Cordy, & Botsford, JJ.

OPINION BY: COWIN

OPINION

[**979] [*281] COWIN, J. The central issue in this case is whether a provider of wireless cellular telecommunications, or "cell phone" service, qualifies as a "telephone company" in order to obtain central valuation of certain [***2] of its personal property by the Commissioner of Revenue (commissioner), rather than being subjected to separate valuations by local boards of assessors. [4] For the reasons stated below, we hold that a provider of wireless cellular telecommunications service is not a "telephone company" for purposes of central valuation.

4 Pursuant to *G. L. c. 59, § 39*, "the machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies" are subject to central valuation by the Commissioner of Revenue (commissioner), rather than to separate valuations by the local boards of assessors of the various municipalities in which the property is located.

Background. Bell Atlantic Mobile of Massachusetts Corporation, Ltd. (Bell Atlantic Mobile), the successor in interest to Bell Atlantic Mobile of Massachusetts LLC, is a provider of what is popularly [**980] known as "cell phone" service. As currently organized, Bell Atlantic Mobile is a Bermuda corporation doing business in Massachusetts under the name "Verizon Wireless."

For fiscal year 2004, the Commissioner of Revenue centrally valued Bell Atlantic Mobile's property, treating it as a "telephone company" for purposes of *G. L. c. 59, § 39*; [***3] however, the commissioner determined that Bell Atlantic Mobile was not eligible for the property tax exemption granted to certain utility corporations [5] because it was not incorporated as of January 1, 2003. Bell Atlantic Mobile appealed under *G. L. c. 59, § 39*, [*282] to the Appellate Tax Board (board), naming as appellees both the commissioner and the boards of assessors of the 220 municipalities in which it owns

property ("*§ 39* appeals"). In each of the *§ 39* appeals, Bell Atlantic Mobile argued that the commissioner's valuation of its property was too high, both because it included property that should have been subject to the corporate utility exemption, and because the commissioner's valuation methodology was improper. Each *§ 39* appeal also sought abatement of property taxes from the relevant board of assessors. [6] Seeking the same relief under other provisions, Bell Atlantic Mobile filed separate appeals pursuant to *G. L. c. 59, §§ 64* and *65*, requesting abatement of property taxes paid to the 220 cities and towns in which its personal property was located ("*§ 65* appeals"). Meanwhile, the board of assessors of Newton filed its own *§ 39* appeal, arguing that Bell Atlantic Mobile was not **[***4]** a "telephone company" within the meaning of *G. L. c. 59, § 39*, and that the commissioner had therefore erred in centrally valuing its property. The Newton assessors argued, additionally, that the commissioner had undervalued the taxable property.

5 *General Laws c. 59, § 5, Sixteenth (1) (d)*, the "corporate utility exemption," grants an exemption from property tax to certain personal property of "a foreign corporation subject to taxation under section . . . fifty-two A . . . of . . . chapter sixty-three." Eligible corporations are exempt from property tax on all personal property except "poles, underground conduits, wires and pipes, and machinery used in manufacture." *Id. General Laws c. 63, § 52A*, in turn, contains a definition of "[u]tility corporation" that includes "every incorporated telephone and telegraph company subject to chapter one hundred and sixty-six."

6 The record before us does not show that Bell Atlantic Mobile sought abatement in the *§ 39* appeals; however, we accept the board's finding that it did.

The board consolidated the *§ 39* appeals and the *§ 65* appeals. It then bifurcated the issues for trial, holding hearings first on the issue of Bell Atlantic Mobile's eligibility **[***5]** for central valuation and the corporate utility exemption, and deferring all questions of the correct value of the taxable property.

The board decided the consolidated *§ 39* appeals on May 15, 2006, holding that neither Bell Atlantic Mobile nor its limited liability company predecessor was a "telephone company" entitled to central valuation under *G. L. c. 59, § 39*. The same day, the board also issued an order in the *§ 65* appeals, ruling that because Bell Atlantic Mobile was not a "telephone company" at any time, it was not eligible either for central valuation under *§ 39* or for the corporate utility exemption under *G. L. c. 59, § 5, Sixteenth (1) (d)*. The board stayed further action on the *§ 65* appeals to allow the parties to seek judicial **[*283]** review of its decision that Bell Atlantic Mobile is not entitled to central valuation under *§ 39*. [7] Bell Atlantic Mobile appealed. **[**981]** We granted Bell Atlantic Mobile's application for direct appellate review, and we affirm the decision of the board. [8]

7 The board did not finally resolve the *§ 65* appeals because outstanding valuation issues remained. It did finally resolve the *§ 39* appeals by concluding that Bell Atlantic Mobile is not a telephone company **[***6]** or eligible for central valuation by the commissioner.

The parties devote considerable argument to the corporate utility exemption, see *G. L. c. 59, § 5, Sixteenth (1) (d)*. That matter is not at issue in the *§ 39* appeals that are before us.

8 We acknowledge the amicus briefs submitted by the boards of assessors of the city of Boston and the town of Brookline; the Massachusetts Association of Assessing Officers and Massachusetts City Solicitors and Town Counsel Association; and the New England Legal Foundation and Associated Industries of Massachusetts.

Discussion. Our review of a board decision is limited to questions of law. *Towle v. Commissioner of Revenue, 397 Mass. 599, 601, 492 N.E.2d 739 (1986)*. See *G. L. c. 58A, § 13*. We will not disturb the board's findings so long as they are supported by substantial evidence and a correct application of the law. *Koch v. Commissioner of Revenue, 416 Mass. 540, 555, 624 N.E.2d 91 (1993)*. The proper interpretation of a statute is a question of law for us to resolve. See *Gray v. Commissioner of Revenue, 422 Mass. 666, 675 n.12, 665 N.E.2d 17 (1996)*, quoting *Massachusetts Community College Council MTA/NEA v. Labor Relations Comm'n, 402 Mass. 352, 353, 522 N.E.2d 416 (1988)* ("the duty ultimately to interpret **[***7]** the statute rests with the court"). As the board is an agency charged with administration of the tax law, however, its interpretations of tax statutes "may be given weight by this court." *Commissioner of Revenue v. McGraw-Hill, Inc., 383 Mass. 397, 401, 420 N.E.2d 293 (1981)*, quoting *Xtra, Inc. v. Commissioner of Revenue, 380 Mass. 277, 283, 402 N.E.2d 1324 (1980)*.

The board made extensive findings of fact, based on substantial evidence, regarding the development and operation of wireless cellular telecommunications technology. Cellular "telephones" use radio frequencies licensed by the Federal Communications Commission (FCC) to transmit voice and data over a network of radio antennae mounted on towers and buildings. When a

subscriber to "cell phone" service presses the "send" button on a handset, a radio signal is transmitted to a nearby cellular base station. The signal transmits information identifying [*284] the subscriber, the originating handset, and the number the subscriber is trying to reach. The handset must continually monitor and transmit its location so as to maintain a connection as the handset's location changes. The base station receiving the transmission sends the signal to a mobile telephone switching office [***8] (MTSO), which then transmits the call either to another cellular base station (if the recipient is also a "cell phone" subscriber) or to the copper or fiber-optic lines owned by the local telephone company or a long-distance carrier (if the recipient is a wired telephone, or "land-line," user).

The handset is powered by an internal battery; the electricity generated by the battery, however, does not leave the handset. The signal sent and received by the handset is radio frequency, not electricity. Therefore, Bell Atlantic Mobile's wireless cellular telecommunications network is classified as a commercial mobile radio service (CMRS) and regulated under *G. L. c. 159*, the common carrier statute. The board found that wireless cellular telecommunications technology and telephone technology developed on "parallel but distinct tracks," and that the two technologies are both conceptually and historically separate.

Neither the relevant tax statutes -- *G. L. c. 59, § 39* (central valuation); *G. L. c. 59, § 5 Sixteenth (1) (d)*, [**982] (corporate utility exemption); and *G. L. c. 63, § 52A* (definition of "utility") -- nor *G. L. c. 166*, which regulates "telephone and telegraph companies," provides a specific [***9] definition of "telephone company." [9] The Legislature has, however, created a comprehensive regulatory framework governing "telephone companies" in *G. L. c. 166*. We therefore look to that chapter for guidance in determining whether a CMRS provider such as Bell Atlantic Mobile qualifies as a "telephone company." See *FMR Corp. v. Commissioner of Revenue, 441 Mass. 810, 819, 809 N.E.2d 498 (2004)*, quoting *Board of Educ. v. Assessor of Worcester, 368 Mass. 511, 513-514, 333 N.E.2d 450 (1975)* (where "two or more statutes relate to the same [*285] subject matter, they should be construed together so as to constitute a harmonious whole consistent with the legislative purpose"). As the board concluded, most of the provisions of *G. L. c. 166* are simply inapplicable to CMRS providers. For example, *G. L. c. 166, §§ 1-10* concern various stock subscription and filing requirements that must be satisfied before a telephone company may "commence the construction of its line." *G. L. c. 166, § 1. Section 15D* concerns safety measures for telephone company employees working in areas where telephone cables are located in common trenches with energized electrical cables; *§§ 21 through 42B* relate to poles and wires. *Sections 16 through 20* govern [***10] telegraph companies. Bell Atlantic Mobile does not own or need poles, wires, pipes, or underground conduits; it has not argued that it is a telegraph company. Although in the past Bell Atlantic Mobile and other CMRS providers filed annual returns pursuant to *G. L. c. 166, § 11*, Bell Atlantic Mobile has apparently not filed such a return since 1993, and there is no evidence that the Department of Public Utilities or the Department of Telecommunications and Energy [10] has taken any enforcement action against Bell Atlantic Mobile, or any other CMRS, for failure to so file.

9 Most of the relevant statutes refer to telephone and telegraph "companies." See *G. L. c. 59, § 39*; *G. L. c. 63, § 52A* ("telephone and telegraph company" included in definition of "utility corporation"); *G. L. c. 166, § 1*. Some, however, refer to telephone and telegraph "utilities." See *G. L. c. 159, § 12D*. In the absence of explicit definitions or distinctions, we assume that the terms "telephone company" and "telephone utility" were used interchangeably by the Legislature.

10 The Department of Public Utilities was renamed the Department of Telecommunications and Energy in 1997. *St. 1997, c. 164, § 28*. As of April 10, [***11] 2007, the agency has resumed the name Department of Public Utilities. *St. 2007, c. 19, § 21*.

In contrast, as a CMRS provider, Bell Atlantic Mobile is regulated under *G. L. c. 159*, which governs common carriers. Bell Atlantic Mobile notes, correctly, that land-line telephone companies are also considered common carriers and thus are regulated under both *G. L. c. 159* and *G. L. c. 166*. We fail to see, however, why that fact requires a conclusion that CMRS providers are regulated under *G. L. c. 166*. The language and structure of the regulatory statutes support the conclusion that the Legislature does not consider CMRS providers such as Bell Atlantic Mobile to be "telephone companies." [11]

11 The board's conclusion that Bell Atlantic Mobile is not a telephone company under *G. L. c. 59, § 39*, disposed of the *§ 39* appeals. Because Bell Atlantic Mobile was not entitled to central valuation by the commissioner under *§ 39*, the board ruled that the commissioner had no authority either to grant or to deny the corporate utility exemption, and therefore did not decide in the *§ 39* appeals whether Bell Atlantic Mobile was entitled to the exemption. The board did decide, in the context of the *§ 65* appeals,

[***12] that Bell Atlantic Mobile was not entitled to the exemption. Those appeals, however, are not before us.

[**983] The board found additional support for its conclusion in an [*286] analysis of the corporate utility exemption granted by *G. L. c. 59, § 5, Sixteenth (1) (d)*. The board examined the list, set forth in *G. L. c. 63, § 52A*, of the kind of utility companies entitled to the exemption, and noted that the listed businesses (which include, in addition to telephone and telegraph companies, electric and gas companies, water and aqueduct companies, railroads and railroad terminal companies, street railways, electric railroads, trackless trolleys, and natural gas pipeline companies) all shared a common characteristic: an extensive, physically interconnected distribution infrastructure. The board noted also that all of the listed businesses have historically been considered "natural monopolies" because the extensive capital investment required to create the infrastructure for such a business tends to discourage competition, so that these businesses have historically been allowed to operate as monopolies subject to more extensive government regulation of entry and rates. CMRS providers, in contrast, do [***13] not utilize the type of physically connected distribution infrastructure needed by the utilities listed in *§ 52A*; moreover, CMRS providers are highly competitive, and they are not subject to the entry and rate regulation historically applied to *§ 52A* utilities.

Finally, the board pointed out that reference to each utility listed in *§ 52A* is accompanied by a reference to the statute under which it is regulated. Therefore, a telephone or telegraph company would qualify for the corporate utility exemption only if it were "subject to [regulation under] chapter one hundred and sixty-six." *G. L. c. 63, § 52A*. The board reasoned that these specific references to the relevant regulatory authorities indicate that an entity that provides service similar to an included utility, but not regulated under the same statute, is not a *§ 52A* utility and not entitled to the same favorable tax treatment. As we have already discussed *supra,* the majority of the provisions of *G. L. c. 166* are simply inapplicable to a CMRS provider, and Bell Atlantic Mobile's assertion that it might hypothetically be "subject to" *G. L. c. 166* in some way is too speculative to be convincing. [*287] Therefore, the language of the corporate [***14] utility exemption statutes reinforces the conclusion that Bell Atlantic Mobile is not a telephone company.

Turning to the central valuation statute itself, the board found that Bell Atlantic Mobile owns virtually none of the property that *G. L. c. 59, § 39*, makes eligible for central valuation. That statute was enacted in 1915 to address the problem of piecemeal assessment of a distribution infrastructure whose components were physically interconnected by a system of wires that crossed municipal boundaries. See *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. 198, 199, 820 N.E.2d 208 (2005)*. The commissioner at that time had urged the Legislature to adopt a central valuation system, describing the difficulties of the then-current system in language that focused specifically on the interconnectedness of telephone infrastructure:

> "In almost no case is a line of wires situated wholly in a given municipality. Thus the duty imposed upon assessors is to value a part of an extensive property, -- a part which *is not disconnected* and the correct valuation of which cannot be made except by knowledge of the whole property. . . . It is necessary for a board of assessors, as it were, to cut off a line of poles [***15] and wires at one boundary of the town, to cut it off at the opposite boundary, and then to find a value for the severed property thus within the limits of the town." (Emphasis added).

[**984] *Report of the Tax Commissioner for Year Ending November 30, 1914,* Pub. Doc. No. 16, 28 (1915). We agree with the board that it is the interconnectedness of the land-line telephone system infrastructure, and not the mere fact that equipment may be found in several different municipalities, that distinguishes "telephone companies" from other businesses for purposes of central valuation under *G. L. c. 59, § 39*. [12] The board's interpretation is logical and consistent with the language and purpose of the regulatory and tax statutes. We defer to it not only [*288] because the board adopted it, see *Koch v. Commissioner of Revenue, 416 Mass. 540, 555, 624 N.E.2d 91 (1993)*, but, more importantly, because it appears to be correct.

> 12 Evidence before the board indicated that radio communication existed at the time *G. L. c. 59, § 39*, was originally enacted. The Legislature presumably was aware of this fact and, had it desired, could have provided for central valuation of wireless communication equipment as well as telephone and telegraph [***16] lines.

Bell Atlantic Mobile argues that our decision in *RCN-BecoCom, LLC v. Commissioner of Revenue, supra,* compels the conclusion that it is a telephone company for purposes of both central valuation and the corporate utility exemption. In that decision, however, a company that provided land-line telephone service

(albeit with a differently designed infrastructure from that of a traditional telephone company) was engaged in the provision of cable television and Internet services as well. *Id. at 200.* The issue was whether the company's telephone service was a sufficiently substantial portion of its over-all business to qualify it as a "telephone company" eligible for central valuation under *§ 39. Id. at 201-202.* Therefore, when we found that the company was "undeniably" engaged in providing telephone services, *id. at 201*, that finding signified only that there was no dispute that some of the services that the company provided *over its land-line network* involved two-way voice communications, as opposed to television or Internet services. *Id. at 200-201.* We were not concerned in the *RCN-BecoCom* decision with whether a wireless cellular telecommunications service provider such as Bell **[***17]** Atlantic Mobile, which did not employ a physically interconnected infrastructure, might also be a telephone company; therefore, the logic of that case is inapplicable here.

We acknowledge that our holding today may not reflect the common, indiscriminate references to cellular telephones and traditional, land-line telephones as similar instrumentalities. Ordinarily, words in a statute are to be given their "usual and natural meaning," *Gillette Co. v. Commissioner of Revenue, 425 Mass. 670, 674, 683 N.E.2d 270 (1997)*, quoting *Commissioner of Revenue v. AMI Woodbroke, Inc., 418 Mass. 92, 94, 634 N.E.2d 114 (1994)*, and to some the usual and natural meaning of "telephone" includes both land-line and wireless communication systems. Here, however, where a complex and technical system of regulation and taxation is concerned, the layperson's definition is not controlling. In this context, the common conception of "telephone" as including cellular communication devices is misleading; from a technological and regulatory standpoint, a cellular "telephone" is in fact a **[*289]** two-way radio. We therefore agree with the suggestion, implicit in the board's findings, that the more technical understanding of "telephone company" -- which excludes **[***18]** CMRS providers such as Bell Atlantic Mobile -- applies in this case.

Bell Atlantic Mobile maintains that our refusal to treat it as a telephone company **[**985]** for central valuation purposes will chill innovation in the wireless cellular telecommunications industry. That, however, is a policy matter for the Legislature. The board has correctly interpreted and applied the statutes as written. [13], [14]

13 Because we affirm the board's finding that Bell Atlantic Mobile was not a telephone company at any time, we do not reach the issue whether the commissioner was correct in finding that at the relevant time, it was not a corporation for purposes of the corporate utility exemption.

14 During the course of these proceedings, the commissioner has changed his position on whether Bell Atlantic Mobile is a telephone company. In the hearings before the board, the commissioner acknowledged that, while the Department of Revenue (department) had treated Bell Atlantic Mobile as a telephone company for purposes of central valuation, there had been conflicting interpretations within the department regarding whether wireless cellular telecommunications providers such as Bell Atlantic Mobile should be so classified. **[***19]** After reviewing the board's findings of fact and report on its decision, the commissioner changed his position, adopting the board's conclusion that Bell Atlantic Mobile was not a telephone company. Bell Atlantic Mobile maintains that we should give greater weight to the commissioner's past practice than to his new position. We disagree. The board correctly gave no weight to the commissioner's prior position, concluding that it was inconsistent with the underlying statutes. See *Massachusetts Hosp. Ass'n, v. Department of Med. Sec., 412 Mass. 340, 346, 588 N.E.2d 679 (1992).*

Decision of the Appellate Tax Board affirmed.

COMMONWEALTH OF MASSACHUSETTS
APPELLATE TAX BOARD

IN RE MCI CONSOLIDATED CENTRAL VALUATION APPEALS: BOSTON AND NEWTON[1]

Docket No.: C269462[2]

Promulgated: March 13, 2008

ATB 2008-255

These are consolidated appeals under the formal procedure, under G.L. c. 58A, §§ 6 and 7 and G.L. c. 59, § 39, challenging the central valuation for fiscal years 2004, 2005, and 2006 determined and certified by the Commissioner of Revenue ("Commissioner"), pursuant to G.L. c. 59, § 39, for MCI's "machinery . . . and underground conduits, wires and pipes" ("§ 39 property"), located in the cities of Boston and Newton.

Commissioner Scharaffa heard these appeals. Chairman Hammond and Commissioners Egan, Rose, and Mulhern joined him in the decisions for the appellants, MWNS, Inc. and MCImetro, LLC, in their fiscal year 2004 appeals and in the decisions for the appellee Commissioner in the remaining appeals.

These findings of fact and report are made pursuant to the Appellate Tax Board ("Board")'s own motion under G.L. c. 58A, § 13 and 831 CMR 1.32 and are promulgated simultaneously with the decisions in these consolidated appeals.

William A. Hazel, Esq., *James F. Ring*, Esq., and *David Loh*, Esq. for the appellant and appellee MCI.

Anthony M. Ambriano, Esq. for the appellant and

---

[1] The parties to these consolidated appeals are named and more fully described *infra*.

[2] The docket numbers of the consolidated appeals are summarized in the table below by appellant, and then by fiscal year and appellee (other than Commissioner):

MWNS, Inc.	MCImetro, LLC	Newton Assessors	Boston Assessors
FY/Docket No./City	FY/Docket No./City	FY/Docket No./Company	FY/Docket No./Company
2004/C269504/Boston	2004/C269462/Boston	2004/C269571/MCImetro, LLC	2005/C273736/MCImetro, LLC
2004/C269538/Newton	2004/C269485/Newton	2005/C273843/MCImetro, LLC	2005/C273734/MWNS, Inc.
2005/C274200/Boston	2005/C274128/Boston	2004/C269581/MWNS, Inc.	
2005/C274234/Newton	2005/C274152/Newton	2005/C273842/MWNS, Inc.	
2006/C280509/Boston		2006/C279712/MWNS, Inc.	
2006/C280543/Newton			

appellee City of Boston.

Richard G. Chmielinski, Esq. for the appellant and appellee City of Newton.

Daniel A. Shapiro, Esq. for the appellee Commissioner of Revenue.

FINDINGS OF FACT AND REPORT

Introduction

MCI WorldCom Network Services, Inc. ("MWNS, Inc."), MCI Metro Access Transmission Services, LLC ("MCImetro, LLC"),[3] the Board of Assessors of the City of Boston ("Boston Assessors"), and the Board of Assessors of the City of Newton ("Newton Assessors")[4] each appeal from certain central valuations of § 39 property certified by the Commissioner for fiscal years 2004, 2005, and 2006, pursuant to G.L. c. 59, § 39.[5]

On August 4, 2006, the Board ordered the consolidation of the appeals enumerated in footnote 2, *supra*, to serve as the lead cases concerning the Commissioner's § 39 central valuations for fiscal years 2004, 2005, and 2006, with all other § 39 central valuation appeals for these fiscal years, involving other telephone companies and municipalities, being essentially stayed pending resolution of these consolidated appeals.

In these appeals, MCI argues that the Commissioner's certified values for its § 39 property in Boston and Newton are substantially too high, while the Assessors argue that these values are substantially too low. For his part, the Commissioner maintains that his valuation methodology and the certified central values derived from that methodology are proper and correct.

In addition to valuation issues, the parties also raised the following: the Assessors claim that the Board does not have jurisdiction over these consolidated appeals; MCImetro, LLC asserts that, under G.L. c. 59, § 5, cl. 16(1)(d), it is entitled to the corporate utility exemption for telephone machinery used in the conduct of its business

---

[3] MWNS, Inc. and MCImetro, LLC are collectively referred to as "MCI."

[4] The Boston Assessors and Newton Assessors are collectively referred to as the "Assessors."

[5] The Boston Assessors appealed the certified central valuation for only fiscal year 2005. MCImetro, LLC appealed the certified central valuations for only fiscal years 2004 and 2005.

other than generators; MCI asserts that in the fiscal years at issue in which it filed petitions challenging the Commissioner's valuations as substantially too high, but the Boston Assessors failed to file petitions challenging the Commissioner's valuations as substantially too low, the Board may not find that the Commissioner's valuations for the § 39 property located in Boston are substantially too low; and lastly, the Commissioner maintains that the scope of the Board's review in these consolidated appeals necessitates a preliminary or threshold finding regarding whether the Commissioner's valuation methodology was proper before the Board can make findings on fair cash value.

These appeals were presented to the Board through: Statements of Agreed Facts with exhibits; the testimony of lay and expert witnesses and the introduction of additional exhibits, including expert valuation reports, at the hearing of these appeals; and post-trial briefs and reply briefs. MCI presented six witnesses at the hearing of these appeals: Charles Burkhardt, Assistant Director for Property Tax for Verizon Communications;[6] David Blazek, Director of Fixed Asset Accounting for Verizon Business;[6] Sean Murphy, Implementation Engineer for Verizon Business;[6] James Kenny, MCI property tax department; Jerome Weinert, the MCI valuation witness from AUS Consultants whom the Board qualified as an expert in the areas of depreciation and functional obsolescence and in valuing telephone companies and whose opinion was the basis for MCI's claims that the values which the Commissioner applied to the subject § 39 property were substantially too high; and Carl Hoemke, whose proposed expert testimony and report valuing the § 39 property using business valuation techniques was excluded by the Board at the hearing.[7] The Assessors called two witnesses, Mark Rodriguez and Mark Pomykacz from Federal Appraisal and Consulting LLC, whom the Board qualified as appraisal experts. The Commissioner also called two witnesses, Marilyn Brown, Chief of the Commissioner's Bureau of Local Assessment ("BLA") and

---

[6] These apparently are short-hand denominations for different sections, departments, or divisions within one or more of the Verizon entities, MCI's successors.

[7] Commissioner Scharaffa ruled that Mr. Hoemke's valuation methodology was not a recognized approach for valuing telephone companies' personal property for *ad valorem* tax purposes. *See, e.g.*, ***Community Cablevision of Framingham v. Assessors of Framingham***, Mass. ATB Findings of Fact and Reports, 1987-180, 185-86 ("The [B]oard does not consider that approach [valuing the business as a whole and subtracting the value of the intangibles, etc.] as a proper method of valuing tangible personal property for assessment and taxation.").

George Sansoucy, whose company, George Sansoucy P.E. LLC, was retained by the BLA to devise a mass appraisal system for central valuation of telephone company § 39 property. The Board qualified Mr. Sansoucy as an expert in the fields of utility and telephone company personal property valuation and in engineering. He testified on the valuation system that he developed, recommended, and helped to implement for the Commissioner. He also provided the Board with his opinion regarding the values derived for MCI's § 39 property. The parties' valuation experts critiqued other parties' valuation methodologies and values. On the basis of this evidence, the Board makes the following findings of fact.

The Parties

MWNS, Inc. was formed as a Delaware corporation in February 1973 with the original name of MCI Telecommunications Corporation. Its name was subsequently changed to MCI WorldCom Network Services, Inc. in May 1999 and then changed again in June 2005 to MCI Network Services, Inc. Since April 10, 2006, it has been named Verizon Business Network Services, Inc. For Massachusetts purposes, MWNS, Inc. filed a Form P.S.1 as a "utility corporation" for each of calendar years 2002, 2003, and 2004.[8]

MCImetro, LLC was formed as a Delaware limited liability company in May, 1998. At all relevant times, its sole member was MWNS, Inc. Effective April 26, 2004, MCImetro, LLC filed a Form 8832 with the Internal Revenue Service electing to be taxed, for federal income tax purposes, as a corporation. Prior to that time, as a limited liability company wholly owned by a corporate sole member, MCImetro, LLC was treated as a disregarded entity and as a division of MWNS, Inc., and was taxed as a partnership for federal income tax and Massachusetts utility corporation franchise tax purposes. For Massachusetts purposes, MWNS, Inc. included MCImetro, LLC as a division in its Form P.S.1 filings except that MCImetro, LLC filed its own Form P.S.1 for the period of April 26, 2004 through December 31, 2004.[9]

---

[8] Form P.S.1 is a Massachusetts "Public Service Corporation Franchise Tax Return."

[9] There is no issue in these appeals regarding the appropriateness of MCImetro, LLC's filing its own Form P.S.1 for Massachusetts utility corporation franchise tax purposes, other than its possible effect on

MWNS, Inc. and MCImetro, LLC were part of a consolidated group of companies owned by WorldCom, Inc., which filed for chapter 11 Bankruptcy protection in July 2002. The Bankruptcy Court confirmed a reorganizational plan, with an effective date of April 20, 2004, which provided that the MCImetro, LLC's "CLEC assets in Massachusetts (including without limitation contracts and executory contracts) will be assigned/transferred to MCI Metro Access Transmission Services of Massachusetts, Inc." In May 2004, an entity named Brooks Fiber Communications of Massachusetts, Inc. ("Brooks Fiber"), a Delaware corporation, filed a Certificate of Amendment with the Delaware Secretary of State changing its name to MCI Metro Access Transmission Services of Massachusetts, Inc. In August 2004, Brooks Fiber filed a Certificate of Amendment with the Massachusetts Secretary of State changing its name to MCI Metro Access Transmission Services of Massachusetts, Inc. ("MCImetro of Massachusetts, Inc.").

For fiscal years 2004 and 2005, Brooks Fiber submitted Forms 5941 to the Commissioner, and the Commissioner certified and issued centralized valuations to Brooks Fiber. For fiscal year 2005, MCImetro of Massachusetts, Inc. did not submit a Form 5941 to the Commissioner and was not subject to central valuation. Brooks Fiber never amended its Forms 5941, which were submitted before the Bankruptcy confirmation, to add any fiber optic cable, conduit, or generation equipment that may have been transferred to it as of April 20, 2004. For fiscal year 2006, the Commissioner treated MCImetro of Massachusetts, Inc. as a telephone company under G.L. c. 59, § 39 and centrally valued its § 39 property. MCImetro of Massachusetts, Inc. also filed a Massachusetts Form P.S.1 and annual telephone and telegraph company returns with the Massachusetts Department of Telecommunications and Energy ("DTE").

Both MWNS, Inc. and MCImetro, LLC provide voice, broadband data transfer, and Internet services over land-line based telecommunications systems based on fiber optic cables, conduits and electronic machinery. MWNS, Inc. is a long distance telephony provider, while MCImetro, LLC is a competitive local exchange carrier or "CLEC" providing local telephone service. Both MWNS, Inc. and MCImetro, LLC file annual telephone and telegraph company returns with the DTE. At all relevant times, the Commissioner treated MWNS, Inc. and MCImetro, LLC as telephone companies for the

---

the LLC's eligibility for the corporate utility exemption under G.L. c. 59, § 5, c. 16(1)(d).

purpose of centrally valuing their telephone personal property under G.L. c. 59, § 39. The Assessors do not dispute, and the Board finds that there was no evidence challenging, the Commissioner's classification of MWNS, Inc. and MCImetro, LLC as telephone companies for purposes of § 39 for the fiscal years at issue.

Newton and Boston are municipal corporations situated within the Commonwealth of Massachusetts. The Assessors are charged with, among other things, assessing tax on § 39 property that has been centrally valued by the Commissioner.

The Commissioner is responsible for the administration of certain defined tax matters as provided for in the General Laws. Pursuant to G.L. c. 14, § 3, the Commissioner is empowered to administer and enforce the tax laws of the Commonwealth using, among other things, his powers to conduct audit and compliance activities. The BLA is the Bureau within the Department of Revenue's Division of Local Services responsible for reviewing and making recommendations to the Commissioner with respect to the Commissioner's obligations under G.L. c. 59, § 39. The BLA, among other responsibilities: issues the personal property return form, denoted Form 5941, for submission by qualified telephone companies; determines whether an entity qualifies for treatment as a telephone company; examines and may audit § 39 returns; establishes the fair cash value of all telephone companies' § 39 property on a municipality-by-municipality basis; and certifies the fair cash value determinations for all telephone companies in the municipalities in which they own personal property subject to central valuation under G.L. c. 59, § 39.

Reporting Requirements and Jurisdiction

The Commissioner performs an annual valuation of telephone and telegraph company personal property subject to central valuation pursuant to G.L. c. 59, § 39. The Commissioner must complete this valuation and certify values to the owners of the § 39 property and to the boards of assessors of the municipalities where § 39 property is located by May 15th of each year.[10] Taxable personal property owned by telephone and telegraph companies that is not subject to central valuation is reported to and valued by local assessors in the municipalities where the property

[10] Prior to its amendment by St.1981, c. 111, § 2, G.L. c. 59, § 39 required the Commissioner to issue his certified central values by March 15th.

is located under G.L. c. 59, §§ 29 and 38.

In order to provide the Commissioner with information necessary to perform his central valuation, telephone companies are required to make a return with the Commissioner on a specified date not later than March 1st.[11] The Commissioner sometimes allows extensions beyond the March 1st date, even though the relevant central valuation statutory provisions do not expressly provide for them. The return, as described in G.L. c. 59, § 41, is "in the form and detail prescribed by the commissioner and shall contain all information which he shall consider necessary to enable him to make the valuations required by section 39, and shall relate, so far as is possible, to the situation of the company and its property on January first of the year when made." "If any company . . . shall . . . fail to make the return required of section forty-one, the [C]ommissioner shall estimate the value of the property of the company according to his best information and belief." G.L. c. 59, § 42. For the fiscal years at issue, the Commissioner issued prescribed tax forms under G.L. c. 59, § 41, for use in central valuations. The form is denoted as State Tax Form 5941, "FISCAL YEAR [year] - Telephone and Telegraph Company: Return of personal property subject to valuation by the Commissioner of Revenue."

MWNS, Inc. made its returns to the Commissioner on Forms 5941 for fiscal years 2004, 2005, and 2006. MCImetro, LLC made its returns to the Commissioner on Forms 5941 for fiscal years 2004 and 2005.[12] The companies made both hard copy and electronic submissions to the Commissioner. The inventory reported to the Commissioner was based primarily on MCI's financial accounting books, denominated "Book 30," which were maintained for purposes of reporting to the U.S. Securities and Exchange Commission ("SEC"). MCI also maintained a second set of books containing property inventories for federal income tax purposes, which were termed "Book 10." When MCI's financial books were restated for SEC purposes to reflect the bankruptcy proceedings and asset impairments, the new financial books were designated as "Book 1."

In Book 30, MCI's outside plant was tracked using cost

---

[11] This reporting deadline was held over from the pre-amendment version of G.L. c. 59, § 39, despite the two-month increase in the amount of time for the Commissioner to fulfill his responsibility.

[12] Because MCImetro, LLC transferred its "CLEC assets in Massachusetts" to MCImetro of Massachusetts, Inc. as of April 20, 2004, it presumably did not own the § 39 property as of January 1, 2005 and, accordingly, did not file a Form 5941 for fiscal year 2006.

centers, listing just a small number of Massachusetts municipalities. Consequently, amounts reported for the outside plant (underground fiber optic cable and conduit) had to be adjusted to reflect its location on a municipality-by-municipality basis. In preparing Form 5941, the overall cost of the underground fiber optic cable and conduit had to be extrapolated across the overall system in accordance with mileage across the system. MCI's engineers were also consulted from year to year on additions to and subtractions from the outside plant and that information was also taken into account in completing the Forms 5941. In reporting its electronic and other non-manufacturing machinery from Book 30 to Forms 5941 for the Commissioner, it was necessary for MCImetro, LLC to apply some further adjustments relating to categorization.

The Assessors argue that the Board does not have jurisdiction over the present appeals because MCI failed to submit proper returns, under G.L. c. 59, § 41, "in the form and detail prescribed by the Commissioner." The Assessors also argue that the Board lacks jurisdiction over these appeals because MCI's returns were not submitted by the March first deadline contained in G.L. c. 59, § 41 and the Commissioner lacks authority to grant extensions. The Board notes, however, that § 41 contains a savings provision for companies "unable to comply . . . for reasons beyond [their] control." Thus, it appears that a telephone company's inability to make a return for reasons beyond its control will excuse that company's failure to meet the "make a return" requirements contained in § 41. The Board further notes that § 41 does not prohibit supplementary or amended filings, and finds that, in conjunction with the Commissioner's authority to audit returns and insure compliance, and under the circumstances present in these appeals, the subsequent filings here relate back to the companies' original submissions.

In the present appeals, for fiscal year 2004, MWNS, Inc. made its Form 5941 return by letter dated February 28, 2003. Its February 10, 2003 request for an extension of time to make the return had been denied previously by the Commissioner on February 20, 2003. The Commissioner received the return on March 4, 2003. It was re-executed by a corporate officer on April 2, 2003. For fiscal year 2005, MWNS, Inc. made its Form 5941 return by letter dated March 10, 2004. The Commissioner had previously granted MWNS, Inc. an extension of time to March 15, 2004 within which to file its return. Subsequently, Marilyn Browne of the Commissioner's BLA advised MWNS, Inc. by letter that it

had filed an outdated form. On March 26, 2004, MWNS, Inc. made its Form 5941 return under an agreed-to extension date. For fiscal year 2006, MWNS, Inc. made its Form 5941 return by letter dated March 11, 2005. On February 17, 2005, the Commissioner had previously granted MWNS, Inc. an extension of time to March 15, 2005 within which to file its return. The Commissioner received the return on March 17, 2005. For both fiscal years 2005 and 2006, the Commissioner had not put the Forms 5941 or their instructions into a finalized version until after March 1st. For fiscal year 2005, the Form 5941 was amended on March 9, 2004 and contained a written filing deadline of "March 30, 2004." For fiscal year 2006, the Commissioner issued final corrective instructions on filing the Form 5941 by a mailing dated April 4, 2005.

For fiscal year 2004, MCImetro, LLC made its Form 5941 return, under an agreed-to extension date, by letter dated March 26, 2003 and received on April 2, 2003. On February 21, 2003, the Commissioner had granted MCImetro, LLC an extension of time to April 1, 2003 within to file its return. Fiscal year 2004 was the first year that MCImetro, LLC was required to report its machinery other than generators. This change in the Commissioner's policy resulted from the Board's August 2002 Order in ***RCN Beco-Com, LLC v. Commissioner of Revenue and City of Newton***, Mass. ATB Findings of Fact and Reports 2003-410, *aff'd* 443 Mass. 198 (2005) ("***RCN Beco-Com***" Order).[13] The Commissioner apparently recognized the magnitude of this new reporting task by granting MCImetro, LLC an extension of time within which to file its return and by accepting the return a day beyond the extension date without protest. For fiscal year 2005, MCImetro, LLC made its Form 5941 return by letter dated March 10, 2004. On February 26, 2004, the Commissioner had granted MCImetro, LLC an extension of time to March 15, 2004 within which the file its return. Subsequently, Marilyn Browne of the Commissioner's BLA advised MCImetro, LLC by letter that it had filed an outdated form. On March 26, 2004, MCImetro, LLC made its Form 5941 return under an agreed-to extension date. As stated above, the Commissioner amended Form 5941 for this

[13] In ***RCN Beco-Com***, "the Board found and ruled that the Commissioner's historical practice, when centrally valuing the § 39 property of telephone and telegraph companies, of applying the corporate utility exemption of G.L. c. 59, § 5, clause 16, ¶ 1, irrespective of how the business entity was organized or held, was improper . . . . By its plain and unambiguous language, [the Board further found and ruled that] the exemption applies to corporations, not to partnerships or to LLCs." ***Id.*** at 462.

fiscal year on March 9, 2004, and the amended form contained a written filing deadline of "March 30, 2004."

The Board finds that this above-stated course of conduct between MCI and the Commissioner was of probative value on the issue of MCI's inability "to comply . . . for reasons beyond [its] control" in making its returns to the Commissioner on its Forms 5941. The Board further finds a continuing practice on the part of the Commissioner of granting, periodically, extensions to telephone companies to make or file their returns on their Forms 5941 after March 1st. The Board also finds that the Commissioner's granting of extensions under the circumstances present in these appeals at least implied reasons beyond MCI's control in making its returns to the Commissioner on Forms 5941, and the Board so finds that such reasons existed. Indeed, the changes in the Forms 5941, their instructions, published filing deadlines, and other related mailings, as well as the Commissioner's failure to promulgate any formal guidance, in conjunction with the shifting state of the law, and his rejection of returns, all of which the Board finds were beyond the control of MCI, justified MCI making its returns to the Commissioner beyond the March 1st date.

From the Commissioner's perspective, the Forms 5941 were filed seasonably with the necessary information for the BLA to make timely central valuation determinations and certifications. Both the Commissioner and the Assessors stipulated to the timely filing of the returns. MCI relied on the stipulations and did not request the opportunity to present additional evidence on that issue. Even though the Board determines its jurisdiction independent of any such stipulations, the Board found that the stipulations did serve to bolster the Board's determination that the Commissioner was not prejudiced by the post-March 1st filings and that he recognized that MCI's failures to timely make its returns to the Commissioner resulted from reasons beyond MCI's control. In addition, the Commissioner acknowledged that the many changes that the BLA implemented during this time period created some confusion and misunderstandings.

Accordingly, the Board determines that any delays by MCI in filing an appropriately informative Form 5941 for fiscal years 2004, 2005, and 2006 were not fatal to the Board's jurisdiction over these appeals because they fell within the "for reasons beyond [its] control" savings provision in § 41.

The Commissioner issued certified central valuations to MWNS, Inc. and the Assessors for fiscal years 2004,

2005, and 2006. The Commissioner issued certified central valuations to MCImetro, LLC and the Assessors for fiscal years 2004 and 2005. MWNS, Inc. and MCImetro, LLC timely paid the tax assessments to the municipalities. MWNS, Inc. and MCImetro, LLC seasonably filed petitions with the Board appealing the Commissioner's certified central valuations of their § 39 property for fiscal years 2004, 2005, and 2006, and fiscal years 2004 and 2005, respectively. The Newton Assessors timely filed petitions with the Board appealing the Commissioner's certified valuation of MWNS, Inc.'s and MCImetro, LLC's § 39 property for fiscal years 2004, 2005, and 2006, and fiscal years 2004 and 2005, respectively. The Boston Assessors timely filed petitions with the Board appealing the Commissioner's certified central valuations of MWNS, Inc. and MCImetro, LLC for fiscal year 2005 only. On the basis of these findings of fact and as more fully discussed in its Opinion below, the Board finds that it has jurisdiction over these consolidated appeals.

Standard of Review

Every owner of § 39 property and board of assessors to whom the Commissioner certifies § 39 property values has the right to appeal those valuations to this Board. G.L. c. 59, § 39. "In every such appeal, the appellant shall have the burden of proving that the value of the machinery, poles, wires and underground conduits, wires and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the commissioner of revenue." ***Id.*** The relevant statutory sections contain no definition of "substantially higher or substantially lower" and provide no direction for measuring or otherwise interpreting these terms. In discussing the Board's adjudicatory role for reviewing the Commissioner's valuation of state-owned land under G.L. c. 58, §§ 13-14, the Supreme Judicial Court, in *dicta* in ***Board of Assessors of Sandwich v. Commissioner of Revenue***, 393 Mass. 580 (1984) ("***Sandwich II***") referenced § 39 and observed that:[14]

> [O]rdinarily an "appeal" to the [Board] results in a trial of all the issues raised by the petition and the answer. The [B]oard hears testimony from all parties and forms an independent judgment of value based on all the evidence received. In reaching its conclusion, the [B]oard may select any method of valuation

[14] This case is designated ***Sandwich II*** in deference to ***Assessors of Sandwich v. Commissioner of Revenue***, 382 Mass. 689 (1981), which the Supreme Judicial Court refers to as ***Sandwich I*** (in ***Sandwich II*** above).

> that is reasonable and that is supported by the record. (citation omitted). In some cases, however, the Legislature has provided that the [B]oard should perform a more traditional appellate function, rather than make a de novo determination of value. In such cases, the [B]oard's inquiry is limited, at least initially, to determining whether the valuation of the Commissioner was proper. . . . For example, G.L. c. 59, § 39, . . . which deals with the valuation of the poles, wires, pipes, and the machinery belonging to telephone and telegraph companies, provides that in an appeal from the Commissioner's determination of value for that property, "the appellant shall have the burden of proving that the value of the [property] is substantially higher or substantially lower," than the Commissioner's determination. Only if the taxpayer has met that burden does the board undertake an independent valuation of the property.

Id. at 586.

This Board previously acknowledged the Supreme Judicial Court's *dicta* in ***Sandwich II*** in ***RCN Beco-Com,*** Mass. ATB Findings of Facts and Reports at 2003-444 in ruling that this standard of review did not apply when the Board determined whether a company qualified to be classified as a telephone company for central valuation purposes under § 39. Moreover, in ***RCN Beco-Com***, this Board recognized that § 39 was adopted to remedy the inconsistent valuations that local assessors had been placing on § 39 property and to provide necessary consistency and uniformity. The Board also noted that § 39 is remedial in nature and, as such, should be construed broadly to address the concerns that it was enacted to remedy. ***Id.*** at 2003-437

For the reasons discussed in its Opinion below, the Board finds that the standard of review in these appeals requires it to initially determine whether the valuation of the § 39 property by the Commissioner was correct, and, only if the appellants prove that it was "substantially higher or substantially lower" than the § 39 property's fair cash value, should the Board substitute its own valuation of the § 39 property. Accordingly, to ascertain the appropriateness of the Commissioner's certified central valuation of MCI's § 39 property in these appeals, the

Board finds that its initial examination is not limited only to the Commissioner's methodology, as suggested by the Commissioner. The Board finds that it may determine the § 39 property's fair cash value, compare it to the Commissioner's valuation, and then, only if the Commissioner's valuation is "substantially higher or substantially lower" than the Board's value, may the Board substitute its determination of fair cash value for the Commissioner's valuation.

When determining whether the value of the § 39 property is substantially higher or substantially lower than the Commissioner's valuation, the Board will consider all the relevant facts and circumstances. Because these statutory sections provide no definition of what is "substantially higher or substantially lower" than the Commissioner's valuation, the Board looks to the "common and approved usage" of the term "substantially." G.L. c. 4, § 6, ¶ Third. According to THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002), "substantial" means "considerable in importance, value, degree, amount, or extent," ***id.*** at 1376, while "considerable" means "large in amount, extent, or degree." ***Id.*** at 305. Similarly, according to MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003), "substantial" means "considerable in quantity," ***id.*** at 1245, while "considerable" means "large in extent or degree." ***Id.*** at 266. BLACK'S LAW DICTIONARY (Abridged Fifth Ed. 1983), defines "substantial" as being of "real worth and importance" and "of considerable value." ***Id.*** at 744. Finally, BOUVIER'S LAW DICTIONARY (Rawle's Third Revision 1914) does not contain a definition for "substantially" or "substantial," but does define "substantial damages" as being "damages . . . worth having, as opposed to nominal damages." ***Id.*** at 3173. On this basis, the Board finds that "substantially higher or substantially lower" than the Commissioner's valuation, as used in § 39, means a considerable or large value and not a mere trifle or nominal amount.

Whether the Board May Increase the Commissioner's Certified Central Valuations for MCI's § 39 Property Located in Boston for Fiscal Years 2004 and 2006 Where MCI Has Appealed Those Valuations But the Boston Assessors Have Not

Despite the fact that the Boston Assessors did not file petitions under § 39 challenging the central valuations determined and certified by the Commissioner for MCI's § 39 property for fiscal years 2004 and 2006, they

assert that the Board may still find that the Commissioner's certified value for MCI's § 39 property in Boston is substantially too low and increase it as appropriate.

Section 39 provides, in pertinent part, that: "In every such appeal, the appellant shall have the burden of proving that the value of the machinery, poles, wires and underground conduits, wires and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the [C]ommissioner." The Board finds that the relevant language in § 39 plainly places the burden on "the appellant" to prove that the Commissioner's certified valuation is "substantially higher or substantially lower, as the case may be." To be an appellant for purposes of appealing the Commissioner's fiscal years 2004 and 2006 certified central valuations of MCI's § 39 property located in Boston, the Boston Assessors would have had to have filed petitions with the Board. They did not do so. On this basis, and for reasons set out in its Opinion below, the Board finds that for fiscal years 2004 and 2006, the Assessors of Boston are not appellants because they failed to file petitions in those fiscal years. Accordingly, the Board finds that it may not increase the central valuations determined and certified by the Commissioner for MCI's § 39 property located in Boston for fiscal years 2004 and 2006.

The § 39 Property

Generally, MCI's § 39 property, the certified central values of which are at issue in these consolidated appeals is composed of MCI's outside plant and its electronic machinery and generators. MCI's outside plant consists primarily of fiber optic cable and conduit. The fiber optic cable is positioned underground inside plastic conduit. The number of fibers, or "count," in the fiber optic cable varies. At all relevant times, MCI did not have any aerial cable or poles in Newton or Boston. MCI uses the fiber optic cable to transport voice and data signals across the network and to related electronic and other machinery located at MCI's facilities and at customers' premises.

MWNS, Inc. owns long-distance ("LD") fiber optic cable that is situated underground along the Massachusetts Turnpike and runs North and South between South Station in Boston and Providence, Rhode Island. Approximately 13.7 miles of MWNS, Inc.'s LD fiber optic cable is located in

Boston and 4.9 miles in Newton. MWNS, Inc.'s LD fiber optic cable is typically 44 count to 54 count and was installed around 1987. MWNS, Inc.'s utilization rate, or percent of fiber optic cables actually "lit," is approximately fifty percent.

MCImetro, LLC does not own any fiber optic cable in Newton, but does own approximately 6.2 miles of fiber optic cable for local service in Boston. MCImetro, LLC's cable is composed of backbone, or main lines of fiber optic cable running to different parts of Boston, and laterals, or side splices of fiber optic cable that link the backbone into a particular building. The backbone may contain 144 count fiber optic cable while the laterals more likely contain 24 count. The utilization rate for MCImetro, LLC's fiber optic cable ranged between zero and sixteen percent.

In addition to its fiber optic cable and conduit, MWNS, Inc.'s generators are also subject to central valuation. MWNS, Inc. owns four generators located in the basement of the Prudential Building in Boston, but none in Newton. The generators provide back-up power in case of a power supply outage. There is no issue in these appeals regarding MWNS, Inc.'s entitlement to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d) for certain of its telephone personal property located in Boston and Newton. Accordingly, its fiber optic cable, conduit, and generators ("machinery used in manufacture or in supplying or distributing water") are subject to central valuation under G.L. c. 59, § 39 and taxable under G.L. c. 59, §§ 2 and 18, cl. First and cl. Fifth.

In addition to its fiber optic cable and conduit, the Commissioner centrally valued MCImetro, LLC's other personal property in Newton and Boston, which was not exempt because as an LLC, MCImetro, LLC did not qualify for the corporate utility exemption under clause 16(1)(d). This personal property includes machinery in its main facility at the Prudential Building, sometimes referred to as its "node," and machinery placed at customers' premises or in space leased by MCImetro, LLC. This machinery includes power equipment, the rectifier, which converts A/C power into D/C power, the DMS 500 switch, the multiplex equipment, the communications equipment, the fault alarm equipment, and the fiber optic electronics. The DMS switch processes voice and dial-up traffic. The multiplex equipment terminates or connects customer's circuits to the company's network or combines traffic from several sources for transmission through the network. The communication and fault alarm equipment routes Internet traffic or

monitors network machinery for operating status. Fiber optic electronics convert the electronic signals to optical for transport over the fiber optic cable.

MCImetro, LLC's Entitlement to the Corporate Utility Exemption under G.L. c. 59, § 5, cl. 16(1)(d)

The Commissioner determined that MCImetro, LLC, which is organized as a limited liability company (and not as a corporation) was not entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d).[15] MCImetro, LLC maintains, however, that, for a variety of reasons, it is eligible for the corporate utility exemption for fiscal years 2004 and 2005.[16]

MCImetro, LLC, which was formed as a Delaware limited liability company in May 1998, submitted its Forms 5941 to the Commissioner for fiscal years 2004 and 2005. For these two fiscal years, the Commissioner centrally valued all of MCImetro, LLC's telephone property as § 39 property because of its status as a limited liability company and not a corporation. MWNS, Inc. and MCImetro, LLC were part of a consolidated group of companies owned by WorldCom, Inc. that filed for chapter 11 Bankruptcy protection in July 2002 in Federal Bankruptcy Court. The Bankruptcy Court confirmed WorldCom, Inc.'s plan for reorganization with an effective date of April 20, 2004. The plan provided, among other things, that MCImetro, LLC's "CLEC assets in Massachusetts (including without limitation contracts and executory contracts) would be assigned/transferred to MCI Metro Access Transmission Services of Massachusetts, Inc."

MCImetro, LLC argues that as of January 1, 2003 and January 1, 2004, it was a division of MWNS, Inc. and a constituent part of a "utility corporation" for tax purposes. MCImetro, LLC further argues that it either filed its own or joined in the filing of Forms P.S.1 with

---

[15] Prior to fiscal year 2004, the Commissioner exempted from central valuation and taxation non-generating machinery for all telephone companies regardless of their form of organization. Following the Board's ***RCN-Beco-Com*** Order, ruling that RCN, as an LLC, did not qualify for the clause 16th corporate utility exemption, the Commissioner adopted a new policy, beginning in fiscal years 2004, exempting the non-generating machinery of LLCs only if they filed federally as corporations. Following the issuance of the Supreme Judicial Court's opinion in RCN-Beco-Com, the Commissioner, on February 8, 2005, issued a memorandum announcing that, for fiscal year 2006, he no longer considered LLCs filing federally as corporations or filing federally as disregarded entities whose single members are S corporations as being entitled to the clause 16th corporate utility exemption.

[16] See footnotes 5 and 12, *supra*.

the Commissioner. Therefore, MCImetro, LLC surmises that because it was treated like a corporation for Massachusetts tax purposes under G.L. c. 63, it should be allowed to claim the corporate utility exemption to avoid the imposition of what it considers to be double taxation. MCImetro, LLC also claims that, for fiscal year 2005, the corporate utility exemption is applicable to property owned by it because, prior to July 1, 2004, which MCImetro, LLC argues is the date for applying the exemptions under G.L. c. 59, § 5 for fiscal year 2005, MCImetro, LLC transferred the property to a sister corporation. Notwithstanding these facts and arguments, the Board, for reasons more fully articulated in its Opinion below, finds that the Commissioner correctly determined that MCImetro, LLC was not entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d) for fiscal years 2004 and 2005 and its § 39 property was subject to central valuation and taxation.

Telecommunications Marketplace

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), introduced significant change into the telecommunications marketplace by allowing any communications business to compete in any market against any other communications business. Consequently, CLECs began competing in the local exchange marketplace, and established local exchange carriers, as well as new competitors, began to build and expand long-distance fiber optic networks expecting increases in demand because of, among other things, the mounting popularity of the Internet. This network building, along with growing wireless service, expanded the supply of telecommunications service. At the same time, advances in technology further increased land-line capacity while reducing the need for certain electronics.

This increase in capacity, however, was not accompanied by the anticipated increase in demand for land-line based telephony and telecommunications services. With capacity outstripping demand, prices for services began to fall. Consequently, by the year 2000, telecommunications companies, including MWNS, Inc. and MCImetro, LLC, began experiencing bankruptcies, consolidations, and GAAP[17] required recognition of asset impairments.[18] The parties'

[17] GAAP is an acronym for generally accepted accounting principles.

[18] When the carrying value of assets, that is the assets' original cost less accumulated depreciation, can not justify cash flow earnings,

valuation experts essentially concurred on the stagnant, and to some extent declining, state of the telecommunications industry and the land-line based telephone segment as of the relevant assessment dates.

The Commissioner's Valuation Methodology

Historically, under G.L. c. 59, § 39, the BLA had valued "poles, wires and underground conduits, wires and pipes" of all telephone companies by depreciating their original cost by 10% per year down to a floor of 30% of original cost, or, as it is sometimes phrased, "30% to the good." The "machinery," which prior to fiscal year 2004 consisted solely of the telephone companies' generators, was valued at 90% of their original cost or 90% to the good. After the Board's ***RCN Beco-Com*** Order, which resulted in the BLA's valuing significantly more machinery property under § 39 because LLCs no longer qualified for the corporate utility exemption for their non-manufacturing machinery, the Commissioner recognized the need, and issued a Request for Response ("RFP") seeking, to hire a qualified consultant who could evaluate BLA's existing valuation methodology and devise an adaptable computerized mass appraisal system for application by the BLA by May 15, 2003 for fiscal year 2004. The Commissioner's procurement team selected George E. Sansoucy P.E., LLC as the qualified bidder based on his engineering background and appraisal experience.

Consistent with the RFP, Mr. Sansoucy evaluated the Commissioner's then existing valuation methodology and observed, among other things, that: the use of original cost as "current value new" did not acknowledge market conditions; the depreciation rate of 10% per year for all classes of property did not recognize that different types of property have different economic lives; there was no stated rationale for depreciation limits; the three general categories of property listed on the Form 5941 were each comprised of items with significantly different physical and market characteristics; there was no uniformity of form in the submissions of the reporting entities; it was difficult to determine whether the reporting entities limited their submissions to the classes of property subject to central valuation; there appeared to be a wide variation as to the nature of "costs" being reported; and

---

then, for accounting purposes, those assets are considered impaired, and their value is restated in the company's financial books to reflect their new allocated fair market value.

some submissions included extraneous information.

Accordingly, after considering all three of the traditional methods of valuation, Mr. Sansoucy recommended a method of valuation that used a "composite multiplier" based upon a reproduction cost new approach to value that trended the original cost of property and then adjusted the property for physical, functional and economic forms of depreciation using Federal Communications Commission ("FCC") depreciation schedules. The methodology was designed to first determine what it would cost to reproduce the subject property item as of the current valuation date, and then determine the amount of value lost to physical deterioration, functional obsolescence and economic factors based upon the age of the property. Mr. Sansoucy recommended using a trended reproduction cost new less depreciation approach because it is objectively based upon available original cost information and verifiable indices and it creates equality and uniformity between classes of property and companies.

Mr. Sansoucy's methodology begins with the reported original dollar cost of the categorized property and its vintage year or year of purchase. That original cost is trended or factored to arrive at a "cost new," which is the cost to currently reproduce the property as of the valuation date, by using a trending index. For the telephone company personal property, such as wires, conduits and electronic machinery, Mr. Sansoucy recommended and the BLA used the C.A. Turner Plant Index, subsequently renamed the AUS Telephone Plant Index ("TPI Index"). The TPI Index is a commercially available publication that the BLA purchases. It is updated by AUS semi-annually and is based on the FCC uniform code of accounts for telephone plant property. For valuing generator equipment, Mr. Sansoucy recommended the Handy-Whitman Index of Public Utility Construction Costs ("Handy-Whitman Index").

The indices are composed of digits representing the relative numeric positions of current cost and are provided for historical years to the present. To use the index, the digit for a vintage year is divided by the current year digit to arrive at a factor that is applied to the original cost to determine cost new.

The depreciation component, which includes the loss of physical, functional, and economic service over time, utilized FCC service lives for each FCC property category account in accordance with FCC Docket No. 98-137 (December

17, 1999).[19] The 23 categories of property that are contained in the FCC service life tables are listed as FCC Account references in the TPI. Mr. Sansoucy recommended the FCC service lives because they are based on objective data from the telephone industry, are verifiable and allow for an orderly decrease in value over time accounting for all, or virtually all, aspects of depreciation.

The depreciation calculation that Mr. Sansoucy recommended and that was adopted by the Commissioner was "straight-line" depreciation. Straight-line depreciation takes the expected service life of property and divides it into even yearly amounts. These amounts are the yearly depreciation deductions. The depreciation method utilizes a "floor," meaning that when the value diminishes to the predetermined level, it is not further depreciated in value until the property is taken out of service. For telephone company personal property, other than generators, Mr. Sansoucy used a floor of 30%. He based this amount on the property's continuing vitality and maintenance, as well as its salvage value. Additional evidence supported consideration of the considerable original investment in associated direct and indirect costs, particularly regarding the outside plant, for setting the floor.[20]

The two component steps, the cost new factor and the depreciation percentage are combined to allow for a single calculation. The "composite multiplier" is created by taking the trended cost new mathematical factor and multiplying it by the depreciation percentage (adjusted by the floor, if applicable). The resulting "composite" number is then multiplied by the reported original cost. The composite multipliers are calculated for each category of property for each vintage year. By combining the steps into one multiplier, Mr. Sansoucy provided the Commissioner

---

[19] In Re 1998 Biennial Review, 15 FCC Rcd 242 (FCC 1999) is the official citation for this document

[20] According to THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12th ed. 2001), direct costs, which are sometimes referred to as hard costs, include: building permits, materials, products, and equipment; labor used in construction; equipment used in construction; security during construction; contractor's shack and temporary fencing; material storage facilities; power line installation and utility costs; contractor's profit and overhead, including supervision and coordination, as well as insurance; and performance bonds. Indirect costs, which are sometimes referred to as soft costs, include: architectural and engineering fees; appraisal, consulting, accounting, and legal fees; cost of carrying the investment during construction; all risk insurance and *ad valorem* taxes during construction; costs of carrying the property after construction before stabilization; and administrative expenses. ***Id.*** at 358-59.

with a single mathematical input for each line item on the Commissioner's fiscal year 2005 and 2006 Internet spreadsheet. The appropriate floor was also figured into the composite multiplier.

For the valuation of generators, the composite multiplier reflected the reproduction cost new determined from the Handy-Whitman Index and a market-based depreciation study confirmed by Mr. Sansoucy from comparisons of available used equipment and the anticipated cost of new generators. The resulting expected service life for electrical generators used in the telephone industry was 12 years or 8.33% depreciation per year. Mr. Sansoucy viewed the generation equipment as generally retaining value because it provides emergency power only, is subject to a high degree of maintenance to insure reliability, and suffers from only limited actual wear and tear. A floor depreciation of 60% to the good, as opposed to the BLA's prior floor of 90% to the good, was recommended and applied based on Mr. Sansoucy's opinion that no matter the age of the generator it retains at a minimum 60% of its value. Mr. Sansoucy's market-based evaluation demonstrated that a viable sales market exists for used generators of the type needed in the telecommunications industry.

Both before and after fiscal year 2004, BLA's practice was to value only property "in service." Form 5941 obliquely reflected this position in the definition of original cost by requiring the inclusion of the "costs of construction to place said property in operation." The definition also referenced FCC regulations contained in 47 CFR Section 32.2000. The BLA considerd unlit fiber optic cable not to be in service and not subject to valuation or tax. If any fiber strand in a cable is lit, however, the cable is considered in service and taxable. Generators used in telephone systems are back-up power supplies and are considered in service because they are connected to the system and available for use without any further construction or expenditures.

For fiscal year 2004, BLA revised Form 5941 in response to the Board's ***RCN Beco-Com*** Order, but before the BLA contracted with Mr. Sansoucy for his new valuation methodology. This Form 5941 required reporting companies to attach a list of their § 39 property, which included the year of purchase, year of installation and original cost, in summary categories: "poles & wires"; "underground conduits, wires & pipes"; and "machinery" (generators for corporations and all machinery for non-corporate entities).

Consequently, for fiscal year 2004, it was not possible to obtain the detail on the 23 property categories to fully implement Mr. Sansoucy's valuation methodology. Mr. Sansoucy, therefore, recommended aggregating the property categories and aggregating and averaging the multiplier tables. The resulting certified values were based on class-averaged cost trends for the categories and category-averaged depreciation percentages. Ms. Brown and Mr. Sansoucy opined that the aggregation for fiscal year 2004 resulted in a conservative application of Mr. Sansoucy's methodology and concomitant values on the lower end of the fair cash value range. Specifically, they argued that the aggregation of depreciation percentages resulted in shorter average lives that they believed approximated the 25% of additional economic obsolescence taken in fiscal years 2005 and 2006.

The Form 5941 was modified for fiscal year 2005 to allow full implementation of Mr. Sansoucy's valuation methodology. In addition, Mr. Sansoucy's firm updated the composite multiplier tables, annually, based on the most recent TPI Index published. For fiscal years 2005 and 2006, the filing format required companies to enter installation and cost information on an interactive Department of Revenue Internet spreadsheet that included pull down menus with community lists, 23 property categories, FCC account codes and vintage years.

For fiscal years 2005 and 2006, an additional 25% economic obsolescence was applied to the preliminary value determinations from the composite multiplier system. The additional obsolescence deduction was in response to claims, particularly from wireless companies, that proposed BLA values were overstated due to technological advances. The 25% estimate was arrived at based upon calculations from a sample property listing that applied a sliding scale of additional depreciation from 5% to 70% depending on the age of the property. A weighted depreciation average was then calculated by applying the sliding percentage to the amount of total property from that vintage year. For fiscal year 2005, the additional 25% economic obsolescence was applied to all property; for fiscal year 2006, the additional economic obsolescence was not applied to property in service less than one year.[21] Mr. Sansoucy also testified that, although the deduction was applied to generators, it may not be appropriate to continue to do so

[21] The Board notes, however, that MWNS, Inc.'s inventory of § 39 property and that property's original cost was essentially identical for fiscal years 2005 and 2006.

because generators maintain their value in the marketplace. Summaries of Mr. Sansoucy and the BLA's certified valuations of MWNS, Inc.'s § 39 property for fiscal years 2004, 2005, and 2006 and MCImetro, LLC's § 39 property for fiscal years 2004 and 2005 are contained in the following two tables.

MWNS, Inc.

Fiscal Year	City	Original Cost	RCN[22]	Depreciation	RCN Less Depre	Add'l 25% Eco Obs	Cert Value
2004	Boston	3,468,776	3,733,960	800,824	2,933,136		2,933,100
2004	Newton	906,817	1,076,684	497,391	579,293		579,300
2005	Boston	3,468,776	3,749,036	996,945	2,752,091	688,023	2,064,100
2005	Newton	906,817	1,001,727	471,571	530,156	132,539	397,600
2006	Boston	3,468,776	3,845,899	1,247,991	2,597,908	649,477	1,948,400
2006	Newton	906,817	1,082,885	578,476	504,409	126,102	378,300

MCImetro, LLC

Fiscal Year	City	Original Cost	RCN[20]	Depreciation	RCN Less Depre	Add'l 25% Eco Obs	Cert Value
2004	Boston	99,433,976	100,866,166	25,891,126	74,975,040		74,975,100
2004	Newton	185,345	187,625	88,558	99,067		99,100
2005	Boston	99,765,123	102,943,462	27,332,017	75,611,445	18,902,861	56,708,500
2005	Newton	185,346	195,651	81,534	114,117	28,529	85,588

[22] "RCN" is an abbreviation for reproduction cost new.

MCI's Valuation Methodology

Mr. Weinert was the chief architect of AUS Consultants' valuation report prepared for MCI. Similar to Mr. Sansoucy and the BLA's valuation methodology, Mr. Weinert valued the § 39 property using a trended reproduction/replacement cost new further reduced by all elements of depreciation. His approach contained eight steps: (1) obtaining an inventory of the § 39 property; (2) developing reproduction cost new figures; (3) evaluating functional obsolescence and utilization for development of replacement cost new figures; (4) developing estimated depreciation in the § 39 property; (5) developing replacement cost new less depreciation; (6) evaluating and quantifying external or economic obsolescence associated with the § 39 property or the industry; (7) applying the economic or external obsolescence to the replacement cost new less depreciation figures to arrive at a value; and (8) a market check.

Mr. Weinert selected the information contained in the Forms 5941 filed by MCI with the Commissioner for the fiscal years at issue as "the most rational beginning point in our appraisal." He made this selection after discussing with MCI personnel the various accounting and property records and books available and after viewing and verifying, to the extent possible, the § 39 property in place. Mr. Weinert considered the Forms 5941 to be "the best records available" for determining the inventory and historic or original cost of the relevant § 39 property for the fiscal years at issue.

Mr. Weinert next ascertained the reproduction cost new of the relevant § 39 property by trending the original or historic cost of the various categories of property, such as, for example, fiber optic cable, conduit, electronics, and power systems, using what he considered to be appropriate indices. He not only used the TPI Index, but also used cost indices from the U.S. Bureau of Labor Statistics, the Robert Snow Means heavy utility construction cost manual, and indices developed from certain MCI data. For some of the § 39 property, he used a composite index that he had prepared.

After developing his reproduction costs new, Mr. Weinert derived replacement cost new figures using estimates of MCI's fiber utilization in Massachusetts in a cost-to-capacity analysis, which he believed addressed the under-utilization portion of the functional obsolescence associated with MCI's fiber optic cables. In his analysis,

Mr. Weinert calculated the reproduction cost of the required fiber capacity on a percentage basis, "by comparing the required capacity in fibers to the existing capacity in terms of fiber." From these calculations, he developed replacement cost factors of 72% for MWNS, Inc.'s fiber optic cable and 67% for MCImetro, LLC's fiber optic cable. A summary of Mr. Weinert's original costs, reproduction costs new, and replacement costs new for MWNS, Inc. and MCImetro, LLC are contained in the following two tables, respectively, by fiscal year and municipality.

MWNS, Inc.

Fiscal Year	Municipality	Original Cost	Reproduction Cost New	Replacement Cost New
2004	Boston	3,468,776	3,802,539	3,364,625
2004	Newton	906,817	1,130,138	813,699
2005	Boston	3,468,776	3,858,195	3,404,698
2005	Newton	906,817	1,161,108	835,998
2006	Boston	3,468.776	3,946,297	3,473,910
2006	Newton	906,817	1,210,076	871,255

MCImetro, LLC

Fiscal Year	Municipality	Original Cost	Reproduction Cost New	Replacement Cost New
2004	Boston	99,351,770	103,108,844	100,175,008
2004	Newton	185,346	195,725	195,725
2005	Boston	99,682,678	104,277,119	101,226,614
2005	Newton	185,346	195,725	195,725

In the fourth step of his methodology, Mr. Weinert estimated what he considered to be appropriate amounts of physical depreciation and additional functional obsolescence for the telephone property within various categories of the § 39 property. He stated that "the physical depreciation was determined based on the age of the property and its service life, while the functional obsolescence is being quantified based on the impact on the property's remaining life caused by changing technology and service requirements." Accordingly, he determined both physical and functional service lives, recognizing that, in the communications industry, functional factors are the drivers. He based his depreciation on the age of the

property, its purported service life, and his determination that retirements of telephone property increase as the age approaches the expected service life.

Mr. Weinert created his own service life tables based on interviews with MCI personnel and his experience, and he plotted depreciation using Iowa type R survivor curves. He rejected the use of a floor. He attributed service lives of 18 years to generators, 15 years to power equipment, 14 years to fiber optic cable and conduit, and 6 years to customer termination equipment, switch electronics, communications equipment, fault alarm equipment, multiplex equipment, fiber optics electronics, and customer premises equipment. Using the age of the property in each category, Mr. Weinert calculated its remaining life and its total life, which is the age plus the remaining life. He then calculated the "condition" of the property, which is its remaining life divided by its total life, and, for his fifth step, applied that condition percentage to the replacement cost new for the property to reach his estimate of the property's replacement cost new less depreciation. These steps completed what Mr. Weinert termed "the preliminary cost approach."

Summaries of the replacement cost new, the depreciation, and the replacement cost new less depreciation totals for Boston and Newton for the relevant fiscal years are contained in the following two tables for MWNS, Inc. and MCImetro, LLC, respectively.

MWNS, Inc.

Fiscal Year	Municipality	Replacement Cost New	Depreciation	Replacement Cost New Less Depreciation
2004	Boston	3,364,625	951,125	2,413,500
2004	Newton	813,699	652,228	161,471
2005	Boston	3,404,698	1,150,634	2,254,064
2005	Newton	835,998	678,308	157,690
2006	Boston	3,473,910	1,371,404	2,102,506
2006	Newton	871,255	737,247	134,008

MCImetro, LLC

Fiscal Year	Municipality	Replacement Cost New	Depreciation	Replacement Cost New Less Depreciation
2004	Boston	100,175,008	41,031,777	59,143,231
2004	Newton	195,725	126,086	69,639
2005	Boston	101,226,614	53,683,551	47,543,063
2005	Newton	195,725	145,741	49,984

For his sixth step, Mr. Weinert analyzed whether economic obsolescence, or obsolescence external to the property, existed. Relying on data published in Value Line Investment Surveys ("Value Line"), which contain statistics regarding 98 different industries' return on total capital and return on equity, Mr. Weinert compared the overall returns of 72 industries in the United States economy in general with those of the communications industry and the inter-exchange/broadband carrier segment of the communications industry. He excluded 26 sectors from his analysis "because the Value Line data contained within them did not allow the calculation of returns on capital or equity." Mr. Weinert also did not include in his analysis any data particular to MCI because Value Line did not publish any information regarding MCI. Value Line did not report negative returns on capital, and Mr. Weinert consequently excluded those industry segments from his analysis.

Mr. Weinert computed his return on capital of 12% for what he refers to as the "U.S. Industry" for the period 2001 to 2006 by multiplying the net profit for each of the 72 industry segments by the return on total capital for that segment. He then summed these results and divided the sum by the aggregate net profit for those 72 segments. It appears that his 12% return for the U.S. Industry in general is the weighted average of the returns for each year between the period of 2001 to 2006. Again, using Value Line data and a similar mathematical approach, Mr. Weinert computed returns on capital of 7.5% and 4.5% for the telecommunications segment and the inter-exchange/broadband segments, respectively. He then calculated a 63% economic obsolescence by comparing the

4.5% return for the inter-exchange/broadband segments to the 12% return for the U.S. industry in general. Mr. Weinert calculated, but did not appear to rely on, his economic obsolescence figure of 52% that resulted from his return on equity comparison.

In addition, Mr. Weinert reviewed his telecommunications industry cost-of-capital reports, taken from a white paper that he prepared for the telecommunications industry, for 2004, 2005, and 2006, which detailed the cost of debt and equity capital for all of the industry segments. As a subset of those reports, Mr. Weinert testified that he also had "the return on equity" for all of the industry segments. Considering the average telecommunication return on total capital and equity as well as returns of companies that he deemed comparable to MCI, such as Sprint and AT&T, Mr. Weinert determined that his study revealed overall returns of 13.5% for capital and 16.3% for equity, for the periods at issue. Based on these returns, Mr. Weinert then calculated a 65% economic obsolescence by comparing the 4.5% return for the inter-exchange/broadband segments to the 13.5% return, which he apparently rounded to 13%, for the U.S. industry in general. Mr. Weinert admitted in cross-examination that the 13% return that he used in this calculation was not the return for U.S. industry in general, but actually the return for the communications industry. He calculated, but did not appear to rely on, his economic obsolescence figure of 47% that resulted from his return on equity comparison.

Mr. Weinert reconciled his 63% and 65% economic obsolescence calculations at 65% using the two foregoing methods. Summaries of the replacement cost new less depreciation, the economic obsolescence, and the resultant market value totals for Boston and Newton for the relevant fiscal years are contained in the following two tables for MWNS, Inc. and MCImetro, LLC, respectively.

MWNS, Inc.

Fiscal Year	Municipality	Replacement Cost New Less Depreciation	Economic Obsolescence	Market Value
2004	Boston	2,413,500	1,568,774	844,726
2004	Newton	161,471	104,956	56,515
2005	Boston	2,254,064	1,465,144	788,920
2005	Newton	157,690	102,499	55,191
2006	Boston	2,102,506	1,366,629	735,877
2006	Newton	134,008	87,106	46,902

MCImetro, LLC

Fiscal Year	Municipality	Replacement Cost New Less Depreciation	Economic Obsolescence	Market Value
2004	Boston	59,143,231	38,443,104	20,700,127
2004	Newton	69,639	45,265	24,374
2005	Boston	47,543,063	30,902,992	16,640,071
2005	Newton	49,984	32,489	17,495

Finally, Mr. Weinert relied on a market or sales approach as a check on the market values derived from his trended reproduction/replacement cost new less depreciation methodology, notwithstanding his reluctance to use a market or sales technique to value the § 39 property because of concerns over comparability. Mr. Weinert considered all of the available acquisitions of telecommunications companies during 2001 through 2003 and compared the current value paid in those transactions to the historic original cost of the property, plant and equipment. His comparison produced a range of purchase-price-to-original-investment of $0.01 to $0.26 with one outlier of $0.75. Mr. Weinert found that this range indicated an average of $0.14 on the dollar was paid to acquire telecommunications companies and assets. The AUS Consultants Valuation indicated a range of purchase-price-to-original-investment of $0.05 to $0.24, which produced an overall average of $0.18 on the dollar for 2004 and 2005 and $0.21 on the dollar for 2003. The Board notes that Mr. Weinert's market approach involved the sale of business entities, not just their assets, for cash and other consideration that is not readily or precisely converted into a cash equivalent.

The Assessors' Valuation Methodology

Messrs. Pomykacz and Rodriguez of Federal Appraisal and Consulting, LLC submitted the valuation on behalf of the Assessors for these appeals. Like Mr. Sansoucy for the Commissioner and Mr. Weinert for MCI, they also relied on a trended reproduction cost new less depreciation approach to value the § 39 property. Like Mr. Sansoucy and unlike Mr. Weinert, however, they did not blend into their methodology

a replacement cost new analysis. Mr. Rodriguez performed the valuation from the preparation of the asset list through the physical depreciation phases of the valuation, while Mr. Pomykacz developed the economic obsolescence used. Their values for MWNS, Inc.'s and MCImetro, LLC's § 39 property located in Boston and Newton for fiscal years 2004, 2005, and 2006 and fiscal years 2004 and 2005, respectively, are summarized in the following two tables.

MWNS, Inc.

Fiscal Year	Municipality	Market Value
2004	Boston	3,700,000
2004	Newton	500,000
2005	Boston	4,000,000
2005	Newton	490,000
2006	Boston	3,800,000
2006	Newton	480,000

MCImetro, LLC

Fiscal Year	Municipality	Market Value
2004	Boston	65,100,000
2004	Newton	130,000
2005	Boston	66,700,000
2005	Newton	120,000

Messrs. Pomykacz and Rodriguez considered all three of the traditional valuation approaches for valuing the § 39 property. They eschewed both the sales-comparison and income-capitalization approaches because of insufficient and unreliable data. They instead relied on the cost approach because, in their opinion, it is typically the optimal method in estimating the value of equipment and machinery, especially when the equipment and machinery to be valued constitute only a portion of the assets that comprise an overall system. Messrs. Pomykacz and Rodriguez maintained that reproduction cost has been and is widely used in many industries including the telecommunications industry. They further asserted that reproduction cost is an accepted cost methodology within the telecommunications industry because historical cost and operating information concerning most assets is readily available.

Accordingly, to estimate the value of the § 39 property, Messrs. Pomykacz and Rodriguez employed a trended reproduction cost new approach that incorporated all forms of depreciation: physical; functional; and economic. Mr. Rodriguez relied on MCI's § 39 property's original cost and vintage year as reported in Book 10 and in MWNS, Inc.'s "2004 tax returns work papers" that were provided by MCI to the Assessors as part of the discovery process. Mr. Rodriguez also made certain assumptions regarding the installation date, description, classification, and historical costs associated with MWNS, Inc.'s § 39

property. He did not rely on Book 30 because of concerns regarding the possible inclusion of impairments and asset write-downs, and he did not rely on the Forms 5941 because they were premised on Book 30 and did not have the detail contained in Book 10.[23]

For trending the original cost, Mr. Rodriguez, like Mr. Sansoucy, used the TPI Index to calculate a reproduction cost new. Then, based on the average service life of an asset derived from FCC Docket No. 98-137 (December 17, 1999), as well as discussions with industry professionals such as manufacturers of fiber optic cable and equipment, he depreciated the asset considering the effect on historic age caused by the service life. Mr. Rodriguez did not use a cost-to-capacity analysis on the fiber optic cable like Mr. Weinert did, because Mr. Rodriguez believed that it was not necessary and that, at any rate, there was insufficient data. Mr. Rodriguez inspected the § 39 property and "observed and learned that the [a]ssets applied modern technology, were regularly updated and were well maintained." He "did not identify any significant functional obsolescence issues related to the use of" the § 39 property.

Mr. Pomykacz developed his 20% economic depreciation percentage using three analyses: a "complex analysis" of industry wide obsolescence for land-line based telephone companies; a "fiber optic utilization analysis"; and a "simple analysis" of industry wide obsolescence based on communication equipment production capacity. In his complex analysis, Mr. Pomykacz began by examining production utilization rates for communications equipment similar to the § 39 property. He considered production utilization rates for this similar communications property as equivalent to or proxies for the actual utilization rates for the § 39 property, which he was unable to obtain. Mr. Pomykacz explained that declining production utilization rates indicate over-capacity in their networks and underutilization of their equipment, while increasing utilization rates indicate greater demand. According to Mr. Pomykacz, the production utilization rates are good general indicators of the economic health of the industry. His data showed a decline in production utilization rates in the years 2000 to 2002 and a recovery in 2004. In addition, Mr. Pomykacz reviewed the stagnation and then decline in profits of land-line based telephony companies. He quantified the decline at 35%, 47%, and 53% for 2003,

[23] However, Mr. Rodriguez did rely, to some extent, on MWNS, Inc.'s Forms 5941.

2004, and 2005, respectively. After prognosticating that the industry would stabilize and the current rate of decline would not continue indefinitely, Mr. Pomykacz quantified the decline in value for those years at roughly one-half the decline in profits or 18%, 24%, and 26% for 2003, 2004, and 2005, respectively.

In his fiber optic utilization analysis, Mr. Pomykacz compared his forecasted stabilized utilization rate of 15% to his predicted long-term stabilized utilization rate of 35%. He then obtained an underutilization rate of 20% by subtracting his forecasted rate from the long-term rate. He deemed the underutilization rate to be an appropriate estimate of the economic obsolescence to apply in his trended reproduction cost new methodology.

In Mr. Pomykacz' simple approach, he considered the decline in communications equipment production capacity to be a proxy for the amount of economic obsolescence to apply to all of the § 39 property in his methodology. He noted that in "healthier times" the industry should run at 80% capacity, but as of the relevant valuation dates in these appeals, it was running at a capacity in the range of 45% to 55%. He forecasted stabilized utilization rates of 60% to 65%, which he then subtracted from his long term stabilized utilization rate of 80% to achieve an indicated economic obsolescence of 20% for fiscal years 2004 and 2005 and 15% for fiscal years 2006. As a final step, he reconciled the amount of economic obsolescence obtained from these three separate methods at 20% for all of the § 39 property and for all of fiscal years at issue in these appeals. A summary of his reconciliation is contained in the following table.

Reconciliation of Economic Obsolescence

Description	Fiscal Year 2004	Fiscal Year 2005	Fiscal Year 2006
Complex Analysis	26%	24%	18%
Fiber Optic Utilization Analysis	20%	20%	20%
Simple Analysis	20%	20%	15%
Economic Obsolescence Conclusion	20%	20%	20%

Summaries of the Commissioner's certified values and

MCI's and the Assessors' estimated values for the § 39 property in Boston and Newton for MWNS, Inc. for fiscal years 2004, 2005, and 2006 and MCImetro, LLC for fiscal years 2004 and 2005 are contained in the following two tables.

Fiscal Year	Municipality	MWNS, Inc. Commissioner ($)	MCI ($)	Assessors ($)
2004	Boston	2,933,100	844,726	3,700,000
2004	Newton	579,300	56,515	500,000
2005	Boston	2,064,100	788,920	4,000,000
2005	Newton	397,600	55,191	490,000
2006	Boston	1,948,400	735,877	3,800,000
2006	Newton	378,300	46,902	480,000

Fiscal Year	Municipality	MCImetro, LLC Commissioner ($)	MCI ($)	Assessors ($)
2004	Boston	74,975,100	20,700,127	65,100,000
2004	Newton	99,100	24,374	130,000
2005	Boston	56,708,500	16,640,071	66,700,000
2005	Newton	85,588	17,495	120,000

Valuation Findings

Based on all of the evidence, the Board makes the following findings of fact regarding valuation of the § 39 property for fiscal years 2004, 2005, and 2006.

The Commissioner's trended reproduction cost new less depreciation methodology for centrally valuing telephone companies' § 39 property was a proper approach and furthered the important Legislative purpose behind § 39 of providing a standardized state-wide valuation system for telephone companies that promotes uniformity, equality and fairness in valuing telephone companies' § 39 property in all of the various municipalities in which such property is located. The Commissioner's valuation methodology is based on objective information that is capable of being, and is, categorized by property type and uses readily available, verifiable, and complementary indices. The methodology is capable of being updated by the Commissioner annually, thereby assuring that the values for the fiscal year at issue are based on timely data. The methodology is also consistent with a statutory scheme of valuing the personal

property of telephone companies according to items and information listed on an annually-made "return" or, in case no or a defective return is made, according to the Commissioner's estimate of the value of the property consistent with his best information and belief. *See* G.L. c. 59, §§ 39-42.

The Commissioner's starting point in this endeavor, completed Forms 5941, which constitute the "return" required by G.L. c. 59, § 41, was an appropriate beginning under the circumstances. The inventory reported on Forms 5941 in these consolidated appeals was based on MCI's so-called Book 30 financial books with some adjustments to, among other things, allocate the fiber optic property, using cable miles, on a municipality-by-municipality basis. The Book 30 inventories that were used in these appeals did not contain any fresh start or asset impairment accounting. Rather, the so-called Book 1 contained those accounting write-downs. When MCI attempted to use Book 1 as the basis for its reporting requirement to the Commissioner, the BLA rejected it. The Board finds that these write-downs should not be included in reporting § 39 property because they incorporate concepts, such as global entity valuation and subjective internal financial projections, which are not directly related to the § 39 property. In addition, there is no evidence in these appeals, that MCI's net book value may limit its earning capacity and potential. The Board further finds that these accounting concepts are not germane to *ad valorem* property tax assessment and central valuation of the telephone companies under § 39 because the concept of central valuation here requires that all companies report an original cost that has a common basis. The other set of financial books referred to in these proceedings, Book 10, was maintained for income tax purposes and was not shown to be suitable for reporting MCI's § 39 property to the Commissioner for central valuation and *ad valorem* property tax purposes.

For the fiscal years at issue, the Commissioner had a policy of centrally valuing only the § 39 property that was in service. The Board finds that for Massachusetts *ad valorem* property tax purposes, this policy was erroneous because, as more fully explained in the Opinion below, the relevant statutes require that *all* property owned in the municipalities on the valuation date that is not specifically exempt, should be valued. Accordingly, all § 39 property should be reported to the Commissioner by the telephone companies and any diminution in value attributable to this property may be addressed in the

valuation. The BLA, however, did not audit the Forms 5941 to determine whether telephone companies, and in particular MCI, reported all property. The Commissioner, nevertheless, considered fiber optic cable and conduit in service even if only one strand within a cable was lit while all the other accompanying strands were dark. The Assessors have not demonstrated that MCI failed to include on the Forms 5941 any § 39 property that was in place at the relevant time but not in service. Indeed, it appears to the Board that MCI either may not have been aware of the Commissioner's in-service policy or regardless of it, reported all of its property in place at the end of each year.[24] Moreover, given the stagnation in the land-line telecommunications industry generally, the abundance of in-place and reported dark fiber locally, and the information in evidence regarding the § 39 property reported to the Commissioner by MCI for the relevant fiscal years, the Board concluded that it was doubtful that MCI was adding, to any significant degree, fiber optic property to its system in Boston and Newton during the fiscal years at issue. There was no substantial evidence to the contrary. MCI's valuation expert, Mr. Weinert, also relied on the information contained in the Forms 5941 as "the best records available." Mr. Rodriguez relied on Book 10 in the mistaken belief that the relevant Book 30 contained fresh start accounting and impairment values. Accordingly, the Board finds that the Commissioner's reliance on the Forms 5941 as the starting point in his trended reproduction cost new less depreciation valuation methodology was appropriate here. Further, for future years, the Commissioner can use his power to audit and verify the accuracy of the information contained on the Forms 5941 to ensure that the Commissioner is properly valuing § 39 property.

Relying on the original cost of the § 39 property and its vintage year or year of purchase, the Commissioner trended and depreciated that original cost using a "composite multiplier," which combined the trending factor with the depreciation factor to, in one calculation, arrive at the cost to currently reproduce the property as of the valuation date and determine its depreciated value.[25] For the trending of telephone personal property and the generators, the Commissioner relied on the TPI Index and

---

[24] Mr. Weinert, MCI's valuation expert, assumed that the Commissioner included unlit dark fiber optic cable in his central valuation.

[25] The composite multiplier also included the appropriate depreciation floors.

the Handy-Whitman Index, respectively. The valuation experts for the other parties also relied, at least to some extent, on the TPI Index. The Board finds that the TPI Index for telephone property and the Handy-Whitman Index for generators complemented the § 39-property reporting format required by the Commissioner and the FCC service life or depreciation tables. These readily available indices provided ample categorization and grouping and functioned well within a standardized central valuation system.

The Commissioner used straight-line depreciation, incorporating FCC service lives for each FCC property category account, in accordance with FCC Docket No. 98-137 (December 17, 1999), with a floor of 30% for the telephone property and 60% for the generators. Mr. Sansoucy recommended, and the Commissioner adopted, straight-line depreciation because it "lends itself well to an automated system, . . . is predictable [and is] verifiable." Mr. Sansoucy also testified that utility property is "heavily maintained to operate at its full functionality, so at any given moment it is still in very good condition." Mr. Sansoucy used the FCC service lives because they were based on objective data provided to the FCC from the telephone industry regarding actual retirements of property, and they are verifiable. The FCC also periodically reviews its service lives and will change them, if warranted. In addition, because of the similarity of equipment and similar pace of technological change among telecommunications providers, as well as the convergence of services offered by these providers, the Board determined that it was appropriate to apply the FCC service lives to all telecommunications companies subject to central valuation. Mr. Sansoucy further noted that the FCC service lives allow for not only an orderly decrease in value over time, but also the inclusion of all or most aspects of depreciation.

Mr. Sansoucy explained that "the floor concept is to diminish the value of the property to a point where it reaches an operating floor if it continues to age. It does not go down in depreciation any further until it is fully retired or taken out of service and replaced." Based primarily on the justifications contained in Mr. Sansoucy's testimony and valuation report, the Board agreed with the Commissioner's use of straight-line depreciation and the FCC service lives with suitable floors.

The Board also finds that a 30% floor was appropriate for the telephone property because, as Mr. Sansoucy

suggested, it reflected the property's continuing vitality and maintenance, as well as its salvage value, and, other evidence supported consideration of the considerable original investment in associated direct and indirect costs, particularly regarding the outside plant, in setting the floor. The Board also concurs with the 60% floor that Mr. Sansoucy selected, and the Commissioner adopted, for generators. This limit properly reflects the generators' limited use, high degree of maintenance, and retained residual value, which Mr. Sansoucy confirmed with market data.

Moreover, the Board finds that the suggested depreciation floors worked in concert with the FCC service lives, which are intended to determine a rate of depreciation for property allocated over its useful life. When, as here, the property retains considerable value well in excess of salvage value as it approaches and reaches the end of its service life, it is appropriate, for *ad valorem* property tax purposes, to use a depreciation floor to reflect the value that the non-retired property maintains while it remains part of the income-generating system.

For fiscal years 2005 and 2006, the Commissioner subtracted an additional 25% economic obsolescence from the values obtained from the automated central valuation methodology. This deduction resulted from submissions from and discussions with knowledgeable representatives from the telecommunications, primarily wireless, industry indicating that the Commissioner's proposed values were excessive because of, among other things, technological advances and the state of the industry. For fiscal year 2006, the Commissioner, on Mr. Sansoucy's recommendation, did not apply the 25% economic obsolescence deduction to property less than one year old. The Commissioner quantified the 25% economic obsolescence estimate by applying to a sample property listing a measure of additional depreciation ranging from 5% to 70% depending on the age of the property. Recognizing the inherent difficulty in quantifying economic obsolescence, the Board finds that this exercise provided some support for including the additional 25% obsolescence estimate in the Commissioner's methodology for valuing the § 39 property, particularly where, as set forth in more detail below, the Board finds that the determinations of and support for obsolescence percentages offered by MCI's and the Assessors' valuation experts were lacking.

Based on these subsidiary findings, the Board finds that, in these appeals, the Commissioner's certified values

for MCI's § 39 property for fiscal years 2005 and 2006 were correct, despite the existence of some minor discrepancies, which did not result in values that were substantially too high or substantially too low. As the Board found, *supra*, it does not appear that MCI added property to its systems in Boston and Newton between the relevant assessment dates for fiscal years 2005 to 2006. Accordingly, it does not appear that the Commissioner's failure to apply his economic obsolescence deduction to property in service for less than one year for his fiscal year 2006 valuations was of any consequence with respect to the § 39 property at issue.

For fiscal year 2004, it was not possible for the Commissioner to obtain from the telephone companies the detail on the 23 property categories to fully implement Mr. Sansoucy's valuation methodology. On Mr. Sansoucy's recommendation, the Commissioner aggregated the property categories and aggregated and averaged the composite multiplier tables. The resulting certified values were based on class-averaged cost trends for the categories and category-averaged depreciation percentages. Both Ms. Brown and Mr. Sansoucy believed that the aggregation process used for fiscal year 2004 resulted in "conservative" values because the aggregation of depreciation percentages resulted in shorter average service lives, which, they asserted, approximated the 25% of additional economic obsolescence that the Commissioner took in fiscal years 2005 and 2006. Appreciating that fiscal year 2004 was, in essence, a transition year with respect to telephone companies reporting § 39 property and with respect to the Commissioner implementing a better trended reproduction cost new less depreciation methodology and understanding that it was not possible to fully implement the new methodology with all of its categories, the Board finds that the Commissioner's aggregation process was an acceptable methodology and means to estimate the value of the § 39 property for fiscal year 2004 under the circumstances.

The Board, however, does not concur with Mr. Sansoucy and Ms. Brown's observation that the fiscal year 2004 methodology produced "conservative" enough values to subsume and include an approximation of the 25% economic obsolescence deduction used in later years. The Board finds little quantifiable support for their position in this regard and observes that the final certified values of the § 39 property for fiscal year 2004 are not consistent with those for fiscal years 2005 and 2006, unless an

additional deduction of 25% for economic obsolescence is applied. It also appears to the Board that the telecommunications market was afflicted by similar economic and other external factors in all of the fiscal years at issue. Ms. Brown and Mr. Sansoucy acknowledged as much by claiming that the "conservative" values derived by the Commissioner's valuation methodology for fiscal year 2004 included approximately 25% of additional obsolescence.

Accordingly, the Board finds that the Commissioner's valuation for MCI's § 39 property for fiscal year 2004 was incorrect and resulted in certified values substantially higher than its fair cash value. The Board, therefore, finds that an additional deduction for economic obsolescence, in the amount of 25%, including on generators and property in service less than one year, should be applied to the Commissioner's certified values for fiscal year 2004. The Board finds that the generators are part of MCI's overall asset system, as is the property in service less than one year, and neither should be segregated out of the system's asset mix for economic obsolescence purposes. For all of the fiscal years at issue in these appeals, the Board also notes that the reproduction cost new values that MCI's valuation expert, Mr. Weinert, derived were higher than those used by Mr. Sansoucy and the Commissioner.

With respect to Mr. Weinert's methodology, the Board finds the existence of several serious flaws, including his excessive deductions for functional obsolescence and his use of 65% as his measure of economic obsolescence, which compromised his final values.

The Board finds that Mr. Weinert's use of both reproduction cost and replacement cost for trending fiber optic cable and conduit, along with additional deductions for, what he labeled, physical, functional, and economic depreciation and obsolescence resulted in excessive deductions for functional obsolescence. Reproduction cost estimates the current cost to construct an exact duplicate property using the same materials, while replacement cost estimates the cost to construct an equivalent property using contemporary materials. The APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12th ed. 2001) 357. Consequently, the reproduction cost method contains deficiencies and obsolescence that must be addressed through a depreciation analysis, while the replacement cost method cures, at least to some extent, functional obsolescence.

As stated in THE APPRAISAL OF REAL ESTATE:

> If reproduction cost or replacement cost is used inconsistently, double counting of items of

> depreciation and other errors can be introduced. The cost basis selected for a particular appraisal must be clearly identified in the report to avoid misunderstanding and must be consistently applied throughout the cost approach to avoid errors in calculating an estimate of value.

Id at 357. Mr. Weinert's depreciation analysis, however, later accounts for the functional obsolescence associated with MCI's fiber optic cable and conduit through his selection of service lives. The Board is not convinced that a substantial presence of super-adequacies[26] exists in MCI's system as of the relevant assessment dates for the fiscal years at issue in these appeals, notwithstanding the general fact that telecommunication companies like MCI intentionally overbuild. The Board finds that telecommunications companies overbuild because of the high hard and soft costs associated with the installation of cable and conduit and the relatively low costs of the cable and conduit components. The Board further finds that telecommunication companies intentionally overbuild for the sake of redundancy and to plan for the possibility of expansion and ease of repair. It is part of a predetermined business plan for their systems. Moreover, the present trend toward convergence or bundling of telecommunication services, such as telephone, Internet, and television, necessitate additional fiber optic capabilities. Accordingly, the Board finds that MCI receives benefits from the vast majority of its cable, even those unlit strands. Mr. Sansoucy referred to Mr. Weinert's use of both replacement cost and depreciation as a "double dip" for functional obsolescence. Under the circumstances present in these appeals, the Board agrees.

Moreover, Mr. Weinert premised the need for an additional functional obsolescence deduction on the greater capacity in newer fiber optics. The evidence indicates, however, that MCI's existing infrastructure of fiber optics can be and has been modified to increase its functional capabilities, with minimal disruption and presumably minimal expense, by simply splicing certain enhancements into the cable, thereby extending its service life. In addition, his projections of when advances in new technology will necessitate replacement of the old appear

---

[26] A "super-adequacy" is a component or system in the property that exceeds market requirements and does not contribute to value an amount equal to cost. THE APPRAISAL OF REAL ESTATE 403-406

subjective and speculative. The Board further observes that Mr. Weinert's rationale for integrating a replacement cost new method into his valuation methodology and his rationales for incorporating deductions for physical depreciation and functional and economic obsolescence in his methodology, all overlap, thereby suggesting that he accounted for certain factors multiple times in his methodology.

For example, Mr. Weinert stated that his replacement cost analysis addresses underutilization of fiber optic cable and conduit "due to excess supply . . . , the weakness of the economy, in general, and the dismal state of the communications industry." Later, when justifying his economic obsolescence deduction, Mr. Weinert refers not only to the economy and economic state of the industry, but also to technological change and "a permanent glut of optical capacity." Mr. Weinert additionally considered overlapping factors when developing service lives in his depreciation analysis. He stated in that section of his valuation report that "improvements in communications equipment, particularly optical communications equipment, have caused a significant shortening of the service lives of property over their physical service lives."

Accordingly, the Board finds that Mr. Weinert's combined functional obsolescence determinations were excessive under the circumstances while the FCC tables used by Mr. Sancoucy and the Commissioner adequately included and accounted for, among other things, all, or nearly all, of the functional obsolescence related to MCI's § 39 property.

In addition, the Board finds that Mr. Weinert's use of the Iowa R curve with his service lives and without depreciation floors, in lieu of straight-line depreciation, was improper. Mr. Weinert based his service lives on technological advancements and not necessarily on actual, or even expected, retirements of MCI's § 39 property. The Iowa R curve, however, is based on utility experience with actual retirements. Mr. Weinert's combination of his service lives with the Iowa R curve and without a depreciation floor allows him to fully depreciate a significant portion of the § 39 property well before it is actually retired. The Board finds that this approach was inconsistent and faulty for *ad valorem* property tax purposes. Moreover, Mr. Sansoucy credibly testified that the Iowa curves ordinarily are used for rate-making purposes for the recovery of capital and not for *ad valorem* tax valuation purposes.

With respect to Mr. Weinert's 65% economic obsolescence, the Board finds that it is not credible. Mr. Weinert failed to provide meaningful factual support to link the purported economic downturn affecting the telecommunications industry generally to Massachusetts or the § 39 property at issue here. Also, in calculating an economic baseline for the overall U.S. economy to use in his comparative analysis of the overall U.S. economy, the telecommunications industry, and the inter-exchange/broadband subset of the telecommunications industry that he claimed was representative of MCI, he likely skewed his analysis of the overall U.S. economy by excluding 26 out of 98 U.S. industry sectors. Mr. Sansoucy observed that the 26 excluded sectors probably had losses while the 72 included sectors produced profits. Accordingly, it seems that Mr. Weinert's measure of the overall U.S. economy's performance is likely inflated.

Furthermore, in calculating the economic performance of the inter-exchange/broadband subset of the telecommunications industry to use in his comparative analysis, Mr. Weinert again skewed his results, but this time by deflating the economic performance. The combined effect of comparing these oppositely skewed measures accentuates the approach's unreliability. Mr. Sansoucy concluded that Mr. Weinert's multiplication of net profit by return on capital and net profit by return on shareholders equity are "meaningless" "constructs" for valuation purposes. The Board notes that, according to even Mr. Weinert's analysis, the telecommunications industry and the inter-exchange/broadband subset of the telecommunications industry were nonetheless earning a profit during the relevant time period.

Lastly in this regard, Mr. Sansoucy's Comparative Effective Lives chart demonstrates that the total depreciation and obsolescence deductions used by Mr. Weinert in his methodology result in effective lives for electronic machinery and fiber optics in the range of only 2.1 to 3.3 years. The Board finds that this chart provides further support for the finding that Mr. Weinert's total deductions for depreciation and obsolescence are excessive.

With respect to Mr. Rodriguez' and Mr. Pomykacz' trended reproduction cost new less depreciation methodology, the Board finds that it was similar in many respects to the Commissioner's. The Board finds, however, that their starting point for the property to be valued, which included Book 10 and 2004 tax returns work papers for

MWNS, Inc., as well as numerous assumptions, are not as reliable as the Forms 5491 that both the Commissioner and Mr. Weinert used and may double count some property, include property not located in Boston or Newton, or even exclude property that is in those municipalities. The Board further finds that their selections of many of the service lives associated with the § 39 property were excessive and resulted in lower amounts of, and longer periods for, depreciation than appropriate. In addition, the Board reiterates here that the service lives connected with the FCC tables used by the Commissioner in conjunction with suitable floors were the most reliable service lives to use for, among other things, depreciation purposes for the § 39 property.

The Board also finds that all three of the results from the questionable methods that Mr. Pomykacz used to develop his 20% economic obsolescence figure were suspect. Both his complex analysis and his fiber optic utilization analysis rely too heavily on dubious calculations and unpersuasive assumptions, including a highly subjective 50% reduction that Mr. Pomykacz took on the obsolescence figures indicated by his complex analysis and his curious subtraction of a fiber utilization rate of 15% from an assumed, but essentially unsupported, future rate of 35% to reach his indicated obsolescence rate of 20%.[27] With respect to his simple analysis, which is premised on manufacturing activities generally and plant utilization rates in particular, as being good proxies for the economics of the land-line based telecommunications industry, this analysis understates the economic obsolescence that it is attemping to derive by including manufacturers of wireless telecommunications personal property.

Conclusion

The Board finds that: (1) it has jurisdiction to hear and decide these appeals; (2) MCImetro, LLC is not entitled to the corporate utility exemptions under G.L. c. 59, § 5, cl. 16(1)(d) for fiscal years 2004 and 2005; (3) in the fiscal years where MCI filed petitions challenging the Commissioner's certified values as being substantially too high, but the Boston Assessors failed to file petitions challenging them as being substantially too low (fiscal years 2004 and 2006), the Board may not find that the

[27] See discussion on pages 53-55, *supra*.

Commissioner's certified values for the § 39 property located in Boston are substantially too low and increase them; (4) the Board's standard of review in these appeals requires it to initially determine whether the valuation of the § 39 property by the Commissioner was correct, and, only if the appellants prove that it was "substantially higher or substantially lower" than its fair cash value, should the Board substitute its own valuation of the § 39 property, and to ascertain the propriety of the Commissioner's certified central valuation of MCI's § 39 property in these consolidated appeals, the Board finds that its examination is not limited only to the Commissioner's methodology, as suggested by the Commissioner; (5) telephone companies' personal property that is owned, even if not in service, as of the relevant January 1st assessment date, is taxable and subject to the Commissioner's central valuation under § 39, unless otherwise exempt; (6) for fiscal year 2004, the Commissioner's valuation of MCI's § 39 property was incorrect and resulted in certified values that are substantially too high because he did not apply a 25% economic obsolescence deduction to all of the § 39 property, including generators and property placed in service less than one year; and (7) for fiscal years 2005 and 2006, the Commissioner's valuations of MCI's § 39 property was proper and did not result in certified values that are either substantially too high or substantially too low, even though the valuations do contain some relatively minor discrepancies.

On this basis, for fiscal year 2004, the Board decides Docket Nos. C269504 (Boston) and C269538 (Newton) for the appellant, MWNS, Inc., and determines a value of $2,199,852 for its § 39 property located in Boston, a $733,284 reduction from the Commissioner's certified value, and a value of $434,470 for its § 39 property located in Newton, a $144,823 reduction from the Commissioner's certified value. Also, for fiscal year 2004, the Board decides Docket Nos. C269462 (Boston) and C269485 (Newton) for the appellant, MCImetro, LLC, and determines a value of $56,231,280 for its § 39 property located in Boston, an $18,743,760 reduction from the Commissioner's certified value, and a value of $74,300 for its § 39 property located in Newton, a $24,767 reduction from the Commissioner's certified value. The Board decides the remaining appeals for fiscal year 2004 (Docket Nos. C269571 & C269581), for fiscal year 2005 (Docket Nos. C273736, C273734, C273842, C273843, C274128, C274152, C274200, & C274234) and for

fiscal year 2006 (Docket Nos. C280509, C280543, & C279712) for the appellee Commissioner. The Board's decisions in these appeals are promulgated simultaneously with this Findings of Fact and Report.

OPINION

Reporting Requirements & Jurisdiction

The Assessors argue that the Board does not have jurisdiction over these appeals because MCI failed to submit timely and detailed Forms 5941 for all of the years at issue. The Board, however, finds and rules that it does have jurisdiction over these appeals.

In its findings, *supra*, the Board found that for each of the years at issue, MCI timely made returns to the Commissioner on Forms 5941. In rendering this finding, the Board also found, *supra*, that the course of conduct between MCI and the Commissioner was of probative value on the issue of MCI's inability "to comply . . . for reasons beyond [its] control" in meeting the March 1st date for making its returns to the Commissioner on Forms 5941. The Board further found that the Commissioner's granting of extensions under the circumstances present in these appeals constituted reasons beyond MCI's control in making its returns to the Commissioner on Forms 5941. The Board recognized that the changes in the Forms 5941s, their instructions, published filing deadlines, and other related mailings and matters, as well as the Commissioner's granting of extensions and failure to promulgate any formal guidance, in conjunction with the evolving state of the law, all of which the Board found was beyond the control of MCI, justified MCI making its returns to the Commissioner after the March 1st date.

From the Commissioner's perspective, the Board found, *supra*, that the forms were filed seasonably with the necessary information for the BLA to make timely central valuation determinations and certifications on or before the May 15th date. Both the Commissioner and the Assessors stipulated to the timely filing of the returns. MCI relied on the stipulations and did not request the opportunity to present additional evidence on that issue. Even though the Board establishes its jurisdiction independently of any such stipulations, the Board found that the stipulations did serve to bolster the Board's determination that the Commissioner was not prejudiced by the post-March 1st

filings and he recognized that MCI's failures to timely make its returns to the Commissioner resulted from reasons beyond MCI's control. In addition, the Commissioner acknowledged that the many changes that the BLA implemented during this time period created some confusion and misunderstandings.

Accordingly, the Board concluded that any delays by MCI in making its returns to the Commissioner on appropriately informative Forms 5941 for fiscal years 2004, 2005, and 2006 were not fatal to the Board's jurisdiction over these appeals because they fell within the "for reasons beyond [MCI's] control" savings provision in G.L. c. 59, § 41.

> Section 41 provides, in pertinent part, that:
> Every telephone . . . company owning any property required to be valued by the commissioner under section thirty-nine shall annually, on or before a date determined by the commissioner but in no case later than March first, make a return to the commissioner . . . . This return shall be in the form and detail prescribed by the commissioner and shall contain all information which he shall consider necessary to enable him to make the valuations required by section thirty-nine, and shall relate, so far as is possible, to the situation of the company and its property on January first of the year when made. . . . Failure to make the return required by this section shall bar the company from any appeal of the commissioner's determination of value under section thirty-nine, *unless such company was unable to comply with such request for reasons beyond such company's control*. (Emphasis added.)

The Board rules that the savings clause comes into play when returns do not comply with § 41's requirements, not just when a company fails to make any return at all. The Board finds and rules that the phrase "[f]ailure to make the return required by this section" means the failure of a company to submit a return that, for example, "is in the form and detail prescribed by the [C]ommissioner" or when a company submits a return that is deficient in some way. The Board previously interpreted virtually identical language contained in G.L. c. 59, § 42 in ***RCN Beco-Com, LLC v. Commissioner of Revenue and City of Newton***, Mass. ATB Findings of Facts and Reports 2003-410, *aff'd* 443 Mass. 198

(2005) ("***RCN Beco-Com***"). In ***RCN Beco-Com***, the Board noted that "G.L. c. 59, § 42 provides that in the event a telephone . . . company '*fail[s] to make the return required by [§ 41]* the commissioner shall estimate the value of the property of the [company] according to his best information and belief.' In other words, the Commissioner has an affirmative duty to value telephone . . . companies' § 39 property *even if the return is inadequate for the Commissioner's purposes.*" (Emphasis added.) ***Id.*** at 2003-442. Accordingly, in ***RCN Beco-Com***, the Board determined that, as used in § 42, the failure to make the return required by § 41 means the failure to make a return without inadequacies or, in other words, submitting a return that is not adequate for the Commissioner's central valuation purposes. That determination is the equivalent of the Board's finding and ruling here with respect to the nearly identical language and phrase used in § 41. "'"[W]here the Legislature uses the same words in several sections which concern the same subject matter, the words "must be presumed to have been used with the same meaning in each section."'" ***Whitehall Co., Ltd. v. Beverages Control Commission***, 7 Mass. App. Ct. 538, 540 (1979) (quoting ***Insurance Rating Bd. v. Commissioner of Ins.***, 356 Mass. 184, 188-189 (1969) (quoting ***Liddell v. Standard Acc. Ins. Co.***, 283 Mass. 340, 346 (1933)). Moreover, the Board's interpretation of tax statutes is entitled to deference. *See* ***Xtra, Inc. v. Commissioner of Revenue***, 380 Mass. 277, 283 (1980) (citing ***Henry Perkins Co. v. Assessors of Bridgewater***, 377 Mass. 117, 121 (1979)).

In the instant appeals, MCI did not submit returns that conformed to the Commissioner's requirements. The Board found, however, that the course of conduct between MCI and the Commissioner, including the Commissioner's granting of extensions and his numerous pronouncements and revisions resulting from the shifting state of the law, as well as his rejecting returns, establishes that MCI's failures to timely make the required returns were for reasons beyond its control. This finding comports with the holding in ***Dexter v. City of Beverly***, 249 Mass. 167 (1924), in which the Supreme Judicial Court held that while an express statutory deadline for a taxpayer to make a return of property to the assessors cannot be waived, the course of conduct between the taxpayer and the assessors was probative on whether good cause existed to invoke a savings clause and excuse the taxpayer's failure to timely file its return under G.L. c. 59, § 29. ***Id.*** at 169-70. In the

instant appeals, the Board finds and rules that the failures to make the returns were for reasons beyond MCI's control.

Lastly, the Board finds and rules that the changes in the Forms 5941s, their instructions, published filing deadlines, and other related mailings and matters, as well as the Commissioner's failure to promulgate any formal guidance, in conjunction with the changing state of the law, and his discretionary granting of extensions and rejecting returns, created snares for the unwary, which constituted "reasons beyond [MCI]'s control." *See* ***Becton Dickinson and Company v. State Tax Commission***, 374 Mass. 230, 233 (1978) ("[S]tatutes embodying procedural requirements should be construed, when possible, to further the statutory scheme intended by the Legislature without creating snares for the unwary."). *See also* ***SCA Disposal Services of New England, Inc. v. State Tax Commission***, 375 Mass. 338, 341 (1978) ("[N]otions of fairness and common sense" should be considered in applying administrative provision.).

Accordingly, the Board rules that, on these bases, it has jurisdiction over MCI's appeals.

Commissioner's Power to Audit

The Chief of the BLA testified that the BLA does not have the power to audit telephone company returns, Forms 5941, filed under G.L. c. 59, § 41. The Board disagrees. General Laws c. 14, § 3 provides, in pertinent part, that: "The commissioner shall be responsible for administering and enforcing all laws which the department [of revenue] is or shall be required to administer and enforce." This provision goes on to provide that "administering and enforcing the tax laws of the commonwealth [include] the conduct of audit and compliance activities." Chapter 14 is the Department of Revenue's enabling statute, and the powers that are granted under § 3 apply to all of the Commissioner's tax administration and enforcement activities, including those relating to telephone company central valuation under G.L. c. 59, §§ 39-42, unless expressly countermanded.

Moreover, the language in the central valuation provisions indicates that the Commissioner can audit returns. The Commissioner is mandated by § 39 to determine annually values for telephone companies within a certain time frame. He cannot perform this function without adequate information from the telephone companies. Section 42 empowers the Commissioner to value a telephone company's

§ 39 property according to his best information and belief if that telephone company fails to file the return required by § 41. The Commissioner may acquire that information through his powers to conduct audit and compliance activities. The return, under § 41, is required to "be in the form and detail prescribed by the commissioner and shall contain all information which he shall consider necessary to enable him to make the valuations required by [§ 39]." Clearly, for the Commissioner to properly administer and enforce his obligations under the central valuation provisions, he must invoke his powers to utilize audit and compliance activities to insure that he receives all the necessary "detail" and "information."

Furthermore, in conjunction with his power to audit, the Commissioner cannot reject or send back returns filed by telephone companies under c. 59, § 41. The Commissioner must accept all returns filed under the telephone company central valuation provisions, and, if after inspection, review, or audit, he determines that they are inadequate in any way, he can order that they be amended, supplemented, or otherwise augmented. If the Commissioner does not receive timely information, he can estimate the value of the § 39 property "according to his best information and belief." It is also significant that the dates upon which returns are filed with the Commissioner impact the Board's jurisdiction over telephone company central valuation appeals and, therefore, the returns must be preserved.

Statutory Background

Non-exempt tangible personal property located in the Commonwealth is subject to taxation to the owner of the property. G.L. c. 59, §§ 2 and 18. Generally, local assessors receive a "true list" of non-exempt personal property from the owner, determine the fair cash value of the personal property, and assess the applicable tax. G.L. c. 59, §§ 29 and 38. The Legislature has decided, however, that the Commissioner should centrally value the statewide system of personal property belonging to telephone companies. G.L. c. 59, §§ 39-42. The local assessors then assess the applicable tax based on the Commissioner's certified central valuation. ***Id.***

According to the Report of the Tax Commissioner for year ending November 30, 1914, Pub. Doc. No. 15, pages 27-30, the poles, wires and underground conduits of telephone companies were not subject to local taxation prior to 1902.

Instead, telephone companies were taxed by the Commonwealth on the value of their corporate franchises. ***Id.*** The Commonwealth distributed the tax paid by the telephone companies to the various municipalities on the basis of the residence of the companies' shareholders. ***Id.*** Consequently, municipalities did not receive benefits based on the location of the telephone companies' personal property. ***Id.*** This anomaly caused many municipalities with a considerable amount of telephone property, but few resident shareholders, to complain. ***Id.*** Those complaints were answered by the passage of Chapter 342 of the Acts of 1902. ***Id.***

This act provided that the poles, wires and underground conduits of telephone companies should be taxed by the municipalities where the property was located. ***Id.*** It was not long, however, before the infirmities inherent in this approach surfaced. In essence, state-wide telephone company property was subjected to almost as many different valuation standards, methodologies, and avenues of redress as there were municipalities determining values. ***Id.*** Recognizing the need to incorporate consistency and uniformity into the property's valuation, as well as some level of convenience for telephone companies seeking redress from assessments into the process, the Legislature enacted G.L. c. 59, §§ 39-42.[28] *See* ***Commissioner of Corporations and Taxation v. Assessors of Springfield***, 330 Mass. 433, 436 (1953).

This act provided for the central valuation of telephone companies' "poles and wires and underground conduits, wires and pipes." The act was later amended to add machinery.[29] Currently, the Commissioner determines the value of the taxable "machinery, poles, wires and underground conduits, wires and pipes of all telephone . . . companies" on a municipality-by-municipality basis and certifies those values to the appropriate boards of assessors. Corporate telephone utilities are exempt, however, from tax on all machinery, except "machinery used in the manufacture or in supplying or distributing water." G.L. c. 59, § 5, cl. 16(1). This exemption results in only their generators, which manufacture electricity, being subject to valuation and taxation as machinery used in manufacturing. As will be discussed in greater detail, *infra*, non-corporate telephone entities are subject to valuation and tax on the value of all of their personal property. ***RCN Beco-Com, LLC v. Commissioner of Revenue and***

---

[28] St. 1915, c. 137.

[29] St. 1918, c. 138.

City of Newton, 443 Mass. 198, 209 (2005).

Standard of Review

Every owner of § 39 property and board of assessors to whom the Commissioner certifies § 39 property values has the right to appeal those valuations to this Board. G.L. c. 59, § 39. "In every such appeal, the appellant shall have the burden of proving that the value of the machinery, poles, wires and underground conduits, wires and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the commissioner of revenue." ***Id.*** The relevant statutory sections contain no definition of "substantially higher or substantially lower" and provide no direction for measuring or otherwise interpreting these terms. In discussing the Board's adjudicatory role for reviewing the Commissioner's valuation of state-owned land under G.L. c. 58, §§ 13-14, the Supreme Judicial Court, in *dicta* in ***Sandwich II***, referenced § 39 and observed that:

> [O]rdinarily an "appeal" to the [Board] results in a trial of all the issues raised by the petition and the answer. The [B]oard hears testimony from all parties and forms an independent judgment of value based on all the evidence received. In reaching its conclusion, the [B]oard may select any method of valuation that is reasonable and that is supported by the record. (citation omitted). In some cases, however, the Legislature has provided that the [B]oard should perform a more traditional appellate function, rather than make a de novo determination of value. In such cases the [B]oard's inquiry is limited, at least initially, to determining whether the valuation of the Commissioner was proper. . . . For example, G.L. c. 59, § 39, . . . which deals with the valuation of the poles, wires, pipes, and the machinery belonging to telephone and telegraph companies, provides that in an appeal from the Commissioner's determination of value for that property, "the appellant shall have the burden of proving that the value of the [property] is substantially higher or substantially lower," than the Commissioner's determination. Only if the taxpayer has met that burden does the [B]oard undertake an independent valuation of the

property.

Id. at 586.

The Board previously acknowledged the Supreme Judicial Court's *dicta* in ***Sandwich II***, in ***RCN Beco-Com,*** Mass. ATB Findings of Fact and Reports at 2003-444, in ruling that this standard of review did not apply when the Board determined whether a company qualified to be classified as a telephone company for central valuation purposes under § 39. Moreover, in ***RCN Beco-Com***, the Board recognized that § 39 was adopted to remedy the inconsistent valuations that local assessors had been placing on § 39 property and to provide necessary consistency and uniformity. The Board also noted that § 39 is remedial in nature and, as such, should be construed broadly to address the concerns that it was enacted to remedy. ***Id.*** at 2003-437

Harmonizing the "substantially higher or substantially lower" standard in § 39 with the *dicta* in ***Sandwich II***, and considering the policies behind the enactment of and amendments to this statutory provision, as well as the definitions of "substantial" contained in various dictionaries indicating the word's "common and approved usage," *see* G.L. c. 4, § 6, ¶ Third and ***Town of Boylston v. Comm'r of Revenue***, 434 Mass. 398, 405 (2001) ("We usually determine the 'plain and ordinary meaning' of a term by its dictionary definition."), the Board finds and rules that the standard of review in these appeals is to initially determine whether the valuation of the § 39 property by the Commissioner is correct, and, only if the appellants prove that it was "substantially higher or substantially lower" than its fair cash value, should the Board substitute its own determination of fair cash value for the Commissioner's certified value of the § 39 property. The Board further finds and rules that its examination is not limited only to the Commissioner's methodology, as suggested by the Commissioner. The Board rules that it may determine the § 39 property's fair cash value, compare it to the Commissioner's valuation, and then, only if the Board finds that the fair cash value is "substantially higher or substantially lower" than the Commissioner's value, will the Board substitute its determination of fair cash value for the Commissioner's valuation. *See* ***O'Brien v. Director of Div. of the Employment Sec.,*** 393 Mass. 482, 487-88 (1984) ("Our task is to interpret the statute 'according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its

enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.'" (quoting ***Industrial Fin. Corp. v. State Tax Comm'n***, 367 Mass. 360, 364 (1975)). *See also* ***Boston Five Cents Sav. Bank v. Assessors of Boston***, 317 Mass. 694, 703 (1945) ("The words of a statute are not to 'be stretched beyond their fair meaning in order to relieve against what may appear to be a hard case.'" (quoting ***Grove Hall Savings Bank v. Dedham***, 284 Mass. 92, 96 (1933)).

The Commissioner tried to equate fully the standard of review here with that in state-owned land valuation cases under G.L. c. 58, §§ 13-14. In the state-owned land valuation appeals, the Board must first find that the Commissioner's state-wide valuation methodology is faulty and not capable of generating reasonably fair and uniform values before the Board may perform a *de novo* valuation. ***Sandwich II*** at 586. The Board finds and rules that the state-owned land valuation standard under G.L. c. 58, §§ 13 and 14 is not applicable here for the simple reason that the governing statutes do not say the same thing. *See, e.g.*, ***Shabshelowitz v. Fall River Gas Co.***, 412 Mass. 259, 262 (1992) ("The language of the statute is the best indication of legislative intent."); ***Commissioner of Revenue v. AMIWoodbroke, Inc.***, 418 Mass. 92, 94-95 (1994) (recognizing that taxing statutes should be construed according to their plain meaning); and ***Conroy v. City of Boston***, 392 Mass. 216, 219 (1984) (interpreting the statute at issue in that case in accordance with the usual and natural meaning of words when its language is plain). Moreover, if the Legislature had desired the Board to follow the state-owned land valuation standard of review, it certainly knew how to do so. *See* ***Commonwealth v. Vega***, 449 Mass. 227, 234 (2007) ("The fact that the Legislature knew how to provide expressly for [a certain standard contained in another statute], but did not do so [here], only reinforces th[e] conclusion [that the Legislature did not intend that other statute's standard be used here.]"). *See also* ***Ruggiero v. Police Comm'r of Boston***, 18 Mass. App. Ct. 256, 260, n.4 (1984) (after examining several statutes that contained a restriction, which the statute at issue did not, the Court concluded that "the Legislature knew how to [create such a restriction in the statute at issue] if it chose to do so."). In fact, the Legislature had the opportunity to use the same standard of review in the state-owned land valuation provisions, adopted earlier, when it amended, among other things, the standard of review

in § 39 in 1955. The Board finds and rules that it is determinative that the Legislature chose different language.

Furthermore, the Board finds and rules that there are distinctly different policies and purposes behind the enactments of these two statutory sections. The state-owned land valuation provisions only intend to provide municipalities with an approximate and proportionate reimbursement of lost taxes from a limited and usually under-funded pool. Consequently, "the proportion of the value of all State owned lands located in [a municipality] is more important than the absolute value of the land in determining the amount received." ***Sandwich II*** at 587. This explanation elucidates why, in state-owned land valuation cases, the Commissioner's methodology, and not necessarily the fair cash values that are attributed to the land, are the preeminent concern. As discussed, *supra*, the policies and purposes behind centrally valuing telephone companies are considerably different.

Lastly, the Board rules that, under the circumstances present in these appeals, and in consideration of the Board's findings, *supra*, even if the Board adopted the Commissioner's more restricted standard of review, the Board's decisions here would not change. For fiscal year 2004, the Board found that the Commissioner's valuation was incorrect because of the methodological error of not adequately accounting for economic obsolescence, as was done for fiscal years 2005 and 2006, which resulted in values substantially too high. For fiscal years 2005 and 2006, the Board found that while the Commissioner's valuations contained minor discrepancies, they did not result in values substantially too high or substantially too low. *See* ***New Boston Garden Corp. v. Assessors of Boston***, 383 Mass. 456, 473 (1981) ("'The market value of . . . property [cannot] be proved with mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.'" (quoting ***Assessors of Quincy v. Boston Consol. Gas Co.***, 309 Mass. 60, 72 (1941)).

Whether the Board May Increase the Commissioner's Certified Central Valuations for MCI's § 39 Property Located in Boston for Fiscal Years 2004 and 2006 Where MCI Has Appealed Those Valuations But the Assessors Have Not

Despite the fact that the Boston Assessors did not file petitions under § 39 affirmatively challenging the central valuations determined and certified by the

Commissioner for MCI's § 39 property for fiscal years 2004 and 2006, they assert that the Board may still find that the Commissioner's certified values for MCI's § 39 property in Boston are "substantially lower" than the fair cash value of the § 39 property and increase them as appropriate.

Section 39 provides, in pertinent part, that: "In every such appeal, the appellant shall have the burden of proving that the value of the machinery, poles, wires and underground conduits, wires and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the [C]ommissioner." The Board rules that the relevant language in § 39 plainly places the burden on "the appellant" to prove that the Commissioner's certified valuation is "substantially higher or substantially lower, as the case may be." *See* ***Commissioner of Revenue v. Cargill, Inc.***, 429 Mass. 79, 82 (1999) ("'[W]e are constrained to follow' the plain language of a statute when its 'language is plain and unambiguous,' and its application would not lead to an 'absurd result,' or contravene the Legislature's clear intent." (quoting ***White v. Boston***, 428 Mass. 250, 253 (1998)). For fiscal years 2004 and 2006 the Boston Assessors were not "appellants" for purposes of § 39, and, accordingly, "§ 39 provides no mechanism for the Board to find a value substantially higher than that certified by the Commissioner." ***In Re Verizon New England, Inc. Consolidated Central Valuation Appeals Order***, Mass. ATB Docket No. C273560, at 11 (March 3, 2008).

The Board further rules that in order to be considered an appellant for purposes of appealing the Commissioner's fiscal years 2004 and 2006 certified central valuations of MCI's § 39 property located in Boston, the Boston Assessors would have had to file a petition with the Board. *See* G.L. c. 59, § 39 and G.L. c. 58A, § 7 ("Any party taking an appeal to the [B]oard, hereinafter called the appellant, from a decision or determination of the [C]ommissioner . . . shall file a petition with the clerk of the [Board].") The Boston Assessors did not do this, and accordingly are not an "appellant" for purposes of G.L. c. 58A, § 7, or c. 59, § 39.

The Boston Assessors further contend that, under § 9 of Chapter 321 of the Act of 1933, which was made applicable to this Board by § 4 of Chapter 400 of the Acts of 1937, "the [Board] in considering any appeal brought before it may make such decision as equity may require and may reduce or increase the amount of the assessment

appealed from." The Board rules that it is doubtful that this provision has any continuing validity. It is not codified in the Board's enabling statute, G.L. c. 58A, §§ 1-14, and has never been adopted as an amendment to the General Laws. Further, there is a specific provision, § 7, in the Board's enabling statute, which governs the power of the Board to address issues where "equity and good conscience so require." *See* ***Globe Newspaper Co. v. Beacon Hill Architectural Comm'n***, 421 Mass. 570, 584 (1996) ("an agency has no inherent authority beyond its enabling act and therefore it may do nothing that contradicts [it]."))(citing ***Commissioner of Revenue v. Marr Scaffolding Co.***, 414 Mass. 489, 493 (1993)).

The Board further rules that, to the extent this section applies to the Board currently, it is inapplicable to appeals brought under G.L. c. 59, § 39, because the express language in § 39, requires "the appellant" to prove that the Commissioner's certified valuation is "substantially higher or substantially lower, as the case may be." When rewording the relevant part of § 39 in 1955, the Legislature is presumed to have known the existing law. *See* ***Gillette Co. v. Commissioner of Revenue***, 425 Mass. 670, 677 (1997) ("The Legislature must be assumed to know the preexisting law and the decisions of this Court." (quoting ***Selectmen of Topsfield v. State Racing Comm'n***, 324 Mass. 309, 313 (1949)); ***Mathewson v. Contributory Retirement Appeal Bd.***, 335 Mass. 610, 614 (1957) ("In its enactment the Legislature presumably knew the existing statute and common law"). Moreover, the specific provisions of G.L. c. 59, §§ 39-42 trump those contained in the more general provisions relied on by the Assessors. *See* ***TBI, Inc. v. Board of Health of North Andover***, 431 Mass. 9, 21 (2000) ("It is a basic canon of statutory interpretation that "general statutory language must yield to that which is more specific.'" (quoting ***Risk Mgt. Found. Of Harvard Med. Insts., Inc. v. Commissioner of Ins.***, 407 Mass. 498, 505 (1990)); ***Doe v. Attorney General***, 425 Mass. 210, 215-16 (1997) (recognizing that when two statutes, or provisions within those statutes, conflict, the more specific provision, particularly where it has been enacted subsequent to a more general rule, applies over the general rule.).

On this basis, the Board finds and rules that for fiscal years 2004 and 2006, the Assessors of Boston are not appellants because they failed to file petitions for those fiscal years. Accordingly, the Board rules that it may not increase the central valuations determined and certified by

the Commissioner for MCI's § 39 property located in Boston for fiscal years 2004 and 2006.

MCImetro, LLC's Entitlement to the Corporate Utility Exemption under G.L. c. 59, § 5, cl. 16(1)(d)

The Commissioner determined that MCImetro, LLC, which was organized as a limited liability company (and not as a corporation), was not entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d). MCImetro, LLC maintains, however, that, for a variety of reasons, it is eligible for the corporate utility exemption for fiscal years 2004 and 2005. It argues that as of January 1, 2003 and January 1, 2004, it was a division of MWNS, Inc. and a constituent part of a "utility corporation" for tax purposes. MCImetro, LLC further argues that because it either filed its own or joined in the filing of Forms P.S.1 with the Commissioner and is treated like a corporation for Massachusetts tax purposes under G.L. c. 63, it should be allowed to claim the corporate utility exemption to avoid the imposition of what it considers to be double taxation. MCImetro, LLC also claims that, for fiscal year 2005, the corporate utility exemption is applicable to property owned by it because, prior to July 1, 2004, which MCImetro, LLC argues is the date for applying the exemptions under G.L. c. 59, § 5 for fiscal year 2005, MCImetro, LLC had transferred the property to a sister corporation. Notwithstanding these facts and arguments, the Board found, *supra*, that the Commissioner correctly determined that MCImetro, LLC was not entitled to the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d) for fiscal years 2004 and 2005 and that its § 39 property was subject to central valuation.

All personal property situated within the Commonwealth and all personal property of the inhabitants of the Commonwealth, wherever located, are subject to taxation, unless expressly exempt. G.L. c. 59, § 2. According to the Preamble in G.L. c. 59, § 18, as a general proposition, personal property is assessed to the owner on January 1st. Clause First of § 18 provides, in pertinent part, that "[a]ll tangible personal property . . . shall . . . be taxed to the owner in the town where it is situated on January 1st.

Pursuant to G.L. c. 59, § 39, the Commissioner, and not the local assessors, is mandated to determine the value, as of January 1st, of telephone companies' machinery, poles, wires and underground conduits, wires and pipes on a

municipality-by-municipality basis and then certify those values to the appropriate assessors and owners. The local assessors then assess property taxes to the owners based on the Commissioner's certified central valuations. In these consolidated appeals, MCImetro, LLC claims that its assessment is wrong because it is entitled to claim the corporate utility exemption.

The Preamble to G.L. c. 59, § 5 and clause 16(1)(d) provide, in pertinent part:

> The following property shall be exempt from taxation and the date of determination as to age, ownership or other qualifying factors required by any clause shall be July first of each year unless another meaning is clearly apparent from the context; provided, . . .
>
> Sixteenth, (1) In the case of (a) a Massachusetts savings bank, (b) a Massachusetts co-operative bank, (c) a Massachusetts corporation subject to taxation under chapter sixty-three other than a corporation mentioned in either paragraph (2) or paragraph (3) of this clause, or (d) a foreign corporation subject to taxation under section twenty, twenty-three, fifty-two A or fifty-eight of said chapter sixty-three, all property owned by such bank or corporation other than the following: -- real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water; provided, that . . .

Pursuant to clause 16(1)(d), this corporate utility exemption applies to foreign corporations subject to annual corporate utility franchise tax under G.L. c. 63, § 52A. Section 52A, which is entitled "Taxation of Certain Utility Corporations," provides, in pertinent part:

> Every utility corporation doing business within the commonwealth shall pay annually a tax upon its corporate franchise in accordance with the provisions of this section.
>
> (1) When used in this section, the following terms shall have the following meanings:
> (a) "Utility corporation" means (i) every incorporated electric company and gas company subject to chapter one hundred and sixty-four; (ii) every incorporated water company and

> aqueduct company subject to chapter one hundred and sixty-five; (iii) every incorporated telephone and telegraph company subject to chapter one hundred and sixty-six; . . .

In these consolidated appeals, the Board found that MCImetro, LLC was, at all relevant times, a limited liability company and not a corporation. Consequently, it plainly does not fit within the corporate utility exemption in clause 16(1)(d) or the definition for a utility corporation contained in c. 63, § 52A.

In ***RCN Beco-Com***, Mass. ATB Findings of Facts and Reports 2003-410, the Board ruled that cl. 16(1) was not ambiguous and "[b]y its terms, it simply applied to corporations and not LLCs." ***Id.*** at 465. The Board further stated that "the Commissioner's action . . . of granting the corporate exemption under § 5, cl. 16, ¶ 1, to telephone companies, irrespective of how the business entity was organized or held, was clearly erroneous and beyond the scope of the statute." ***Id.*** at 466. The Board went on to point out that the appellant voluntarily chose to do business in Massachusetts as an LLC and not a corporation and thereby rendered itself ineligible to claim the corporate utility exemption. ***Id.*** at 470-71. In affirming the Board's decision in ***RCN Beco-Com***, the Supreme Judicial Court agreed with the Board's reasoning and stated that "[t]he [B]oard determined, and we agree, that § 5, Sixteenth, is not ambiguous. By its plain language, it applies to corporations, not limited liability companies. In such a situation, the commissioner's practice clearly was erroneous and beyond the scope of the statute." ***RCN Beco-Com***, 443 Mass. at 207. It is noteworthy that neither the Board nor the Supreme Judicial Court limited its ruling or holding to LLCs filing their federal returns as partnerships. Taxing statutes should be construed according to their plain meaning. ***AMIWoodbroke, Inc.***, 418 Mass. at 94-95. Where, as here, the language of the statute is clear and unambiguous, this Board must apply it. ***Cargill, Inc.***, 429 Mass. at 82.

Quite simply, MCImetro, LLC is an LLC, not a corporation, and the corporate utility exemption in cl. 16(1)(d) is applicable to corporations and corporations only. Accordingly, cl. 16(1)(d) is not applicable to MCImetro, LLC, and MCImetro, LLC is not eligible to claim it.

Moreover, the Board rules that MCI has failed to meet its burden of establishing its right to the corporate

utility exemption. *See* ***New England Legal Foundation v. Boston***, 423 Mass. 602, 609 (1996) ("The burden of proving entitlement to the exemption lies with the taxpayer."). "An exemption is a matter of special favor or grace . . . to be recognized only where the property falls 'clearly and unmistakably' within the express words of a legislative command." ***Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue***, 384 Mass. 794, 796 (1981) (citations omitted). The venerable and fundamental rule regarding taxpayers who claim an exemption from taxation is that "[a]ny doubt must operate against the one claiming tax exemption, because the burden of proof is upon the one claiming an exemption from taxation to show clearly and unequivocally that he comes within the terms of the exemption." ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936). "Exemption from taxation is to be strictly construed and must be made to appear clearly before it can be allowed." ***Springfield Young Men's Christian Ass'n v. Assessors of Springfield***, 284 Mass. 1, 5 (1933). *See* ***Western Massachusetts Lifecare Corp. v. Assessors of Springfield***, 434 Mass. 96, 102 (2001). In these appeals, the Board finds and rules that MCI did not meet its burden of proving that it "clearly and unequivocally" came within the terms of the corporate utility exemption. ***Id.***

MCI argues, however, that cl. 16(1)(d) is not a "true exemption" and therefore, the stricter standard of proof is not appropriate to use in these appeals. MCI bases its argument on an analysis contained in ***Boston Gas Co. v. Assessors of Boston***, 334 Mass. 549 (1956), in which the Supreme Judicial Court determined that Boston Gas Co.'s property, which was exempt under cl. 16, was "not exempt in the absolute sense," because it was "subject to taxation indirectly by inclusion in the valuation of its capital stock thus increasing the franchise payable to the Commonwealth" under the then applicable statute. The Court was not commenting on the nature of the exemption under cl. 16, but on the fact that the property was taxable under another statute. Further the statute referenced by the Court, G.L. c. 63, § 55, is no longer applicable with respect to utility corporations, which are now taxed under G.L. c. 63, § 52A.

In adopting its argument, MCI fails to appreciate that the franchise tax treatment analyzed in ***Boston Gas Co.*** is no longer, and for decades has not been, in effect. St. 1976, c. 415, § 102. Instead, utility corporations are now subject to the franchise tax under G.L. c. 63, § 52A. Pursuant to § 52A, utility corporations pay a tax on their

corporate franchise based only on their net income. With this change, there is no longer an indirect tax on the personal property of utility corporations, and there is no such indirect tax in these appeals. Accordingly, the Board rules that the corporate utility exemption under G.L. c. 59, § 5, cl. 16 is a true exemption from taxation and MCImetro, LLC failed to show that it clearly and unequivocally came within the terms of the corporate utility exemption.

Using a similar argument, MCImetro, LLC also claims that its personal property was subject to at least the potential of double taxation and therefore qualified for the exemption. The cases cited by MCImetro, LLC are simply inapposite. Based on the record and the relevant statutes discussed, *supra*, the Board finds and rules that this argument is also without merit.

In addition, MCImetro, LLC asserts that its federal income tax treatment for fiscal years 2004 and 2005 as a disregarded entity under G.L. c. 63, § 30, and the inclusion of its income in MWNS, Inc.'s Massachusetts utility corporation franchise tax return and its election to be taxed as a corporation in its own right as of April 26, 2004, renders it a utility corporation for purposes of the corporate utility exemption. The Board disagrees.

The Board has found, *supra*, and there is no dispute, that MCImetro, LLC is a limited liability company. Its elections for federal income tax treatment or for Massachusetts utility corporation franchise tax purposes do not change its status as a limited liability company. Its inclusion in MWNS, Inc.'s corporate franchise tax return as a "division," does not alter its jural status as a limited liability company, either. Its elections for federal income tax or Massachusetts utility corporation franchise tax purposes do not affect what MCImetro, LLC was, and how it was organized, at all material times.

There are no such "check-the-box" elections for *ad valorem* property tax purposes, just as there are no provisions for the same "flow-through" tax treatment with respect to *ad valorem* personal property tax, as there are for federal corporate income tax purposes. As long as MCImetro, LLC is the owner of the property as of the relevant assessment date, which, indisputably, is January 1st, MCImetro, LLC will be taxed on its § 39 property for personal property tax purposes, and not some other entity to which MCImetro, LLC's income or other tax measures or assessments may flow.

MCImetro, LLC's attempt to graft the § 30 definition

of a "foreign corporation," which includes foreign limited liability companies, onto § 52A fails. Section 30, which is applicable to business corporations, begins by stating that its definitions apply only to § 30 and "sections thirty-one to fifty-two," inclusive. By its own terms, § 30 does not apply to § 52A, the utility corporation franchise section, which contains its own definition for a "utility corporation" that does not include limited liability companies. The corporate utility exemption, under G.L. c. 59, § 5, cl. 16(1)(d), applies to " a foreign corporation subject to taxation under section . . . fifty-two A . . . of said chapter 63." MCImetro, LLC is not considered a "foreign corporation" or a "utility corporation" under the definition in § 52A, and, therefore, cannot be considered one for the corporate utility exemption under cl. 16(1)(d). The Board's interpretations in this regard honor the basic statutory rules that statutes should be construed to give effect to all provisions and that no words are superfluous, ***Bankers Life and Cas. Co. v. Commissioner of Insurance***, 427 Mass. 136, 140 (1998); related statutory provisions should be interpreted as a harmonious whole, *see* ***FMR Corp. v. Commissioner of Revenue***, 441 Mass. 810, 819 (2004) ("Where two or more statutes relate to the same subject matter, they should be construed together so as to constitute a harmonious whole consistent with legislative purpose."); and the words of a statute should be interpreted according to their common and customary usage. G.L. c. 4, § 6, ¶ Third.

MCImetro, LLC further attempts to bolster its assertion that it is entitled to claim the corporate utility exemption on the basis of its reliance on the Commissioner's instructions on his Forms 5941 for fiscal years 2004 and 2005, which authorized it.[30] The Commissioner later changed his interpretation of the corporate utility exemption.[31] At any rate, the Board rules

---

[30] In his instructions included on his Forms 5941 for fiscal years 2004 and 2005, the Commissioner wrote that corporations, including LLCs filing federal returns as corporations, would be granted the corporate utility exemption under c. 59, § 5, cl. 16(1).

[31] In a "Notification of Change in Telephone and Telegraph Valuation for FY2004" the Commissioner states that "However, for local property tax purposes, the LLC [which files as a disregarded entity for federal income tax purposes through its single member corporation] is treated as a separate legal entity, and property the LLC owns is not entitled to the single member's corporate exemptions [of c. 59, § 5, cl. 16]." Similar language is repeated in the Commissioner's "Certified Telephone & Telegraph Valuations for FY2004."

that the Commissioner is not bound by his misinterpretations, and they are is not entitled to deference. ***BankBoston Corp. v. Commissioner of Revenue***, 68 Mass. App. Ct. 156, 163-64 (2007) (ruling that Commissioner not bound by language in tax form and instructions), *further app. rev. den.* 449 Mass. 1101 (2007); *see also* ***RCN Beco-Com***, 443 Mass. at 207 (stating that where the Commissioner's practice clearly was erroneous and beyond the scope of the statute, "it is not entitled to deference").

MCImetro, LLC advances two additional arguments in support of the application of the corporate utility exemption to its personal property for fiscal year 2005. First, it asserts that the corporate utility exemption should be applied to its personal property because it transferred its "CLEC property" to a sister utility corporation in April 2004, well before the purported July 1st eligibility date for applying the exemption.[32] Second, it argues that in April 2004, it elected to be taxed as a corporation for federal income tax purposes and that election, which also occurred before the purported July 1st eligibility date, qualifies it for the corporate utility exemption. The Board finds and rules that these arguments are without merit. Because the Board has already found and ruled that the MCImetro, LLC's elections for federal income tax purposes and for Massachusetts utility corporation franchise tax purposes are not controlling with respect to *ad valorem* property tax determinations, the Board need not further address MCI's second argument here, except to emphasize that MCImetro, LLC remained a limited liability company at all relevant times and its jural status was never that of a corporation.

With respect to its first argument, the Board finds and rules that when applying the cl. 16(1)(d) exemption in the context of central valuation of telephone companies under § 39, the qualifying date is January 1st.

Section 5 of Chapter 59 provides in pertinent part that "[t]he following property shall be exempt from taxation and *the date of determination* as to age, ownership or other qualifying factors required by any clause *shall be July first* of each year *unless another meaning is clearly apparent from the context*." (Emphasis added.) General personal property taxing provisions, applicable to

[32] For purposes of addressing the issue of the eligibility date for the corporate utility exemption in the context of central valuation under § 39, the Board assumes, but does not find, that the "CLEC property" includes the arguably exempt § 39 property.

telephone companies' personal property, refer to January 1st as the valuation date. *See* G.L. c. 59, § 18, Preamble and cl. 1st. Further, in the specific context of central valuation of telephone companies under G.L. c. 59, § 39, the telephone companies § 39 property is valued, and the "situation" of the company and the property is determined, as of January 1st, not July 1st.

Words used in taxing statutes are ordinarily accorded their common and usual meaning, often as determined by dictionary definitions. *See* ***Town of Boylston v. Comm'r of Revenue***, 434 Mass. at 405. According to its "common and approved usage," the word, "situation" encompasses the "combination of circumstances at a given moment." THE AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) 1297. Similarly, according to MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003), "situation" means a "combination of circumstances at a certain moment." ***Id.*** at 1166.

Because of the important policy reasons behind the enactment of § 39, the remedial nature of § 39, the valuation and certification deadlines contained in § 39, as well as the exception to the July 1st determination date in cl. 5 when "another meaning is clearly apparent from the context," and the determination date in § 39 for "the situation of the company and its property [being] January first," the Board finds and rules that, in order for these related statutory sections to work as a harmonious whole in the context of telephone company central valuation, the date of determination as to the ownership of the § 39 property is January 1st. Statutes should be construed as "a consistent and harmonious whole, capable of producing a rational result consonant with common sense and sound judgment." ***EMC Corp. v. Commissioner of Revenue***, 433 Mass. 568, 574 (2001) (internal citations omitted). "Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense." ***Harvard Crimson, Inc. v. President & Fellows of Harvard College***, 445 Mass. 745, 749 (2006). *See* ***Adamowicz v. Ipswich***, 395 Mass. 757, 760 (1985) (emphasizing that courts will not interpret a statute so as to render any portion of it meaningless; a construction that would defeat the legislative purpose will not be adopted "if the statutory language is fairly susceptible to a construction that would lead to a logical and sensible result." [quotations and citation omitted]). Section 39, which is a remedial statute, should be construed to effectuate its purpose.

See ***RCN Beco-Com***, 443 Mass. at 201 (citing ***Walter Kidde & Co. v. Commissioner of Revenue,*** 389 Mass. 577 (1983). The Board's rulings, which are based on the relationship among these related statutory provisions, are in accordance with the applicable rules for statutory construction.

The Board also notes several related considerations with respect to its ruling that January 1st, and not July 1st, is the controlling date for determination of the § 39 property's ownership for central valuation and corporate utility exemption purposes. The Commissioner must certify his values to the local assessors by May 15th. The assessors and owners have only until June 15th to appeal the certified values, which precedes a July 1st qualification date. Local boards of assessors must timely assess § 39 property at the values certified by the Commissioner. These considerations suggest that a January 1st, as opposed to July 1st, determination date best supports a rational central valuation process. "'While a court must normally follow the plain language of a statute, it need not adhere strictly to the statutory words if to do so would lead to an absurd result or contravene the clear intent of the Legislature.'" ***Anderson St. Assocs. v. City of Boston***, 442 Mass. 812, 816 (2004) (quoting ***Commonwealth v. Rahim***, 441 Mass. 273, 278 (2004); *see also* ***Cargill, Inc.***, 429 Mass. at 82. Here, the Board is following the plain language of the relevant statutory provisions to produce a harmonious and sensible result.

Lastly in this regard, given the Board's findings and rulings, *supra*, the Board finds and rules that MCI's remaining contentions are inconsistent, unpersuasive, lacking in authority, and, accordingly, unavailing.

Valuation and Taxation

The general rule in Massachusetts is that "all property, real and personal situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempt, shall be subject to taxation." G.L. c. 59, § 2. G.L. c. 59, § 18, provides for the place of assessment and the person to be assessed for various categories of personal property and owners. "The statutory provisions that appear only to define the place of assessment and the person to be assessed do, in fact, determine what property is taxable." ***Warner Amex Cable Communications, Inc. v. Board of Assessors of Everett***, 396 Mass. 239, 240 (1985).

The Preamble to § 18 provides, in pertinent part,

that: "[a]ll taxable personal estate within or without the commonwealth shall be assessed to the owner in the town where he is an inhabitant on January first, except as provided in chapter sixty-three and in the following [seven] clauses of this section." This provision, according to P. NICHOLS, TAXATION IN MASSACHUSETTS (3rd ed. 1938), authorizes the taxation of personal property where the owner of the property resides. ***Id.*** at 276. It, however, has been largely eviscerated by the seven succeeding clauses in § 18, including the First clause which, in addition to the Fifth clause, applies to MCI's property here, and provides in pertinent part, that: "[a]ll tangible personal property, including that of persons not inhabitants of the commonwealth, except ships and vessels, shall, unless exempted by section five [of chapter 59], be taxed to the owner in the town where it is situated on January first."

What is most striking about these provisions, in the context of assessment and taxation in these consolidated appeals, is the Legislature's use of the modifier "all" when identifying property to be assessed or taxed. The Legislature, in using this word, expresses no limitations or equivocation. The Board finds and rules that this word is a clear indication of the Legislature's intent, under § 18, to tax *all* personal property of telephone companies, unless otherwise exempt

. The Boards further finds and rules that this language is clear and unambiguous and should be given its plain meaning. Taxing statutes are to be construed according to their plain meaning. *See* ***AMIWoodbroke, Inc.***, 418 Mass. at 94. Accordingly, the Board finds and rules here that "all tangible personal property" includes telephone company property that is construction work in progress or is owned but not necessarily "in service." The Board's finding and ruling in this regard is also bolstered by other *ad valorem* taxing statutes, such as G.L. c. 59, § 11, which authorizes the assessors to assess taxes on real estate even if it is under construction or unoccupied. Having defined and identified the property to be assessed and taxed, the issue then becomes one of fair cash valuation.

The assessors are required to assess personal property at its fair cash value. G.L. c. 59, § 38. This mandate is true even if the property is centrally valued by the Commissioner under G.L. c. 59, § 39. The standard to be used in determining fair cash value is the "fair market value, which is the price an owner willing but not under compulsion to sell ought to receive from one willing but

not under compulsion to buy." ***Taunton Redevelopment Associates v. Assessors of Taunton***, 393 Mass. 293, 295 (1984) (*quoting* ***Boston Gas Co.***, 334 Mass. at 566). "A proper valuation depends on a consideration of the myriad factors that should influence a seller and buyer in reaching a fair price." ***Montaup Electric Co., v. Assessors of Whitman***, 390 Mass. 847, 849-50 (1984).

"The burden of proof is upon the appellant to make out its right as a matter of law to an abatement of the tax." ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding Co. v. Commonwealth***, 242 Mass. 47, 55 (1922)). An appellant, under G.L. c. 59, § 39, challenging the Commissioner's valuation of telephone company special-purpose property has the burden of proof even if the property poses unusual problems of valuation. *Cf.* ***Foxboro Associates v. Assessors of Foxborough***, 385 Mass. 679, 691 (1982); ***Reliable Electronic Finishing Co., Inc. v. Assessors of Canton***, 410 Mass. 381, 382 (1991). In appeals under § 39, the appellant first must show that the Commissioner's valuation of its § 39 property is incorrect or improper and results in certified values that are substantially too high or substantially too low, as the case may be, than the property's fair cash value before the Board may substitute its own valuation. G.L. c. 59, § 39. See ***Sandwich II*** at 586.

Generally, real estate and personal property valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization; sales comparison; and cost analysis. ***Correia v. New Bedford Redevelopment Auth.***, 375 Mass. 360, 362 (1978). However, the income-capitalization or discounted-cash-flow methods are often unreliable for valuing utility property. *See* ***Boston Edison Co. v. Assessors of Boston***, 402 Mass. 1, 17 (1988). None of the valuation experts who offered their opinions on the value of the § 39 property in these appeals used an income method. With respect to Mr. Hoemke's approach, which the Board ruled inadmissible, the Board found that it was not reliable, credible, or probative here because it valued the telephone entity as a whole based on projections and assumptions and then attempted to back-out the value of the § 39 property. *See* ***Community Cablevision of Framingham***, Mass. ATB Findings of Fact and Reports at 1987-185-87. In addition, the Board, like all of the valuation experts, found and that sales-comparison approach is virtually impossible to implement when, as here, there are

effectively no reliable or comparable sales.[33] See ***Montaup Electric Co.***, 390 Mass. at 850. "[D]epreciated reproduction [and replacement] cost [methodologies are the] more appropriate [cost analyses for] valuing special purpose property" like the telephone company's § 39 property here. *See* ***Boston Edison Co. v. Assessors of Watertown***, 387 Mass. 298, 304 (1982).

In these appeals, the Board found that the most appropriate method to use to value the § 39 property was a cost analysis. The parties' valuation experts concurred. The Board also found that the Commissioner's valuations were essentially correct except for his valuation of MCI's § 39 property for fiscal year 2004. The Board found and ruled that, in that fiscal year, the Commissioner's failure to adequately incorporate economic obsolescence into his valuation resulted in values substantially higher than the property's fair cash value. The Board further found that, despite some minor discrepancies, the Commissioner's trended reproduction cost new less depreciation methodology was an appropriate approach to use under the circumstances for valuing MCI's § 39 property for fiscal years 2005 and 2006, the resulting valuations were correct, and the discrepancies did not result in values that were substantially higher or substantially lower than the § 39 property's fair cash value.

In reaching its conclusions in these consolidated appeals, the Board is not required to believe the testimony of any particular witness or to adopt any particular method of valuation that a witness may suggest. Rather, the Board may accept those portions of the evidence that it determines have more convincing weight. ***Foxboro Associates***, 385 Mass. at 683. ***New Boston Garden Corp.***, 383 Mass. at 473. ***Assessors of Lynnfield v. New England Oyster House, Inc.***, 363 Mass. 696, 702 (1972). "The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the [B]oard." ***Cummington School of the Arts, Inc. v. Assessors of Cummington***, 373 Mass. 597, 605 (1977) (citations omitted). In evaluating the evidence, the Board may select among the various elements of value and form its own independent judgment of fair cash value, *see* ***General Electric Co. v. Assessors of Lynn***, 393 Mass. 591, 605 (1984); ***North American Philips Lighting Corp. v. Assessors of Lynn***, 392 Mass. 296, 300 (1984), in conformance with the standard of review for § 39 appeals enunciated, *supra*.

[33] Despite his criticism of this approach as a technique for valuing the § 39 property, Mr. Weinert did use it as a purported check or back-up.

See ***Sandwich II*** at 586. The Board need not specify the exact manner in which it arrived at its valuation. ***Jordan Marsh Co. v. Assessors of Malden***, 359 Mass. 106, 110 (1971). "'The market value of . . . property [cannot] be proved with mathematical certainty and must ultimately rest in the realm of opinion, estimate and judgment.'" ***New Boston Garden Corp.***, 383 Mass. at 473 (quoting ***Boston Consol. Gas Co.***, 309 Mass. at 72).

Conclusion

On this basis, the Board decided MCI's fiscal year 2004 appeals for the appellant, and the remaining appeals for the appellee, Commissioner of Revenue. The Board's decisions in these consolidated appeals are promulgated simultaneously with this Findings of Fact and Report.

APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board

THE COMMONWEALTH OF MASSACHUSETTS
Appellate Tax Board
100 Cambridge Street
Boston, Massachusetts 02114
(617) 727-3100

IN RE	)	
VERIZON NEW ENGLAND, INC.	)	
CONSOLIDATED CENTRAL VALUATION APPEALS	)	**DOCKET NO. C273560**
FY 2003, FY2004, FY2005, FY 2006, FY2007, FY2008	)	

ORDER

These 612 appeals were filed with the Appellate Tax Board ("Board") under G.L. c. 59, § 39 for Fiscal Years 2003 through 2008 by Verizon New England, Inc. ("Verizon") against the Commissioner of Revenue ("Commissioner") and various cities and towns and by certain cities and towns against Verizon and the Commissioner. A complete list of docket numbers and parties is included in Appendix A for Fiscal Years 2003 through 2007 and Appendix B for Fiscal Year 2008.

Commissioner Scharaffa heard the appeals, which were bifurcated for hearing, and he was joined in this Order by Chairman Hammond and Commissioners Egan, Rose, and Mulhern.

This Order addresses the first set of bifurcated issues, which includes the issues delineated in the Board's Order of September 7, 2007, including, but not limited to, whether poles and the wires thereon erected upon public ways are subject to central valuation and taxation under G.L. c. 59, §§ 2, 18 and 39.

On the basis of the Statement of Agreed Facts and attached exhibits introduced by the parties, and for the reasons described below, the Board finds and rules that:

1. Verizon is taxable on all of its poles and the wires thereon erected upon public ways under G.L. c. 59, § 2 and G.L. c. 59, § 18, First;

2. Only those cities and towns that filed petitions under § 39 may seek to establish that the value of Verizon's properties in their city or town was substantially higher than the value certified by the Commissioner; and

3. The Board's rulings and decisions in these appeals apply to all years at issue in these appeals, fiscal years 2003 through 2008, and cannot, as Verizon argues, be applied prospectively only.

I. POLES AND THE WIRES THEREON ON PUBLIC WAYS

The Board finds and rules that Verizon is taxable on all of its poles and the wires thereon erected upon public ways under G.L. c. 59, § 2 and G.L. c. 59, § 18, First, as well as its poles and the wires thereon erected upon private property.

Verizon and the Commissioner concede that Verizon's underground conduits, wires and pipes laid in public ways and its poles, underground conduits and pipes, together with the wires thereon or therein, laid in or erected upon private property are taxable under G.L. c. 59, § 18, Fifth, but argue that § 18, Fifth is the sole authority for taxation of poles and wires. However, in ***RCN Becocom, LLC v. Commissioner of Revenue, et al,*** Mass. ATB Findings of Fact and Reports, 2003-410, *aff'd* 443 Mass. 198 (2005), both this Board and the Supreme Judicial Court ("Supreme Judicial Court" or "Court") specifically rejected the taxpayer's argument that the clauses of § 18 are mutually exclusive in holding that all of the taxpayer's personal property, which included "all wires laid in or erected upon public ways," was taxable under § 18, First. ***RCN,*** Mass. ATB Findings of Fact and Report 2003 at 471.

In upholding the Board on all the legal issues it decided, the Supreme Judicial Court noted that "RCN concedes that its nonmachinery tangible personal property (in Newton, its wires[34] and underground conduits) is taxable under G.L. c. 59, § 18, First." ***RCN,*** 443 Mass. at 208. RCN had argued, however, that G.L. c. 59, § 18, Second

[34] Because RCN owned no poles in Newton, neither the Board nor the Court specifically addressed the taxability of poles erected on public ways; however, the analyses of the Board and the Court in ***RCN*** concerning the taxability of wires under § 18, First is equally applicable to poles erected on public ways.

governed the taxation of machinery; because, as a non-corporate entity, RCN's non-manufacturing machinery was not taxable under § 18, Second, and clauses Third through Seventh were also not applicable to it, RCN maintained that its non-manufacturing machinery was not subject to tax. After observing that its previous decisions had not addressed the issue of whether the various clauses of § 18 were mutually exclusive, the Court ruled that:

> The plain text of the statute does not preclude the application of clause First to machinery that does not fall under the purview of clause Second. Thus, the board was correct in finding that all of RCN's personal property was subject to taxation.

RCN, 443 Mass. at 209.

The Court's analysis in reaching this conclusion is equally applicable to the present appeals. Section 18, First was enacted in 1918 as the "final step in the change of the principle of situs in taxing tangible personal property from the old rule of *mobilia sequuntur personam* by which the situs of all personal property was deemed to be at the domicile of the owner to the present practice of basing situs almost wholly on the physical location of the property." P. NICHOLS, TAXATION IN MASSACHUSETTS (3D ED. 1938) at 278. In contrast, § 18, Fifth, like § 18 Second at issue in ***RCN,*** had already been enacted at the time § 18, Clause First was enacted. The applicable version of Clause Fifth is the result of three enactments: it was originally enacted in 1902 to tax the underground conduits, wires and pipes of corporations other than railway companies laid in public streets (St. 1902, c. 342, § 1); it was later amended, in response to ***Coffin v. Artesian Water Co.,*** 193 Mass. 274 (1906) (ruling that water pipes and mains located on private property were not taxable to the owner of the pipes and mains) to provide that poles, underground conduits, and pipes, together with the wires "thereon or therein, laid in or erected upon private property " were taxable to the owners of such property (St. 1909, c. 439, § 1); finally, it was amended to exclude poles and wires of street railway companies upon private rights of way not owned by the company (St. 1913, c. 458, § 1).

Because § 18, First was enacted after § 18, Fifth, it cannot be maintained in these appeals that § 18, Fifth is the exclusive provision under which Verizon may be taxable on its poles and wires; rather, as the Court ruled in ***RCN,*** § 18, First was enacted to tax "'all tangible personal

property' not otherwise exempt in the city or town where it is situated" . . . which "presumably included personal property not previously subject to tax." ***RCN,*** 443 Mass. at 208.

The attempt by Verizon and the Commissioner to distinguish the clear holding of ***RCN*** that all of RCN's personal property was subject to taxation, including its wires laid in or erected upon public ways, on the ground that it is a corporation is unavailing. There is nothing in G.L. c. 59, § 2 (providing in relevant part for the taxation of all personal property that is not "expressly exempt") or § 18, First that conditions taxability on the corporate or other jural status of the owner. *Compare* G.L. c. 59, § 5, cl. 16(1)(d) (providing that only corporate utilities, including telephone company corporations such as Verizon, qualify for property tax exemption for all property other than "real estate, poles, underground conduits, wires and pipes and machinery used in manufacture or in supplying or distributing water"). Although § 18, Fifth, like the relevant provision of § 18 Second cited by the taxpayer in ***RCN,*** contains a corporate requirement, Verizon, like RCN, is taxable on their poles and wires erected upon public ways under § 18, First, which has no such requirement.

As it did in ***RCN,*** the Board also rejects the argument by Verizon and the Commissioner that ***Assessors of Springfield v. Commissioner of Corporations and Taxation,*** 321 Mass. 186 (1947) controls the decision of these appeals. In ***Assessors of Springfield,*** the assessors argued that certain equipment and poles and wires erected upon public ways owned by New England Telephone and Telegraph Company constituted "machinery" taxable under G.L. c. 59, § 39 and § 18, Second. The Court rejected the argument that this property was machinery, and further observed that the assessors "rightly do not contend here, as they did before the board, that the poles of the taxpayer together with the wires thereon erected upon public ways were subject to local taxation" under § 18, Fifth. ***Id.*** at 194. After quoting the relevant language from § 18, Fifth, the Court noted that the "statute makes no provision for the taxation of poles with the wires thereon erected upon public ways but taxes only those located on private property." ***Id.***

Subsequent decisions of the Court make clear that the "statute" which the Court found did not provide for the taxation of poles and wires erected upon public ways was § 18, Fifth, and not § 18 in its entirety, and that such

property is taxable under § 18, First. In two decisions dealing with the issue of whether a cable television operator was taxable on its poles and wires erected upon public ways, the Court observed that the issue of whether such property was taxable under § 18, First had not been argued. *See* ***Warner Amex Cable Communications Inc. v. Assessors of Everett,*** 396 Mass. 239, 241, n. 2 (1985) ("Neither the board nor the assessors in their brief have relied on the introductory language of § 18 or on § 18, First, to justify the city's right to assess Warner's aerial distribution system located over public ways."); ***Nashoba Communications Limited Partnership v. Assessors of Danvers,*** 429 Mass. 126, 127, n. 1 (1999) ("We note that, as in ***Warner Amex*** . . . neither the board nor the assessors have relied on the introductory language of § 18 or on § 18, First, to justify the assessors' right to assess the property at issue in this case."). Similarly, the issue of the taxability of such property under the introductory language of § 18 or § 18, First was not raised or decided in ***Assessors of Springfield.***

Further, the Court in ***RCN*** specifically relied on § 18, First in ruling that the "the board was correct in finding that all of RCN's personal property was subject to taxation." ***RCN,*** 443 Mass. at 209. Accordingly, while ***Assessors of Springfield*** stands for the proposition that poles and wires erected upon public ways are not taxable under § 18, Fifth, ***Warner Amex, Nashoba,*** and ***RCN*** clearly indicate that § 18, First is an independent source of authority for the taxation of such poles and wires.

The Board's ruling that Verizon is subject to property tax on its poles and wires erected upon public ways is consistent with the statutory provisions dealing with the taxation of telephone company property. First, G.L. c. 59, § 39 provides that the following property is to be centrally valued by the Commissioner and taxed by local boards of assessors: "machinery, poles, wires and underground conduits, wires and pipes." By specifically providing for the valuation and assessment of poles and wires under § 39, the clear legislative intent is to subject such property to taxation. Further, the legislative purpose of § 39 was to "ensure consistency and competence in the valuation of a Statewide system" and to remedy problems faced by the various local board's of assessors "in attempting to value a portion of a system that crossed municipal boundaries and the resulting disparate valuations for affected companies." ***RCN,*** 443 Mass. at 198. Section 39 is rendered essentially

meaningless, and the purpose behind its enactment left largely unfulfilled, if only poles and wires erected upon private property were subject to tax.

Second, the corporate utility exemption under G.L. c. 59, § 5, clause 16(1)(d), which applies to corporations such as Verizon but not to non-corporate entities such as RCN, specifically carves out from the corporate utility exemption "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water." Again, it makes little sense to specifically provide that poles and wires are not exempt, and are therefore taxable, if only poles and wires erected upon private property were subject to tax.

Finally, G.L. c. 59, § 2 provides that all personal property within the commonwealth is subject to tax, unless it is expressly exempt. There is nothing in § 5, clause 16(1)(d) or elsewhere that exempts poles and wires erected upon public ways from tax. Section 18, First provides the place where and the person to whom poles and the wires thereon erected upon public ways are to be assessed. ***RCN*** 443 Mass. at 209. Accordingly, the Board finds and rules that Verizon is taxable on all of its poles and the wires thereon erected upon public ways under G.L. c. 59, § 2 and G.L. c. 59, § 18, First.

II. VALUATION HIGHER THAN THAT CERTIFIED BY COMMISSIONER

The Board finds and rules that, in order for it to establish a valuation higher than that certified by the Commissioner, a city or town must have filed an appeal with the Board for the relevant fiscal year. G.L. c. 59, § 39 authorizes the Board to establish a substantially higher or substantially lower valuation than that certified by the Commissioner provided that: "in every such appeal, the ***appellant*** shall have the burden of proving that the value of the machinery, poles, wires, and underground conduits, wires, and pipes is substantially higher or substantially lower, as the case may be, than the valuation certified by the Commissioner." (emphasis added).

Therefore, it is the appellant that bears the burden of proving that the value of § 39 property is substantially higher than the value certified by the Commissioner; where a city or town is only an appellee -- that is, where it has filed no appeal itself -- § 39 provides no mechanism for the Board to find a value substantially higher than that certified by the Commissioner. Accordingly, the Board

rules that only those cities and towns that filed petitions under § 39 may seek to establish that the value of Verizon's properties in their city or town was substantially higher than the value certified by the Commissioner.

The Board notes that Verizon filed 585 § 39 appeals against various cities and towns and the Commissioner for the Fiscal Years 2005 through 2008. However, only 27 § 39 appeals were filed by cities or towns as appellants against Verizon and the Commissioner for the Fiscal Years 2003 through 2008.

III. FISCAL YEARS AFFECTED BY BOARD'S RULING

The Board's rulings and decisions in these appeals apply to all years at issue in these appeals, fiscal years 2003 through 2008, and cannot, as Verizon argues, be applied prospectively only.

There is simply no support for Verizon's suggestion that the Board's ruling should be applied only prospectively. The Board is required to render a decision in cases before it. *See* G.L. c. 59, § 39 (requiring Board to "hear and decide" appeals from Commissioner's valuation of telephone company property, including poles and wires) and G.L. c. 58A, § 13 (requiring Board to make decision in each appeal heard by it). There is nothing that gives the Board the authority to render advisory opinions or declaratory judgments. Rather, the Board must render decisions regarding the valuations raised in the subject appeals.

In addition, Verizon's argument that prospective application of a Board ruling that poles and wires erected upon public ways is required because such a ruling would amount to an unanticipated "change in policy" and an "overruling" of ***Assessors of Springfield*** is without merit. First, the Commissioner's determination that poles and wires erected upon public ways need not be included in Verizon's return under G.L. c. 59, § 41 is inconsistent with the underlying statutes and is therefore entitled to no deference. ***Massachusetts Hospital Association, Inc. v. Department of Medical Security,*** 412 Mass. 340, 346 (1992). Further, the Court in ***RCN*** rejected the taxpayer's claim, like Verizon's claim here, that it had the right to rely on the Commissioner's prior practices:

> Most significantly, neither [***Commissioner of Revenue v.***] ***BayBank Middlesex,*** [421 Mass. 736 (1996)] nor any other cases cited by RCN as

> precedent to bind the commissioner involved a third party with its own statutory right of appeal which would be harmed by the application of the commissioner's past practice. In this matter, G.L. c. 59, § 39 specifically affords the assessors an independent right to challenge the commissioner's valuation of a telephone company's statutory property.

RCN, 443 Mass. at 207.

In addition, as described above, the Board ruling in these appeals does not "overturn" ***Assessors of Springfield.*** The Board's ruling that poles and wires erected upon public ways are taxable is not based on either § 18, Second or § 18, Fifth, the two statutes addressed by the Court in ***Assessors of Springfield.*** Rather, the ruling is based on § 18, First, a statutory basis left open by the Court in ***Warner Amex*** and ***Nashoba,*** and finally adopted by it in ***RCN.*** Accordingly, the Board's ruling is applicable for all fiscal years at issue in these appeals.

IV. FURTHER PROCEEDINGS

A pre-trial conference to establish a hearing date and discovery cutoff date concerning the remaining issues in these appeals, including valuation, is scheduled for Thursday, March 27, 2008 at 10:00 am.

APPELLATE TAX BOARD

_____ Chairman

_____ Commissioner

_____ Commissioner

_____ Commissioner

_____ Commissioner

Attest: _____
Clerk of the Board

Date:
(Seal)

APPENDIX A

CASES AND DOCKET NUMBERS PERTAINING TO VERIZON NEW ENGLAND, INC. FOR FY03 TO FY07

****

Verizon New England, Inc. v.
Commissioner of Revenue and Various Cities and Towns*
C273560 - C273626 (FY2005)
C279452 - C279565 (FY2006)
C285247 - C285362 (FY2007)

****

Board of Assessors of the City of Billerica v. Commissioner of Revenue and
Verizon New England, Inc.
C285482 (FY2007)

****

Board of Assessors of the City of Boston v. Commissioner of Revenue and
Verizon New England, Inc.
C273728 (FY2005)
C279581 (FY2006)
C285613 (FY2007)

****

Board of Assessors of the Town of Canton v. Commissioner of Revenue and
Verizon New England, Inc.
C285639 (FY2007)

****

Board of Assessors of the Town of Framingham v. Commissioner of Revenue and
Verizon New England, Inc.
C266140 (FY2003)

****

Board of Assessors of the Town of Harwich v. Commissioner of Revenue and
Verizon New England, Inc.
C285628 (FY2007)

****

Board of Assessors of the Town of Hatfield v. Commissioner of Revenue and
Verizon New England, Inc.
C285796 (FY2007)

****

Board of Assessors of the Town of Mashpee v. Commissioner

* See attached list of Cities and Towns at page 17.

of Revenue and
Verizon New England, Inc.
C285486 (FY2007)
****

****
City of Newton v. Commissioner of Revenue and
Verizon New England Inc.
C265966 (FY2003)
C269574 (FY2004)
C273836 (FY2005)
C279719 (FY2006)
C285500 (FY2007)
****
Board of Assessors of the City of Quincy v. Commissioner of Revenue and
Verizon New England, Inc.
C285563 (FY2007)
****
City of Springfield v. Commissioner of Revenue and
Verizon New England, Inc.
C273887 (FY2005)
C280591 (FY2006)
C285242 (FY2007)
****
Town of Watertown v. Commissioner of Revenue and
Verizon New England Inc.
C273859 (FY2005)
****
Board of Assessors of the City of Worcester v. Commissioner of Revenue and
Verizon New England, Inc.
C273019 (FY2005)
C285502 (FY2007)

CITIES AND TOWNS

1. Acton
2. Agawam
3. Amherst
4. Andover
5. Arlington
6. Ashby
7. Ashfield
8. Ashland
9. Attleboro
10. Barnstable
11. Bedford
12. Belmont
13. Beverly
14. Billerica
15. Boston
16. Bourne
17. Braintree
18. Brewster
19. Bridgewater
20. Brockton
21. Brookline
22. Burlington
23. Cambridge
24. Canton
25. Chelmsford
26. Chelsea
27. Chester
28. Chicopee
29. Colrain
30. Concord
31. Conway
32. Cummington
33. Danvers
34. Dartmouth
35. Dedham
36. Dennis
37. Dracut
38. East Longmeadow
39. Easton
40. Edgartown
41. Everett
42. Fairhaven
43. Fall River
44. Falmouth
45. Fitchburg
46. Foxborough
47. Framingham
48. Franklin
49. Gloucester
50. Grafton
51. Granville
52. Greenfield
53. Hardwick
54. Haverhill
55. Hingham
56. Hinsdale
57. Holden
58. Holland
59. Holyoke
60. Hopkinton
61. Hubbardston
62. Huntington
63. Kingston
64. Lawrence
65. Leominster
66. Lexington
67. Lowell
68. Lynn
69. Malden
70. Mansfield
71. Marblehead
72. Marlborough
73. Marshfield
74. Mashpee
75. Medford
76. Melrose
77. Methuen
78. Middleborough
79. Milford
80. Milton
81. Nantucket
82. Natick
83. Needham
84. New Bedford
85. Newburyport
86. Newton
87. North Andover
88. North Attleboro
89. North Reading
90. Northampton
91. Norton
92. Norwood
93. Otis
94. Peabody
95. Petersham
96. Pittsfield
97. Plymouth
98. Quincy
99. Randolph
100. Raynham
101. Reading
102. Revere
103. Rockland
104. Salem
105. Sandisfield
106. Sandwich
107. Saugus
108. Shrewsbury
109. Somerset
110. Somerville
111. Southborough
112. Springfield
113. Stoughton
114. Sudbury
115. Taunton
116. Tewksbury
117. Wakefield
118. Walpole
119. Waltham
120. Wareham
121. Watertown
122. Wellesley
123. West Springfield
124. Westborough
125. Westfield
126. Westford
127. Westport
128. Westwood
129. Weymouth
130. Wilbraham
131. Wilmington
132. Winchester
133. Woburn
134. Worcester
135. Yarmouth
136 Hatfield

CASES AND DOCKET NUMBERS PERTAINING TO VERIZON NEW ENGLAND, INC. FOR FY2008

****
Verizon New England, Inc. v.
Commissioner of Revenue and Various Cities and Towns*
C289452 - C289739 (FY2008)
****
Board of Assessors of the Town of Belmont v. Commissioner of Revenue and
Verizon New England, Inc.
C290472 (FY2008)
****
Board of Assessors of the City of Boston v. Commissioner of Revenue and
Verizon New England, Inc.
C290511 (FY2008)
****
Board of Assessors of the Town of Brookline v. Commissioner of Revenue and
Verizon New England, Inc.
C290197 (FY2008)
****
Board of Assessors of the Town of Natick v. Commissioner of Revenue and
Verizon New England, Inc.
C290539 (FY2008)
****
Board of Assessors of the City of Newton v. Commissioner of Revenue and
Verizon New England Inc.
C290518 (FY2008)
****
Board of Assessors of the City of Springfield v. Commissioner of Revenue and
Verizon New England, Inc.
C290494 (FY2008)
****

* See attached list of new communities added to prior list of Cities and Towns.

1. Abington
2. Acushnet
3. Adams
4. Amesbury
5. Aquinnah
6. Ashburnham
7. Athol
8. Auburn
9. Avon
10. Ayer
11. Barre
12. Becket
13. Belchertown
14. Bellingham
15. Berkley
16. Berlin
17. Bernardston
18. Blackstone
19. Bolton
20. Boxborough
21. Boxford
22. Boylston
23. Brimfield
24. Carlisle
25. Carver
26. Charlemont
27. Charlton
28. Chatham
29. Chilmark
30. Clinton
31. Cohasset
32. Dalton
33. Deerfield
34. Dighton
35. Douglas
36. Dover
37. Dudley
38. Dunstable
39. Duxbury
40. East Bridgewater
41. Eastham
42. Easthampton
43. Erving
44. Essex
45. Freetown
46. Gardner
47. Georgetown
48. Great Barrington
49. Groton
50. Groveland
51. Hadley
52. Halifax
53. Hamilton
54. Hampden
55. Hanover

56. Hanson
57. Harvard
58. Harwich
59. Hatfield
60. Holbrook
61. Holliston
62. Hopedale
63. Hudson
64. Hull
65. Ipswich
66. Lakeville
67. Lancaster
68. Lee
69. Leicester
70. Lenox
71. Lincoln
72. Littleton
73. Longmeadow
74. Ludlow
75. Lunenburg
76. Lynnfield
77. Manchester
78. Marion
79. Mattapoisett
80. Maynard
81. Medfield
82. Medway
83. Mendon
84. Merrimac
85. Middleton
86. Millbury
87. Millis
88. Millville
89. Monson
90. Montague
91. Nahant
92. New Marlborough
93. Newbury
94. Norfolk
95. North Adams
96. North Brookfield
97. Northborough
98. Northbridge
99. Northfield
100. Norwell
101. Oak Bluffs
102. Oakham
103. Orange
104. Orleans
105. Oxford
106. Palmer
107. Paxton
108. Pembroke
109. Pepperrell
110. Plainville

111. Plympton
112. Provincetown
113. Rehoboth
114. Rochester
115. Rockport
116. Rowley
117. Rutland
118. Salisbury
119. Scituate
120. Seekonk
121. Sharon
122. Sheffield
123. Shelburne
124. Sherborn
125. Shirley
126. South Hadley
127. Southampton
128. Southbridge
129. Southwick
130. Spencer
131. Sterling
132. Stockbridge
133. Stoneham
134. Stow
135. Sturbridge
136. Sutton
137. Swampscott
138. Swansea
139. Templeton
140. Tisbury
141. Topsfield
142. Townsend
143. Truro
144. Tyngsborough
145. Upton
146. Uxbridge
147. Ware
148. Warren
149. Wayland
150. Webster
151. Wellfleet
152. Wenham
153. West Boylston
154. W. Bridgewater
155. W. Newbury
156. W. Stockbridge
157. West Tisbury
158. Westminster
159. Weston
160. Whitman
161. Williamsburg
162. Williamstown
163. Winchendon
164. Winthrop
165. Wrentham