Massachusetts Department of Revenue
Division of Local Services

# Current Developments in Municipal Law


## 2010

## Utility Cases

## Book 2B

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

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# Utility Cases

## Table of Contents

## Book 2B

## Massachusetts Telecommunication and Electric Utility Cases

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

| | |
|---|---|
| **BOSTON GAS COMPANY d/b/a KEYSPAN ENERGY DELIVERY NEW ENGLAND** | **v. THE BOARD OF ASSESSORS OF THE CITY OF BOSTON** |
| Docket Nos. F275055, F275056[1] | Promulgated: December 16, 2009 |

ATB 2009-1195

These are appeals under the formal procedure, pursuant to G.L. c. 58A, § 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the appellee to abate taxes on certain real estate and personal property in the City of Boston owned by and assessed to the appellant under G.L. c. 59, §§ 11, 18 and 38 for fiscal year 2004.

Chairman Hammond heard these appeals. Commissioners Scharaffa, Egan, Rose and Mulhern joined him in the decisions for the appellee. These Findings of Fact and Report are promulgated on the Board's own motion simultaneously with the issuance of the decisions relating to the appeals.

*John M. Lynch*, Esq. and *Stephen W. DeCourcey*, Esq. for the appellant.

*David L. Klebanoff*, Esq. for the appellee.

## FINDINGS OF FACT AND REPORT

### I. Introduction

#### A. Appellant

The appellant, Boston Gas Company, d/b/a KeySpan Energy Delivery New England ("Boston Gas" or "appellant"), having been in operation for more than 175 years, is the second oldest gas company in the United States.[2] As of December 31, 2002, Boston Gas provided service to approximately 575,000 customers in eighty-one cities and towns throughout the Commonwealth via a 6200-mile network of pipe, storage facilities, and associated equipment necessary to operate and maintain its natural gas storage and

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[1] The appellant also has appeals pending for subsequent periods including: fiscal year 2005 (docket nos. F279207 and F279208); fiscal year 2006 (docket nos. F284088 and F286194); fiscal year 2007 (docket nos. F288525 and F288527); fiscal year 2008 (docket nos. F297265 and F297266); and fiscal year 2009 (docket nos. F303244 and F303245). The parties, with the consent of the Appellate Tax Board ("Board"), agreed to try the fiscal year 2004 appeals as a "test year" to obviate the immediate need for further discovery while allowing relevant issues to be adjudicated and provide substantial guidance for disposition of the remaining appeals.

[2] The present tense, as used in relation to the property involved in these appeals, reflects facts in existence as of January 1, 2003, the assessment date relevant to the appeals.

distribution system. Among the communities served, Boston has by far the largest customer base.

Between 1929 and 2000, Boston Gas was wholly owned by Eastern Enterprises ("Eastern"), a Massachusetts business trust, which was also a public utility holding company. As of January 1, 2000, Eastern owned two other regulated utility companies in Massachusetts, Essex Gas Company and Colonial Gas Company.[3] On November 8, 2000, KeySpan Corporation ("KeySpan") acquired Eastern.

**B. Property at Issue**

The property that is the subject of these appeals includes virtually all of the personal and real property owned by the appellant located within the city of Boston as of January 1, 2003, and which comprises its natural gas storage and distribution system.[4]

As the record in these appeals reflects, Massachusetts does not have a local source of natural gas. Consequently, its natural gas needs are met primarily by transportation of gas in a gaseous state through pipelines from the Gulf Coast and sources in Canada. Gas is also transported into the Commonwealth in liquefied form via large tanker ships, which supply the liquefied natural gas ("LNG") facility in Everett, Massachusetts, or by tanker truck. Once in Massachusetts, the gas can be stored at local storage facilities such as the Everett LNG facility and the LNG facility located in the Dorchester section of Boston, which comprises a portion of the property at issue in these appeals, and is discussed, *infra*. The gas is then used as demand requires. When needed for use, the liquefied gas is vaporized and sent through the pipeline system for distribution to customers.

**1. Personal Property**

The personal property involved in these appeals consists primarily of: an extensive web of pipe, also known as "mains," which are used to transport vaporized gas throughout Boston Gas' distribution system; "services," which are lines that connect mains to customers' property; and meters, which are used to monitor gas distribution and consumption. Boston Gas also owns various other equipment and items, which support the operation of its gas distribution system.

The mains owned by the appellant in Boston comprise approximately 80% of the value of the personal property at issue, and as of December 31, 2002, consisted of nearly five million linear feet, or almost 939 miles, of pipe of various materials and diameters as reflected in the following table.

| Diameter in Inches | Cast Iron Footage | Plastic Footage | Regulator Footage | Steel Footage | Total Footage |
|---|---|---|---|---|---|
| 1 | 281 | 631 | | 643 | 1,555 |
| 1¼ | 532 | 1,816 | | 1,086 | 3,434 |
| 1½ | 3,135 | 188 | | 6,373 | 9,696 |
| 2 | 21,755 | 13,607 | | 21,035 | 56,397 |
| 2½ | 1,273 | 3 | | 493 | 1,769 |
| 3 | 134,978 | 32,027 | 6 | 44,835 | 211,846 |
| 3½ | | 7 | | | 7 |
| 4 | 896,441 | 191,941 | 2 | 183,835 | 1,272,219 |

[3] Eastern also owned four non-utility subsidiaries including Midland Enterprises, Inc., TransGas, Inc., AMR Data Corporation, and ServiceEdge Partners, Inc.

[4] One parcel of real estate, known as "Rivermore," is not part of the appeals.

| | | | | | |
|---|---|---|---|---|---|
| 5 | | 135 | 5 | 1,600 | 1,740 |
| 6 | 1,204,379 | 378,940 | 41 | 282,904 | 1,866,264 |
| 8 | 234,531 | 134,244 | 28 | 133,612 | 502,415 |
| 10 | 58,063 | 139 | 9 | 1,554 | 59,765 |
| 12 | 345,879 | 2,635 | 2 | 209,844 | 558,360 |
| 14 | 9 | | | 387 | 396 |
| 16 | 18,204 | | | 57,016 | 75,220 |
| 18 | 14,241 | | | 570 | 14,811 |
| 20 | 56,854 | | | 57,548 | 114,402 |
| 24 | 63,791 | | | 24,882 | 88,673 |
| 30 | 54,370 | | | 16,250 | 70,620 |
| 36 | 35,085 | | | 4,481 | 39,566 |
| 42 | 5,111 | | | 883 | 5,994 |
| 54 | 963 | | | | 963 |
| **TOTAL** | **3,149,875** | **756,313** | **93** | **1,049,831** | **4,956,112** |

As summarized in the table, roughly 64% of the appellant's mains are constructed of cast iron, and the balance is steel and plastic. In the mid-nineteenth century, cast iron replaced wood as the desired material for buried pipe installations used to transport water and gas because it offered superior strength and pressure capacity. Cast iron was the predominant pipe material from approximately 1850 to 1940, but new installation of cast iron pipe was all but phased out by 1950. Rising utility service demands, which required additional capacity and pressure resistance, led to a transition from cast iron to steel pipe. Gas companies started to use bare unprotected steel in the 1930s, and by the 1950s, began to employ coatings and cathodic rust protection to protect the steel used in their distribution systems. Steel pipes enhanced with these rust inhibitors are still used in certain medium and high pressure applications, as well as for pipes twelve inches or more in diameter.

Plastic pipe was incorporated into gas systems by 1970, offering several advantages over steel pipe including absence of corrosion, lower cost, simpler installation, and potentially longer life. Thus, plastic has been utilized extensively in newer installations, particularly at relatively small diameters up to, but most often less than, twelve inches. At larger diameters, steel remains the material of choice because plastic does not possess the requisite resistance to crushing.

All three types of pipe are quite durable. Cast iron naturally builds a protective film known as "rust scale" around the pipe, and typically lasts 100 to 150 years in the ground. Steel that has been protected from corrosion, as typically used by Boston Gas in Boston, can remain useful for at least 100 years. Plastic has been in use for approximately forty years, and estimates indicate that its useful life will likely extend more than twice this period.

As of December 31, 2002, Boston Gas owned slightly in excess of 110,000 services in Boston, which provided access to gas service for approximately 151,000 commercial and residential customers, accounting for approximately 26% of the appellant's company-wide customer base. Boston Gas maintains its meters in a fluctuating inventory, which is shared system-wide, and not specifically broken down on a town-by-town basis. Consistent with its percentage of customers in Boston, Boston Gas allocated 26% of its meters to estimate those present in Boston as of the relevant assessment date.

**2. Real Property**

The real property at issue is located at 238 Victory Road in the Dorchester section of Boston,[5] approximately three miles from downtown Boston ("Commercial Point"). The approximately 34.5-acre parcel[6] is bordered as follows: to the west by Interstate 93 ("I-93"); to the north by Dorchester Bay; to the South by Victory Road and a recreational boating club known as the Old Colony Yacht Club; and to the east by the Neponset River. The parcel is irregularly shaped and on its seaward side is surrounded, in large part, by a granite seawall. Commercial Point is accessible via Victory Road, an asphalt-paved public street approximately fifty feet wide that extends to the east from main thoroughfares including Morrissey Boulevard and the northbound off-ramp from I-93. Commercial Point has several paved parking areas, but the majority of the site is not paved. The property is generally level and rises slightly toward its center.

The majority of the Commercial Point property is used by Boston Gas as an LNG storage and distribution facility. Boston Gas relies on the facility to fulfill its supply and reliability needs, and in particular to support natural gas needs during peak consumption periods, such as the winter months when significant amounts of gas are used for heating purposes.

The LNG facility is secured by double-chain-link and barbed-wire fences. There are sliding security gates, which are operated via remote control from a control building. Both the entrances to, and the perimeter of, the LNG facility are continuously monitored by remote television cameras and motion detectors. The area outside the facility includes "Rainbow Park," at the property's southeast corner,[7] and the "inlet area," located at the northerly corner of the parcel where it adjoins Dorchester Bay.

Commercial Point is improved with a 331,000 barrel, 1.13 billion cubic foot LNG storage tank constructed in 1971. The tank, which consists of a cryogenic storage tank enclosed by a 111-foot tall steel tank, is the largest among Boston Gas' several storage and gas vaporization facilities in the Commonwealth. The LNG tank is surrounded by an earth and concrete containment dike and is serviced by a series of pipes, both underground and overhead, as well as an above-ground cooling tower used in the process of liquefying natural gas. The site is also improved with a single-story monitoring and control building.

**II. Jurisdiction and Presentation of the Case**

For the fiscal year at issue, the Board of Assessors of the City of Boston ("assessors") valued the subject property and assessed tax thereon as follows:

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[5] The parcel has been referred to by the parties both as 220 and 238 Victory Road. As there is no dispute regarding the location of the land at issue, the Board, for the sake of consistency, will refer to the address as 238 Victory Road.

[6] The size of the parcel, as well as what portion constitutes "upland," and what portion is either "spongy" or underwater, was disputed by the parties during the course of the proceedings relating to these appeals. Though neither party presented evidence from a registered land surveyor to address this issue, the Board addresses this disparity, *infra,* in the discussion of the valuation experts' appraisals of the Commercial Point property.

[7] Rainbow Park had long been accessible to the public as a recreational boat launching area. After the events of September 11, 2001, however, it was closed to the public and surrounded by fencing.

| Property | Assessed Value ($) | Tax Rate/$1000 | Tax Assessed ($) |
|---|---|---|---|
| **Personal Property Docket # 275056** | 223,200,000 | 33.08 | 7,383,456 |
| **Commercial Point[8] Docket # 275055** | 28,000,000 | 33.08 | 926,240 |

The assessors mailed the actual tax bills relating to the referenced assessments on or about April 1, 2004, and the appellant timely paid all assessed taxes pursuant to G.L. c. 59, § 57C. In accordance with G.L. c. 59, § 59, the appellant timely filed Applications for Abatement with the assessors on April 23, 2004. The assessors denied the abatement application relating to the appellant's personal property on June 9, 2004, and the application relating to the Commercial Point real property on May 19, 2004. In accordance with G.L. c. 59 §§ 64 and 65, the appellant seasonably filed Petitions Under Formal Procedure with respect to both matters on July 22, 2004. On this basis, the Board found and ruled that it had jurisdiction to hear and decide these appeals.

The appeals were tried before Chairman Hammond over the course of twenty-two days, which included Chairman Hammond's view of the Commercial Point property. The appellant contested the disputed assessments primarily through the submission of various documents and the testimony of seven witnesses, who were called in the following order: Ronald W. Rakow, Commissioner of the Boston Assessing Department; Leo Sullivan, an assistant assessor with the Boston Assessing Department; Susan F. Tierney, Ph.D., Managing Principal for Analysis Group, Inc.; Joseph F. Bodanza, a former employee of the appellant; Emmet T. Logue, a Massachusetts Certified General Real Estate Appraiser; John Stavrakas, an employee of the appellant; and Thomas Liard, former Tax Manager for the appellant. For their part, the assessors offered documentary evidence and presented four witnesses including: David J. Effron, a consultant with Berkshire Consulting Services; George E. Sansoucy, a professional engineer and expert in utility valuation; Glenn C. Walker, a Massachusetts Certified General Real Estate Appraiser; and Steven R. Foster, also a Massachusetts Certified General Real Estate Appraiser.

## III. The Appellant's Case

### A. Susan F. Tierney, Ph.D.

The appellant's case focused and was largely dependent on the testimony of Susan F. Tierney, Ph.D., a former state and federal regulatory official whose career includes service as the Commissioner of the Massachusetts Department of Public Utilities

[8] Based on the evidence presented, including a view of Commercial Point taken by Chairman Hammond, the Board found and ruled that all of the property at Commercial Point was real property, and classified it as such for purposes of these appeals.

("DPU")[9] and the Assistant Secretary for Policy at the United States Department of Energy. Dr. Tierney is a Managing Principal at Analysis Group, Inc. and, according to her testimony and *CV*, has provided a variety of consulting services to business, government, and other organizations with respect to energy markets, economic and environmental regulation and strategy, and energy facility projects. The Board qualified Dr. Tierney as an expert in regulatory and utility matters generally, as well as rate regulation and its implications on the valuation of regulated assets.

Dr. Tierney testified that utilities generally own several types of property, which she grouped into three categories: rate-regulated utility property, which consists of tangible assets that are used in the governmentally rate-regulated performance of a utility's monopoly function; utility property subject to market-based rates, which consists of tangible assets owned by a utility in a competitive (i.e. not subject to rate regulation) part of its business; and other assets, which include a variety of assets owned by a utility but not used in its core regulated or competitive utility functions. Dr. Tierney stated that for a natural gas utility, such as Boston Gas, pipes, conduits, meters and storage facilities used in the transmission, distribution and storage of gas for consumer use are all rate-regulated utility property.[10] These types of property are at issue in the current appeals.

Dr. Tierney described utility regulation's essential purposes as allowing a utility: to recover through rates charged to consumers its reasonable operating expenses, including taxes, in performing its regulated activity; to recover, over time, its reasonable and prudent investment in the assets used in its performance of a regulated function; and to earn a reasonable return on that investment. Dr. Tierney reduced these elements to the following formula:

| **Revenue Requirement** | = | **Operating Expenses** | + | **Taxes** | + | **Depreciation Allowance** | + | **(Rate of Return** | x | **Rate Base)** |
|---|---|---|---|---|---|---|---|---|---|---|

Dr. Tierney explained that "rate base" in this formula, upon which the utility can expect a specified rate of return, is calculated by the DPU as the dollar amount of the utility's original investment in its plant less accumulated depreciation allowed to be recovered in prior rates as a depreciation allowance. This rate-base amount is commonly known as "net book value."

Dr. Tierney also discussed the DPU's adoption of "performance-based rates" ("PBR"). This regulatory policy, which was in place for several years prior to the assessment date relevant to these appeals, contemplates deviation from the return provided for by the revenue requirement formula described above. More specifically, under PBR, rates are set for several years, and the rate for the first year (the "cast-off

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[9] The Department of Public Utilities was known as the Department of Telecommunications and Energy from November of 1997 to April of 2007.

[10] According to Dr. Tierney, utility property in Massachusetts subject to market-based rates includes assets used in the sale of natural gas as a commodity. "Other assets" include tangible property used in non-utility business activities such as equipment sales and repair, accounting assets such as receivables and goodwill and, where allowed, certain "regulatory assets," which are intangibles consisting of incurred costs or expenditures, recovery of which is allowed from consumers by a regulatory authority pursuant to a specific policy, such as the costs associated with an abandoned project whose original undertaking was approved by the regulatory authority but ultimately proved not to be feasible (so-called "stranded costs").

rate") is based on the traditional cost-based, revenue requirement formula. For each subsequent year, the DPU sets a fixed upward inflation adjustment to the cast-off rate and a downward productivity adjustment intended to encourage utilities to operate efficiently. Thus a utility that operates more efficiently than the productivity offset anticipates will be more profitable than one operating under the traditional cost-based formula. Conversely, relative inefficiency will result in diminished profitability.

Given the constraints imposed by these rate-making policies, Dr. Tierney concluded that a potential buyer of rate-regulated utility property would not reasonably expect to earn more than a return of and on the net book value of such assets on the seller's books and therefore should not pay more than the seller's net book value for the assets.

Dr. Tierney specifically addressed regulatory issues affecting the valuation of the Commercial Point property, which she noted is rate-regulated utility property. In particular, she discussed, at length, the Commercial Point LNG facility's essential function of assuring a steady gas supply to the area. Given this function, Dr. Tierney opined that the DPU would forbid a sale of the Commercial Point property without substitution of equivalent storage capacity and function within the appellant's gas distribution system. Dr. Tierney also concluded that the cost of such substitution would be prohibitively high for several reasons including: the inherent difficulty of siting large new LNG facilities in the Commonwealth; the impracticality of finding an alternative site of sufficiently large size and proximity to Boston; and the necessarily higher cost of replacing the tank at Commercial Point relative to retaining the current LNG facility and the land upon which it is situated. In light of these facts, Dr. Tierney concluded that the DPU would not consider any substitution cost prudently incurred and would not, therefore, approve recovery of the cost. Consequently, were the expense to be incurred by Boston Gas or a subsequent owner of the property, there would be no prospect of its recovery. Thus, Dr. Tierney concluded that the only viable purchaser of the Commercial Point property would be a regulated utility that would continue to provide the same system storage capacity currently available on the site. This buyer would be subject to the various constraints on rate of return discussed, *supra*, and therefore, according to Dr. Tierney, would not reasonably be expected to pay more than net book value for the property.

Dr. Tierney also discussed the concept of the "enterprise value" of a utility as a whole, which she defined as a measure of what the market believes an entire company is worth at a particular point in time, and is equal to its market capitalization plus the company's long term debt less its cash or cash equivalents. Dr. Tierney opined that there is a fundamental difference between the value of a utility's rate-regulated utility property and its enterprise value. She stated that, depending upon the businesses and activities in which a utility engages, the enterprise value of the company may be quite different from the value of its rate-regulated utility property and other regulatory assets which are included in its rate base. Thus, the enterprise value of a utility that owned both rate-regulated utility property and utility property subject to market-based rates would likely be different than the total net book value of the assets because the property subject to market-based rates would have an economic value different than its net book value, depending on market conditions. According to Dr. Tierney, non-utility assets owned by a utility company, which would allow the company to offer valuable goods and services in the marketplace, would also affect the company's enterprise value. Dr. Tierney gave

examples of sources of economic value associated with an enterprise, as distinct from its rate-regulated utility property, which include various intangibles such as intellectual property, brand name, management acumen, customer base, workforce attributes, relationships with suppliers, use of inventory, ability to raise and manage cash, specialization in operations of a particular type of asset, and economies of scale. Dr. Tierney did not, however, specify how and to what extent these various attributes would contribute to the value of a regulated utility.

Dr. Tierney, having distinguished between what she believed to be the economic value of rate-regulated utility property and the value of an enterprise as a whole, reiterated her belief that rate-regulated utility property should sell for net book value. Dr. Tierney acknowledged that utilities have been acquired for sums that vastly exceed the value of their rate–regulated assets, but opined that the additional amount, known as an "acquisition premium" or "acquisition adjustment," is a reflection of a company's enterprise value and in her opinion is not associated with payment for rate-regulated utility property in excess of its net book value. In particular, Dr. Tierney stated that any acquisition premium, which she noted is booked on the accounts of a utility as "goodwill,"[11] relates to benefits anticipated from operation of the combined enterprises, which are rooted in the "attributes of the combined enterprises above and beyond the value of the Rate-Regulated Utility Property itself."

The Board found Dr. Tierney's testimony credible as it related to her explication of regulatory principles, including the substance of the traditional cost-based and performance-based rate-setting mechanisms. The Board also agreed with Dr. Tierney's conclusion that practical considerations, regulatory constraints and security concerns would effectively limit the sale of the Commercial Point property to another regulated utility. Finally, the Board found credible Dr. Tierney's distinction between the enterprise value of an entity and the value of its rate-regulated utility property. The Board, however, found unsubstantiated Dr. Tierney's insistence that any amount paid for a utility above the net book value of its rate-regulated utility property was associated wholly with the utility's enterprise value as distinct from the value of its rate-regulated property. This lack of substantiation, which fundamentally undermines the appellant's case, was particularly evident when viewed against the backdrop of the assessors' presentation of the several sales of utilities discussed in their valuation expert's comparable-sales analysis, discussed *infra*, each of which reflects a substantial acquisition premium that the Board found was not adequately accounted for by Dr. Tierney's testimony.

**B. Joseph F. Bodanza**

Joseph F. Bodanza, a former senior vice-president of the appellant who had held various positions relating to finance, accounting, and regulatory affairs within the company's predecessors, testified on behalf of the appellant. Mr. Bodanza had executed the Applications for Abatement relating to these appeals in which the appellant stated that its opinion of the value of the personal property was $159,157,892 and the real property at Commercial Point, $1,829,984, the net book value of each type of property. Mr. Bodanza stated his belief that as the net book value of the property "[was] the value [the

[11] While goodwill, pursuant to applicable accounting regulations, is carried as an intangible asset on the books of a regulated utility, the evidence presented provided no basis to conclude that this accounting treatment was dispositive for purposes of *ad valorem* taxation.

appellant] was going to be allowed to earn on . . . [the appellant] should not pay taxes on any higher value than . . . net book value."

Mr. Bodanza also testified concerning KeySpan's acquisition of Eastern in 2000, noting that the transaction involved not only Eastern's tangible personal property, but the enterprise as a whole, including regulated and unregulated businesses of Eastern as well as intangible assets. Mr. Bodanza stated his belief that the value of Eastern's enterprise was greater than the net book value of its tangible assets. Mr. Bodanza did not, however, break down the various components of value that comprised the "enterprise" acquired in the Eastern acquisition, nor did he explain how or to what extent the unregulated businesses of Eastern or its intangible assets contributed to its revenue or the purchase price paid for the company. Rather, Mr. Bodanza simply asserted that any amount above the net book value of Eastern paid by the appellant was paid for some unspecified element of Eastern's enterprise. Moreover, while Mr. Bodanza had substantial familiarity with the appellant's financial affairs, as well as rate cases and transactions involving the sale of utility property, he was not presented, nor was he qualified as, an expert on the valuation of utility property in general or the appellant's property in particular. Thus, the Board found that Mr. Bodanza's testimony did little to assist in establishing the fair cash value of the property at issue in these appeals.

**C. Emmet T. Logue**

Although Dr. Tierney's opinion regarding the value of rate-regulated utility property encompasses the appellant's view of the fair market value of the property at Commercial Point, the appellant offered the testimony of Emmet T. Logue, a Massachusetts Certified General Real Estate Appraiser and president of Hunneman Appraisal and Consulting Company. Mr. Logue, whom the Board qualified as an expert in real estate valuation, prepared a Self-Contained Appraisal Report relating to the Commercial Point property, which he stated applied only to the contributory value of the fee simple interest in the land, rather than the value of the land and its improvements as a whole. Mr. Logue twice inspected the property, which he concluded consisted of 34.47 acres, approximately 28.7 of which he determined were upland. To arrive at his valuation, Mr. Logue considered neighborhood and site factors, the environmental history of the property,[12] the area real estate market, zoning, and various other relevant considerations. He also consulted with Dr. Tierney regarding, *inter alia*, the effect of regulation on the site's value as well as the importance of the LNG facility to the Boston Gas storage and distribution system. Having taken these and other factors into

[12] Mr. Logue's discussion of the property's environmental history focused on hazardous waste releases that were reported to the Massachusetts Department of Environmental Protection in 1987 and 1995, as well as the property's designation as a "Tier II" site and remediation activities, the plan for which was substantially underway as of the relevant assessment date. An Activity and Use Limitation ("AUL") placed on the site "covered" approximately 90% of the property, but found "current and future significant risk" in only two areas. These areas comprise approximately 15% of the site and were covered with an engineered barrier and filled with crushed stone. The AUL allows for the property's present use, and currently prohibits residential uses, schools, hotels and daycare centers. The Board noted that the parties presented scant evidence as to the amount or type of contamination.

consideration, Mr. Logue concluded that the property's highest and best use was its continued use as an LNG storage and distribution facility.

To arrive at his estimation of the fair market value of the land at Commercial Point, Mr. Logue considered use of three valuation methodologies, including the cost approach, the income-capitalization approach and the sales-comparison approach. Mr. Logue eschewed the first two approaches in favor of the sales-comparison approach. He concluded that the cost approach was not appropriate because he intended to value the land hypothetically, without improvements, obviating the need for or reason to apply the cost approach. Mr. Logue noted that use of the income approach would have involved analyzing land rents and then capitalizing the estimated rental income of the land to arrive at an indicated value for the parcel. He stated, however, that he was not able to locate any land rents for properties that were similar to Commercial Point in size and use. He therefore concluded that the data available to establish land rent was not adequate and the income approach was of no value.

Having concluded that the sales-comparison approach was the appropriate method to value the parcel at Commercial Point, Mr. Logue sought to identify sales of land similar to the Commercial Point parcel with known sales prices and terms of sale. To achieve this goal, Mr. Logue reviewed sales transactions throughout eastern Massachusetts. Based on this review, Mr. Logue identified sales of five properties he considered sufficiently comparable to the Commercial Point parcel to warrant comparative analysis. The five properties, two of which are waterfront properties, are located in Quincy, Everett, Chelsea and Medford, and their sales occurred between March 1999 and April 2004. The sites ranged in size from five acres to 74.25 acres of identified "upland," and sold for prices ranging from $4.41 to $8.83 per square foot of upland, the unit of comparison Mr. Logue chose to employ in his analysis. Mr. Logue made value adjustments to compensate for differences between these properties and the Commercial Point parcel with respect to market conditions at the time of sale, location and physical characteristics, the property interest acquired, and any special conditions that affected the sale. Mr. Logue made these adjustments individually, then combined the individual adjustments into an overall adjustment factor, which he applied to the chosen sale price unit of comparison to arrive at an indicated value for the Commercial Point parcel.

Based on his comparative analysis, Mr. Logue concluded that the indicated value of the subject property was $6.00 per square foot of upland. He applied this unit price to the 1,250,000 square feet of upland that he had determined were present at Commercial Point. In this manner, Mr. Logue derived an indicated value of $7,500,000 for the Commercial Point parcel.

In an addendum to his report, Mr. Logue identified seventeen "Assumptions and Limiting Conditions" applicable to his appraisal, the last of which states:

> In accordance with the Expert Report of Susan F. Tierney, Managing Principal, Analysis Group, Inc., the Commercial Point facility is rate regulated utility property in Massachusetts where net book value is the basis for establishing the property's value. While I have identified the net book value for the Commercial Point facility as it existed as rate regulated utility property as of January 1, 2003, I have presented a market based estimate of the contributory value of the land assuming the Commercial Point property was unregulated and subject to market based rates. The

> market based land value estimate is, therefore, hypothetical in that it does not incorporate the net book value of the site.

Similarly, in the section of his appraisal report detailing his sales-comparison valuation methodology, Mr. Logue stated "[t]his value conclusion represents my estimate of the contributory market-based value of the land as part of the property improved for LNG storage and distribution purposes and assuming the property is not rate-regulated utility property . . . . My valuation is hypothetical since it does not reflect the rate-regulated nature of this utility." In the Reconciliation and Final Value Estimate section of his report, Mr. Logue offered his opinion of "the market-based value of the fee simple interest in the subject land, as if unregulated utility property."

Mr. Logue confirmed this approach in his testimony, during which he stated that he "was to estimate . . . what could be referred to as the market based value under the hypothetical assumption that [the land] was not rate regulated utility property." Mr. Logue further described his hypothetical assumption as "essentially saying that you know something to be false but you are appraising it and using a certain methodology for the purposes of analysis." Based on Mr. Logue's testimony and appraisal report, it appears that Mr. Logue's true valuation of the property is $388,196, the net book value of the property, a valuation compelled by Dr. Tierney's Expert Report, which Mr. Logue stated in his appraisal report "dictate[s] [the property's] actual valuation."

The Board found that given the hypothetical nature of Mr. Logue's appraisal, his sales-comparison analysis was of minimal probative value. As a threshold matter, the derivation of his indicated value for the Commercial Point parcel was inconsistent with his determination that the highest and best use of the property was its continued use as an LNG storage and distribution facility. Moreover, not only did Mr. Logue's hypothetical assume crucial facts regarding the nature of the property at Commercial Point and its potential use that were at best speculative, but the analysis ignored substantial evidence in the record indicating that under no foreseeable circumstances could his hypothetical be realized. More specifically, Dr. Tierney, with whom Mr. Logue consulted and referenced in his appraisal report, gave detailed and credible testimony regarding the Commercial Point LNG facility's essential function of assuring a steady gas supply to the area, and the consequent prohibition DPU would place on the sale of the Commercial Point property without substitution of equivalent storage capacity and function. Dr. Tierney also credibly testified that the cost of such substitution would be so high as to effectively prevent the property's sale to any party but a regulated utility that would continue to provide the current system storage capacity available on the site. These facts, taken together, render Mr. Logue's hypothetical valuation of little discernable value because the Commercial Point property, the current use of which the Board agreed is its highest and best use, will remain an LNG facility, leading to the inevitable conclusion that it must be valued as such.

Given the foregoing findings, the Board found that it need not address issues relating to Mr. Logue's choice of comparable properties, the various value adjustments he made to compensate for differences between those properties and the Commercial Point parcel, the propriety of his chosen unit value, or the number of square feet of upland that he concluded were present on the Commercial Point parcel to which he applied the unit value. Moreover, to the extent that environmental issues, including the AUL, affected the property, the Board found that any effect on value was not demonstrated with specificity

by Mr. Logue, particularly in the context of the property's highest and best use, which is not impeded by existing environmental concerns.

On this basis, the Board found and ruled that Mr. Logue's testimony and appraisal report, taken together, failed to provide sufficient probative evidence to establish the fair cash value of the Commercial Point parcel or to undermine the value placed upon the property by the assessors.

**D. John Stavrakas**

John Stavrakas, an employee of the appellant who, as of the date relevant to these appeals, was the appellant's Manager of System Planning and Integrity in the New England Region, testified regarding various aspects of the appellant's distribution system in Boston. He described the operation, layout, composition and condition of the system, making reference to maps and tables specifying the types of pipe in Boston by age, material and pressure capacity. With reference to pipe construction, Mr. Stavrakas testified that plastic is currently favored in Boston, given its relatively low cost to install and maintain. Mr. Stavrakas stated that if the Boston gas distribution system had been replaced in its entirety on January 1, 2003, the relevant assessment date, the replacement would have been a high-pressure system constructed predominantly of plastic pipe.

Mr. Stavrakas highlighted the contrast between the Boston distribution system and a new system, stating that as of December 31, 2002, over 60% of the pipe in Boston was cast iron, while roughly 25% was steel and 15% plastic. He also testified that because of its age, the Boston system is a low-pressure system, which presents challenges regarding movement of gas throughout the system. Noting that regulators have prohibited cast-iron main installations since 1991, he discussed the regulatory requirement that a cast-iron main be replaced anytime its integrity may have been undermined, and stated that such mains are typically abandoned in place upon replacement because they lack salvage value. He further discussed the appellant's obligation to file annually a three-year plan relating to the replacement of gas mains.

Mr. Stavrakas testified that the composition and age of the Boston system resulted in operating and maintenance expenses that substantially exceeded those in other parts of Massachusetts. He estimated that total maintenance expenses for what he termed the Boston Division (which includes Boston, Brookline and a portion of Norwood, and excludes East Boston and Charlestown) for the year ended December 31, 2002 were approximately $7,250 per mile. He compared this to the Boston Gas system on Cape Cod, a more efficient high-pressure system, which he stated had maintenance costs of approximately $400 per mile.

**E. Thomas Liard**

Thomas Liard, the former New England Tax Manager for the appellant, testified briefly regarding assessments of Boston Gas' personal property in the Commonwealth. Mr. Liard stated that of the eighty-one cities and towns in the Commonwealth serviced by Boston Gas, Boston was the only community that assessed Boston Gas' personal property at a value that exceeded its net book value. The Board found Mr. Liard's testimony of no probative value with regard to the issues contested in these appeals.

**F. Ronald W. Rakow and Leo Sullivan**

The appellant called Ronald W. Rakow, Commissioner of the Boston Assessing Department and Leo Sullivan, an assistant assessor with Boston, to elicit testimony regarding preparation and substance of the disputed assessments. Mr. Rakow testified regarding the assessments at issue in these appeals, and stated that he approved the

assessments and consulted with Mr. George Sansoucy regarding their preparation.[13] Mr. Rakow also described the submission of the appellant's fiscal year 2004 assessment information to the Massachusetts Department of Revenue ("DOR") as part of the triennial recertification process, and testified as to Mr. Sullivan's role with regard to the assessments involved in these appeals.

Mr. Sullivan testified to his role in the assessment process, which included his preparation of an appraisal report for fiscal year 2004 relating to the land and improvements at Commercial Point for presentation to DOR. Mr. Sullivan concluded that the highest and best use of the Commercial Point property, which he identified as consisting of almost thirty-eight acres, all of which in his view was upland, was continuation of its current use. To arrive at an estimated land value, Mr. Sullivan employed a comparable-sales analysis, which did not account for the potential impact of contamination and, in part, utilized dated sales for comparison with the Commercial Point property.

The Board found that neither Mr. Rakow's nor Mr. Sullivan's testimony was useful in providing a basis for the Board to determine the fair cash value of the property at issue in these appeals. While their testimony, and particularly that of Mr. Sullivan, did not evidence an analytically consistent and comprehensive approach for valuing the property, neither did it lead the Board to determine that the property had been overvalued. The Board found that the testimony of the various experts, documents in evidence, case law, and relevant regulatory and statutory authority were the appropriate sources to rely upon to address this issue.

## IV. The Assessors' Case

### A. George E. Sansoucy

George E. Sansoucy, a professional engineer and principal of George E. Sansoucy, PE, LLC, Engineers & Appraisers ("Sansoucy E&A"), whom the Board qualified as an expert on utility valuation issues and as an engineer, testified on behalf of the assessors regarding the value of the personal property at issue in these appeals, as well as the improvements at the Commercial Point property. Mr. Sansoucy, together with colleagues at his firm, including Glenn C. Walker, prepared a Self-Contained Appraisal Report of the real and personal property owned by Boston Gas in Boston for the fiscal year at issue.

To prepare his appraisal report, Mr. Sansoucy consulted a variety of sources including documents provided by Boston Gas to the assessors, documents filed by Boston Gas with state and federal agencies, the Value Line Investment Survey, Moody's Investor Service, Ibbotson Associates, the RS Means Heavy Construction Cost Manual, the Handy-Whitman Cost Index, publications from the Energy Information Administration, regulatory applications filed by natural gas utilities including Boston Gas, as well as the resulting orders from state and federal regulatory agencies, Securities and Exchange Commission filings by gas utilities, various trade publications, and information gleaned

[13] Mr. Sansoucy had been retained by the assessors during 2003 to prepare an appraisal of the property at issue in these appeals for fiscal year 2004. That appraisal, which was dated October, 2003, is wholly separate from the appraisal Mr. Sansoucy prepared in connection with the current appeals, which is discussed *infra.*

from a tour of the Commercial Point property. Mr. Sansoucy also relied on the appraisal report of Steven R. Foster with regard to the value of the land at Commercial Point. Taking these sources and other information into account, Mr. Sansoucy used the reproduction cost new less depreciation ("RCNLD"), income-capitalization and sales-comparison approaches to derive an indicated value for the property at issue.

**1. Cost Approach**

For his RCNLD valuation methodology, Mr. Sansoucy employed a technique known as cost-index trending. This approach involves integration of data reflecting the original cost of the property to be valued and information from cost manuals (in the present appeals, the Handy-Whitman Index for the North Atlantic Region ("HWI"))[14] that track changes in the cost of construction over a period of years.

The HWI uses a base year, 1973, to which an index value of 100 is assigned. A ratio is then developed for each year in the index reflecting the cost of property relative to the base year. For the year in which a given piece of property is installed, an index figure is taken from the Handy-Whitman table and a ratio of that figure and the index figure applicable to the valuation date is calculated. This ratio is multiplied by the property's original cost to estimate its "cost new" as of the valuation date.

Regulated utilities such as Boston Gas must maintain records of costs of construction to comply with regulatory requirements. Mr. Sansoucy used historical cost records provided by Boston Gas as they related to the property at issue and applied the HWI to derive the cost new of the property. The following table reflects Mr. Sansoucy's calculations of the cost new of personal property owned by Boston Gas in Boston as of December 31, 2002, for the relevant valuation date, January 1, 2003.

| Line # | HWI/DPU Account# | Description | Cost New (rounded) ($000) |
|---|---|---|---|
| 1 | 362 | Gas Holders | $7,253 |
| 2 | 367 (376) | Mains [15] [16] | $958,554 |

[14] Mr. Sansoucy chose the HWI because it tracks, with specificity, annual changes in utility construction costs for several types of electric, gas and water improvements, including gas distribution systems. Notably, both Boston Gas and the DPU used the HWI in connection with the 2003 Boston Gas rate case before the DPU.

[15] Mr. Sansoucy noted that the cost new of mains in Boston may well be understated in his cost estimation because the HWI indices and trend tables begin with 1912. More specifically, trend factors for mains installed before 1912 are not fully trended because they are treated as new in 1912, thereby failing to account for any cost increase between their installation dates and 1912.

[16] The original cost figures provided by Boston Gas did not indicate whether a given cost was associated with cast iron, steel, or plastic pipe. To account for this, Mr. Sansoucy assumed that mains installed prior to 1939 were cast iron, those installed between 1940 and 1969 were steel, and those installed after 1970 were a mix of steel and

| | | | |
|---|---|---|---|
| 3 | 380 | Services | $141,745 |
| 4 | 381 | Meters [17] | $24,264 |
| 5 | 382 | Meter Installation | $4,351 |
| 6 | LPG | LPG Equipment | $16,042 |
| 7 | 369 | Measuring & Regulating | $3,384 |
| 8 | TIP | Other Transmission Plant | $4,382 |
| 9 | | Total Personal Property: | $1,159,975 |

Mr. Sansoucy employed the same analysis to arrive at the cost new of Boston Gas's real property at Commercial Point, not including the value of the land, as follows.

| **Line #** | **HWI/DPU Account #** | **Description** | **Cost New (rounded) ($000)** |
|---|---|---|---|
| 1 | 305 | Production Plant Structures | $355 |
| 2 | 361 | Storage Plant Structures | $10,981 |
| 3 | 362 | Gas Holder Structures | $17,812 |
| 4 | 366 & 390 | General Plant Structures, T & D Structures | $1,385 |
| 5 | | Total Real Property (Improvements): | $30,533 |

Having arrived at figures for cost new, Mr. Sansoucy endeavored to account for various forms of depreciation, including physical, functional, and economic depreciation. To estimate the impact of physical depreciation on the property at issue, Mr. Sansoucy began with the formula: age/life = incurable physical deterioration, also known as physical depreciation. Therefore, for a given portion of the property at issue, Mr. Sansoucy divided the age of the property, as provided by Boston Gas, by the property's estimated useful life. He then multiplied the resulting factor by the cost new of the property to ascertain the diminution in value resulting from physical depreciation.

As discussed, *supra*, Boston Gas owns pipe installed as early as 1849 that is still in use. In fact, of the cost new for the mains in Boston of $958.6 million derived by Mr. Sansoucy, approximately 80%, or $765 million, consists of mains that were installed prior to 1942. Mr. Sansoucy applied a maximum depreciation of 80% (or 20% "to the

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plastic. He then applied the appropriate HWI trend factor to arrive at cost new.

[17] As noted, *supra,* Boston Gas does not maintain a separate account for meters in each city and town. Mr. Sansoucy therefore used an allocation of meter costs based on the proportion of accounts in Boston relative to the system as a whole, which resulted in allocation of 26% of all meters to the city.

good") to these mains, meaning that when the value of property in service diminished to this level, it was not further depreciated in value. Mr. Sansoucy concluded that 20% to the good was an appropriate depreciation floor because, as stated in his appraisal report, "it represents the indirect costs of construction for items such as engineering, permitting, and licenses necessary to install [the] mains which are still valid for replacement of new improvements after the old pipe is no longer physically capable of serving customers." Mr. Sansoucy also considered that the aged mains were still in use, providing service to customers and operating as an integral part of Boston Gas' distribution system.

Having applied the referenced criteria to his analysis, Mr. Sansoucy arrived at figures representing cost new less an allowance for physical depreciation as reflected in the following tables.

**Personal Property**

| Line # | Description | Account # | Cost New (App. E) ($000) | Depreciation To Good (G/E) | Cost New Less Physical Depreciation ($000) |
|---|---|---|---|---|---|
| 1 | L.P.G. Equipment | LPG Total | 16,042 | 46% | 7,432 |
| 2 | Gas Holders | 362 Total | 7,253 | 75% | 5,458 |
| 3 | Street Mains | 376 Total | 759,936 | 20% | 151,987 |
| 4 | Street Mains | 376 Total | 759,936 | 20% | 151,987 |
| 5 | Street Mains | 376.1 Total | 36,082 | 39% | 13,910 |
| 6 | Street Mains | 376.4 Total | 162,537 | 86% | 140,439 |
| 7 | Measuring & Regulating | 369 Total | 3,384 | 73% | 2,461 |
| 8 | Services | 380 Total | 141,745 | 68% | 96,238 |
| 9 | Meters | 381 Total | 93,322 | 61% | 56,586 |
| 10 | Meter Installations | 382 Total | 4,351 | 62% | 2,706 |
| 11 | Other Transmission Plant | OTP Total | 4,382 | 70% | 3,046 |
| 12 | Sub-Total | | 1,229,034 | | 480,263 |
| 13 | Less meters (381) (entire system) | ($85,271) | 1,135,712 | | 423,677 |
| 14 | Plus meters (381) @ 26% of entire system | $22,170 | 1,159,976 | | 438,389 |
| 15 | Total | | 1,159,976 | 38% | 438,389 |

**Real Property**

| Line # | Description | Account # | Cost New (App. E) ($000) | Depreciation To Good (G/E) | Cost New Less Physical Depreciation ($000) |
|---|---|---|---|---|---|
| 1 | Other Equipment | LPG Total | 355 | 79% | 281 |
| 3 | Structures - Storage | 366 total | 10,981 | 63% | 6,916 |
| 4 | Gas Holders | 362 Total | 17,812 | 47% | 8,366 |
| 5 | Land – Transmission & Distribution Plant | 365 Total | 0 | 0 | 0 |
| 6 | Structures – T & D General | 366 Total | 1,385 | 94% | 1,304 |

| | | | | | |
|---|---|---|---|---|---|
| 7 | Total | | 30,533 | 55% | 16,867 |

Mr. Sansoucy next addressed functional obsolescence, a loss in value attributable to a deficiency or superadequacy associated with property.[18] Having considered various aspects of the appellant's gas distribution system in Boston, Mr. Sansoucy concluded that the system exhibited functional obsolescence from two sources: excess construction, a superadequacy resulting from cast iron or steel pipe in the system valued at cost new, but which would be replaced by plastic pipe in a new system at a reduced cost; and excess operation and maintenance expenses associated with cast iron and steel pipe in the system.

To measure functional obsolescence resulting from excess construction, Mr. Sansoucy estimated the size, type, and footage of pipe in Boston that would likely be replaced with plastic. Mr. Sansoucy then estimated the cost differential among cast iron, steel, and plastic pipe using the RS Means Heavy Construction Cost manual, and applied the result to the pipe to be replaced, resulting in an allowance for excess construction of $28,026,368, which he rounded to $28,000,000. The substance of this analysis is reflected in the following table.

| Row | Size/Type | Footage | Per Foot Prices (n/a = not available) ($) | Cost New Iron to Steel ($) | Cost New Iron to Plastic ($) | Cost New Plastic Price Difference Per Foot (E-F) ($) | Total Difference (C x G) ($) |
|---|---|---|---|---|---|---|---|
| 1 | 1 inch - cast iron | 281 | n/a | 8.35 | 3.43 | 4.92 | 1,383 |
| 2 | 1 inch - plastic | 631 | 3.43 | | | | |
| 3 | 1 inch - steel | 643 | 8.35 | | | 4.92 | 3,164 |
| 4 | 1¼ inch - cast iron | 532 | n/a | 8.35 | 3.43 | 4.92 | 2,617 |
| 5 | 1¼ inch - plastic | 1,816 | 3.43 | | | | |
| 6 | 1¼ inch - steel | 1,086 | 8.35 | | | 4.92 | 5,343 |
| 7 | 1½ inch - cast iron | 3,135 | n/a | 8.35 | 3.43 | 4.92 | 15,424 |
| 8 | 1½ inch - plastic | 188 | 3.43 | | | | |
| 9 | 1½ inch - steel | 6,373 | 8.35 | | | 4.92 | 31,355 |
| 10 | 2 inch - cast iron | 21,755 | n/a | 10.10 | 3.92 | 6.18 | 134,446 |
| 11 | 2 inch - plastic | 13,607 | 3.92 | | | | |
| 12 | 2 inch - steel | 21,035 | 10.10 | | | 6.18 | 129,996 |
| 13 | 2½ inch - cast iron | 1,273 | n/a | 10.10 | 3.92 | 6.18 | 7,867 |
| 14 | 2½ inch - plastic | 3 | 3.92 | | | | |
| 15 | 2½ inch - steel | 493 | 10.10 | | | 6.18 | 3,047 |
| 16 | 3 inch - cast iron | 134,978 | n/a | 13.00 | 5.55 | 7.45 | 1,005,586 |

[18] A deficiency may relate to a component or system that property lacks but should have, or a substandard or defective component or system in the property. Superadequacy represents the degree to which elements of property exceed market requirements, thereby not contributing to value an amount equal to their cost. THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12th ed. 2001) 404-411.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| 17 | 3 inch - plastic | 32,027 | 5.55 | | | | |
| 18 | 3 inch - regulator | 6 | - | | | | |
| 19 | 3 inch - steel | 44,835 | 13.00 | 13.00 | 5.55 | 7.45 | 334,021 |
| 20 | 3½ inch - plastic | 7 | 5.55 | | | | |
| 21 | 4 inch - cast iron | 896,441 | n/a | 19.15 | 11.40 | 7.75 | 6,947,418 |
| 22 | 4 inch - plastic | 191,941 | 11.40 | | | | |
| 23 | 4 inch - regulator | 2 | - | | | | |
| 24 | 4 inch - steel | 183,835 | 19.15 | 19.15 | 11.40 | 7.75 | 1,424,721 |
| 25 | 5 inch - plastic | 135 | 16.45 | | | | |
| 26 | 5 inch - regulator | 5 | - | | | | |
| 27 | 5 inch - steel | 1,600 | 24.50 | | | | |
| 28 | 6 inch - cast iron | 1,204,379 | n/a | 30.00 | 21.50 | 8.50 | 10,237,222 |
| 29 | 6 inch - plastic | 378,940 | 21.50 | | | | |
| 30 | 6 inch - regulator | 41 | - | | | | |
| 31 | 6 inch - steel | 282,904 | 30.00 | | | 8.50 | 2,404,684 |
| 32 | 8 inch - cast iron | 234,531 | n/a | 42.50 | 28.00 | 14.50 | 3,400,700 |
| 33 | 8 inch - plastic | 134,244 | 28.00 | | | | |
| 34 | 8 inch - regulator | 28 | - | | | | |
| 35 | 8 inch - steel | 133,612 | 42.50 | 42.50 | 28.00 | 14.50 | 1,937,374 |
| 36 | **TOTAL:** | | | | | | **$28,026,368** |

Having reviewed documents provided by Boston Gas, Mr. Sansoucy noted that the company incurred excess costs for operation and maintenance in Boston relative to the balance of its system, resulting in large part from the system's high proportion of cast iron pipes, which are older and more brittle than steel or plastic. With respect to operating costs, Mr. Sansoucy used what he believed to have been Boston Gas' reported operating costs in Boston of approximately $2500 per mile and subtracted $400 per mile, the sum he believed represented operating costs incurred by systems not subject to the excessive costs applicable to Boston. Mr. Sansoucy then multiplied the $2100 per mile excess cost by 939, the number of miles of pipe in Boston, to derive annual excess operating costs of $1,971,000 before taxes. He then incorporated a tax factor to account for the tax benefit associated with the expense, arriving at an after tax operating expense of $1,183,000. Mr. Sansoucy then capitalized this annual cost, utilizing a 7.5% capitalization rate, to arrive at a total reduction in value of $15,773,000 associated with excess operating costs.

Mr. Sansoucy employed a similar analysis to account for the effect of excess maintenance costs within Boston. Utilizing various data, Mr. Sansoucy estimated Boston Gas' maintenance attributable to Boston at $7,100,000 per year. Based on statements from the company, Mr. Sansoucy allocated 50% of these costs, which he rounded to $3,500,000, to represent Boston Gas' annual excess maintenance expense before tax. As with operating expenses, Mr. Sansoucy factored in a tax benefit and capitalized the resulting annual after tax expense sum to arrive at a valuation impact of $28,000,000 attributable to excess maintenance costs.

Mr. Sansoucy concluded that the real property at Commercial Point, including the tank, pipes and the building, did not suffer from functional obsolescence. He noted that while the property was affected by physical deterioration, their essential need and use have not changed, and no better way to store LNG for its required use has been

developed. In sum, a replacement for the LNG facility would be similar to the facility as it currently exists.

The following table reflects Mr. Sansoucy's summary of cost new less allowances for physical and functional depreciation for the personal and real property at issue.

**Personal Property**

| Line # | Item | ($000) |
|---|---|---|
| 1 | Cost New – Personal Property | 1,159,974 |
| 2 | Less Excess Construction | (28,000) |
| 3 | Cost New Less Excess Construction | 1,131,974 |
| 4 | Less Physical Depreciation (-62%) | (701,824) |
| 5 | Cost New Less Excess Construction & Physical Depreciation | 430,150 |
| 6 | Less Functional Obsolescence, Excess Operating Expense | (15,773) |
| 7 | Less Functional Obsolescence, Excess Maintenance | (28,000) |
| 8 | Physical Depreciation, Excess Operating Costs And Excess Maintenance for Personal Property And Real Property | 386,377 |
| 9 | Cost New - Real Property | 30,533 |
| 10 | Cost New Less Physical Depreciation of Real Property | 16,867 |
| 11 | Total Cost New of Real Property | 16,867 |
| 12 | Land (Steven Foster, Appraiser) | 15,000 |
| 14 | Total Cost New Less Physical and Functional Functional Depreciation for Personal Property Real Property and Land (Rounded) | 418,000 |

Mr. Sansoucy next sought to account for external or economic obsolescence, which results from factors external to the property and which typically cannot be controlled by the property's owner (*see* THE APPRAISAL OF REAL ESTATE (12th ed. 2001) at 363, 412-13) and exists if the cost new of property less physical depreciation and functional obsolescence exceeds that property's value in the market. Mr. Sansoucy analyzed the economic obsolescence associated with Boston Gas' property in Boston by comparing the indicated values he derived using the sales-comparison and income-capitalization valuation analyses, discussed in detail, *infra*, with his figure for cost new less physical depreciation and functional obsolescence from the RCNLD approach. With respect to the personal property at issue, Mr. Sansoucy's cost new less physical and functional obsolescence exceeded his values from the sales-comparison and income-capitalization approaches by $114.4 million and $36.4 million, respectively.

As with functional obsolescence, Mr. Sansoucy concluded that the Commercial Point property was not affected by economic obsolescence. In support of this conclusion,

Mr. Sansoucy cited the nature of the LNG storage and distribution facility, which provides an essential and required special purpose function within the Boston Gas distribution system, and the ownership of which provides a substantial economic benefit, particularly at times of peak demand.

Ultimately, Mr. Sansoucy based his economic obsolescence allowance for the personal property on the income-capitalization approach, having concluded that the sales-comparison approach likely yielded an indicated value that was below the property's fair market value. Moreover, Mr. Sansoucy placed greater emphasis on the income-capitalization approach as the appropriate source of economic obsolescence because cash flow is a primary determinant of the value of an income-producing utility property. Given these conclusions, Mr. Sansoucy incorporated an allowance for economic obsolescence of approximately 10%, having rounded the $36.4 million differential between the indicated values associated with the cost and the income approaches. The following table summarizes the various components of Mr. Sansoucy's RCNLD valuation methodology.

**Personal Property**

| Line # | Item | ($000) |
|---|---|---|
| 1 | Cost New - Personal Property | 1,159,974 |
| 2 | Less Excess Construction | (28,000) |
| 3 | Cost New Less Excess Construction | 1,131,974 |
| 4 | Less Physical Depreciation (-62%) | (701,824) |
| 5 | Cost New Less Excess Construction & Physical Depreciation | 430,150 |
| 6 | Less Functional Obsolescence, Excess Expense | (15,773) |
| 7 | Less Functional Obsolescence, Excess Maintenance | (28,000) |
| 8 | Total Cost New Less Excess Construction, Physical Depreciation, Excess Operating Costs and Excess Maintenance for Personal Property | 386,377 |
| 9 | Less Economic Obsolescence (-10%) | 38,600 |
| 10 | Cost New Less Depreciation (Rounded) Personal Property | 347,777 |
| 11 | Cost New Less Physical Depreciation of Real Property | 16,867 |
| 12 | Total Cost New of Real Property | 16,867 |
| 13 | Total Cost New Less Depreciation for Real and Personal Improvements (Rounded) | 364,644 |
| 14 | Plus Land | 15,000 |
| 15 | Total Cost New Less Physical and Functional Depreciation for Personal Property, Real Property and Land | 379,644 |

| | | |
|---|---|---|
| 16 | (Rounded) | 380,000 |

The Board found Mr. Sansoucy's RCNLD analysis fundamentally sound with respect to valuation of the personal property at issue. In particular, the Board found that Mr. Sansoucy's choice of cost-index trending was an appropriate means to determine the cost new of the property as of the relevant assessment date. Further, his use of the HWI for the North Atlantic Region and historical cost records provided by Boston Gas yielded reliable figures for the cost new of the property. The Board also found that Mr. Sansoucy's allowance for excess cost of construction was reliable, having incorporated figures for pipe likely to be replaced and estimated applicable cost differentials from the RS Means Heavy Construction Cost manual.

The Board found that Mr. Sansoucy appropriately sought to account for physical depreciation, and functional and economic obsolescence. With regard to physical depreciation, Mr. Sansoucy estimated the useful life of the property, and using the property's known age, arrived at an allowance for physical depreciation. The Board also found that Mr. Sansoucy's choice of a depreciation floor of 20% "to the good" was reasonable. In particular, the Board found credible Mr. Sansoucy's rationale that the floor represents indirect costs of construction for items including engineering, permitting, and licenses necessary to install mains, which would remain valid for new improvements after old pipe is no longer capable of providing service. Further the Board found warranted the consideration Mr. Sansoucy gave to the fact that the aged mains continued to provide service to customers and operated as an integral part of Boston Gas' distribution system.

The Board also found that Mr. Sansoucy's estimation of economic obsolescence was reasonable. Having concluded that Mr. Sansoucy's income-capitalization analysis was, with adjustment, generally sound (*see* discussion of the analysis, *infra)*, the Board found that the value derived from the income approach provided an appropriate market reference by which to estimate the economic obsolescence associated with the property at issue. The Board also noted that even had the value associated with Mr. Sansoucy's sales-comparison approach been used to estimate economic obsolescence, the resulting adjustment would still have yielded a value under Mr. Sansoucy's RCNLD analysis that supported the disputed assessment.

Notwithstanding the foregoing findings, the Board found that adjustment to Mr. Sansoucy's functional obsolescence allowance for excess operating expenses was warranted to ensure that these expenses had not been underestimated. During the course of his testimony, Mr. Sansoucy stated that he had inadvertently used a system-wide estimation of operation and maintenance expenses of $2500 per mile provided by Boston Gas to derive his estimate of excess operating costs in Boston. He acknowledged, however, that this figure was lower than the actual expenses incurred by the appellant in Boston. The Board found that the record did not reflect the precise excess operating costs incurred by Boston Gas in Boston. For purposes of this appeal, therefore, the Board adopted $3600 per mile, the estimate offered by the appellant as an appropriate measure of its excess operating expenses in Boston. This sum accounted for the disproportionately high amount of cast iron pipe in Boston, approximately 64% of the system total, as well as operating costs associated with a modern gas distribution system, which would not contribute to an estimation of excess operating costs. The Board chose this estimate, the largest in the record for excess operating expenses, to ensure that the functional

obsolescence allowance was sufficient. Subtracting Mr. Sansoucy's excess operating expense estimate of $2100 per mile from the appellant's estimate results in a shortfall of $1500 per mile, which when multiplied by 939, the number of miles in the system, results in additional expenses before taxes of $1,408,500. Incorporating Mr. Sansoucy's tax factor yields an after tax addition of $845,100, which when capitalized at Mr. Sansoucy's chosen rate of 7.5% results in an additional reduction in value associated with excess operation and maintenance costs of $11,268,000. Adopting this approach, the additional sum for functional obsolescence reduces Mr. Sansoucy's figure for "Total Cost New Less Excess Construction, Physical Depreciation, Excess Operating Costs and Excess Maintenance for Personal Property" to $375,109,000. Further adjustment is required to reflect the modification to the income-capitalization approach, discussed *infra*, that parallels the adjustment to the cost approach relating to excess operating and maintenance costs. This adjustment resulted in an indicated value under the income-capitalization approach of $336,860,550. The reduction corresponds to a slight increase in Mr. Sansoucy's economic obsolescence adjustment to approximately 10.2%. The result is an economic obsolescence allowance of $38,261,118, which when deducted from the adjusted cost new less depreciation sum of $375,109,000, yields an adjusted indicated value of $336,847,882 for personal property under the RCNLD approach. The Board rounded this sum to $336,848,000.

Having found that Mr. Sansoucy's RCNLD analysis was sound in most respects, and having made adjustment for Mr. Sansoucy's error relating to estimation of excess operating and maintenance expenses, the Board found that the adjusted value of $336,848,000 was a reliable reference from which to derive the fair cash value of the appellant's personal property in Boston on the relevant assessment date.

**a. Real Property Valuation Under the Cost Approach**

The Board was not persuaded by the assessors' presentation as it related to estimation of the value of the appellant's real property under the cost approach. As noted previously, the land component of the property at Commercial Point was valued by Mr. Steven F. Foster. Mr. Foster is a Massachusetts Certified General Real Estate Appraiser whom the Board qualified as an expert in real estate valuation. Mr. Foster prepared an appraisal report relating to the land at Commercial Point, which he concluded consisted of approximately 37.97 acres of land, 34.45 of which he considered upland and 3.52 "watershed/tidal" land.[19]

Mr. Foster inspected the property and in reaching his valuation estimate considered regional economic factors, demand for office space, industrial and special purpose development sites, the role of the Commercial Point LNG facility within the appellant's supply and delivery system, various municipal data, zoning, and the nature of the surrounding neighborhood. Although he viewed the property as a rare development opportunity based on its size and water accessibility, Mr. Foster believed that the property would be purchased on a non-contingent basis for industrial use, and thus concluded that an industrially related use was its highest and best use, assuming the land was vacant and available for development.

To arrive at his estimation of the property's fair market value, Mr. Foster considered use of the cost, sales-comparison and income-capitalization methodologies,

[19] Mr. Foster's figures for the size of the parcel as a whole and upland area exceeded those presented by Mr. Logue by approximately 3.5 and 5.75 acres, respectively.

and rejected the cost approach, as did the appellant's expert Mr. Logue, because he was to value the land only. Ultimately, Mr. Foster chose to use the sales-comparison and income-capitalization approaches, the former receiving substantially greater weight in Mr. Foster's reconciliation of value.

For his sales-comparison analysis, Mr. Foster identified six sales and one "offering" of waterfront property he considered comparable to the Commercial Point parcel. The parcel sizes for Mr. Foster's sales ranged from approximately 4.1 acres to 12.15 acres, with identified upland ranging from 3.95 acres to 7.90 acres. The properties' sale prices ranged from $1,500,000 to $3,365,000, or $5.40 to $18.93 per square foot of upland, Mr. Foster's chosen unit of comparison. The properties are located in Quincy, Everett, Chelsea, Charlestown and East Boston, and their sales occurred between October 2002 and October 2007.[20] Mr. Foster made value adjustments to account for differences between these properties and the Commercial Point parcel with respect to market conditions at the time of sale, location and physical characteristics, the property interest acquired, and conditions of sale. Mr. Foster made these adjustments individually, then combined the individual adjustments to arrive at an adjusted price per square foot for each property. Based on these adjusted prices, Mr. Foster concluded that the value of the Commercial Point parcel was ten dollars per square foot of upland. Applying this value to the approximately 1,500,000 square feet that he had identified as upland, Mr. Foster arrived at an indicated value via the sales-comparison approach of $15,000,000.

For his income-capitalization analysis, Mr. Foster identified seven land leases of parcels located in South Boston and Charlestown whose lease commencement dates ranged from June 1999 to October 2006. The lease terms ranged from five to twenty-five years, the parcel sizes from approximately two acres to approximately ten acres, and the rent from $0.75 per square foot to $2.25 per square foot. Mr. Foster did not specify adjustments to these purportedly comparable properties, but ultimately chose $1.00 per square foot as the base rent he deemed appropriate for the Commercial Point parcel. Mr. Foster developed his capitalization rate with reference to improved property sales and published surveys, and employed a mortgage-equity analysis incorporating: a loan-to-value ratio of 75%; an equity-yield rate of 18%; loan amortization of 0.2249 over a ten-year holding period; and a change in value of 2% per year over the holding period. Based on his analysis, Mr. Foster arrived at a capitalization rate of 8.5%.

Applying a vacancy and collection loss adjustment of 10% to his estimated base rent of $1,500,000 (one dollar per square foot for the 1,500,000 square feet of upland) Mr. Foster arrived at an effective gross income of $1,350,000, from which he subtracted expenses of 5%, yielding a net-operating income of $1,282,500. He then applied his chosen capitalization rate of 8.5% to arrive at an indicated value for the property of $15,088,235, which he rounded to $15,100,000.

Reconciling his two valuation approaches, Mr. Foster noted that he considered the income approach less reliable because he found no sales of leased sites in the area, which he stated impaired his ability to understand how local investors analyzed leased land and whether, in fact, a viable market for the land existed. Mr. Foster also cited certain complications with his sales-comparison approach, including what he considered to be

[20] Mr. Foster stated that he also gave consideration to thirteen sales of non-waterfront property which he identified in his appraisal report, but which he stated were not used to value the Commercial Point property.

the uniqueness of the parcel at Commercial Point, and the limited number of sales of large waterfront property available for comparison. Ultimately, Mr. Foster arrived at an opinion of market value of $15,000,000 as of the relevant assessment date, which he based primarily on his sales-comparison analysis.

In the section of his report entitled "Special Assumptions and Limiting Conditions," Mr. Foster states both that "[i]t is a hypothetical assumption of this appraisal that the land is vacant and available for development" and "[i]t is an extraordinary assumption . . . that the highest and best use of the property, as currently improved, is for continuation of its current use as a specialized LNG facility." Mr. Foster based the latter assumption on further assumptions regarding the property's long-standing specialized use, the importance of that use to the area's LNG delivery system, and the difficulty of siting the facility in a different location.

Mr. Foster, unlike Mr. Logue, did not unequivocally conclude that the highest and best use of the Commercial Point property was its current use. Rather, he posited that an industrially related use was its highest and best use, assuming the land was vacant and available for development, and sought to value the land on this basis. The Board found that, similar to Mr. Logue's appraisal, Mr. Foster's analysis amounted to a hypothetical valuation. Under no foreseeable circumstances would the property function as anything other than an LNG facility. This finding undermines the validity of Mr. Foster's highest-and-best-use analysis, because a property's highest and best use must be physically possible, legally permissible, financially feasible, and maximally productive. *See* THE APPRAISAL OF REAL ESTATE (12th ed. 2001) at 307. The Board found that these criteria, considered in the context of the substantial constraints on the use of the property, effectively preclude a finding of highest and best use other than the property's current use.

The Board also found that Mr. Foster's sales-comparison analysis was substantially flawed. For example, Mr. Foster's adjustments to his purportedly comparable sales were not consistent, as Mr. Foster failed to account for a deep-water dock with respect to one property although he had for another, and made no adjustments to two properties unencumbered by AULs, despite having made a downward adjustment to another property similarly unencumbered. Further, Mr. Foster's testimony regarding the sale of one of his chosen properties fatally undermined his assertion that the sale was an arm's-length transaction. More specifically, the sale in question was to the City of Boston, and Mr. Foster acknowledged that the seller was subjected to political pressure to sell the property at its sale price. Despite Mr. Foster's contention that this sale was an arms-length transaction, the Board found that the compulsion associated with "political pressure" precluded such a conclusion, thereby rendering the transaction virtually useless as a comparable sale. The Board also struck from the record one of Mr. Foster's sales, which consisted of several parcels with mixed commercial and residential uses, and for which Mr. Foster made no inquiry regarding the allocation of sale price among the commercial and residential portions of the property.

The Board notes Mr. Foster's testimony that among his chosen comparables, he relied most upon two sales, the adjusted sales price per foot for which were $7.02 and $8.83. These prices were significantly below the ten dollar per square foot value he placed upon the property at Commercial Point. Mr. Foster did not explain this discrepancy.

Given Mr. Foster's lack of reliance on his income-capitalization approach, as well the inherent shortcomings of the approach, of which he was aware, the Board placed no reliance on the analysis. In sum, the Board found and ruled that Mr. Foster's valuation of the parcel at Commercial Point did not provide sufficient probative evidence to establish the fair cash value of the property or to support the value of the property incorporated in Mr. Sansoucy's cost valuation methodology.[21] Lacking a viable land value under the cost approach, the Board further found that the estimation of the value of real property in Mr. Sansoucy's RCNLD analysis was not reliable.

**2. Sales-Comparison Approach**

Mr. Sansoucy began his sales-comparison analysis by briefly discussing the history of the sale of natural gas utility property. He noted that prior to the 1990s, there were few sales of natural gas utilities or their property, but since then, accompanied by deregulation within the industry, the number of sales increased markedly. These sales reflect consolidation among local transmission and distribution providers including many of those in the northeast where several mergers and purchases have been completed. Mr. Sansoucy identified twenty-two sales of gas utility property in the United States over the last decade, from which he chose six that he concluded were comparable to, and in one instance included, the property at issue in these appeals. These sales, all of which were within three years of the relevant assessment date, are reflected in the following table.

| | **Sale 1** | **Sale 2** | **Sale 3** | **Sale 4** | **Sale 5** | **Sale 6** |
|---|---|---|---|---|---|---|
| **Seller/grantor** | **Colonial Gas Co.** | **EnergyNorth Inc.** | **Essex Gas** | **Eastern Enterprises** | **Fall River Gas Co.** | **Providence Energy** |
| **Buyer/Grantee** | **Eastern Enterprises** | **Eastern Enterprises** | **Eastern Enterprises** | **Key Span Corp.** | **Southern Union Co.** | **Southern Union Co.** |
| **Announcement Date** | 10/17/1999 | 7/14/1999 | 12/19/1997 | 11/4/1999 | 10/4/1999 | 11/15/1999 |
| **Sale** | 8/31/1999 | 11/8/2000 | 9/30/2000 | 11/8/2000 | 9/28/2000 | 9/28/2000 |
| **Sale Price (000)** | $474,000 | $248,611 | $113,361 | $2,251,622 | $82,250 | $360,000 |
| **Depreciated Original Cost of Plant Equipment (Net Book)(000)** | $274,532 | $107,282 | $79,518 | $975,749 | $43,949 | $218,190 |
| **Adjusted Purchase Price of Net Book & Equipment (000)** | $359,541 | $200,743 | $100,133 | $1,709,001 | $70,516 | $280,157 |
| **Gross Revenue (000)** | $187,140 | $109,926 | $53,535 | $935,264 | $42,082 | $225,029 |
| **Customers** | 154,500 | 72,000 | 42,348 | 740,000 | 48,000 | 174,000 |

[21] Given the cited flaws in both Mr. Logue's and Mr. Foster's appraisals, and the Board's conclusions that neither appraisal provided a sufficient basis to establish the fair market value of the parcel at Commercial Point, the Board found it unnecessary to address the discrepancy between Mr. Logue's and Mr. Foster's cited parcel size of 34.47 and 37.97 acres, respectively, or their upland acreage of 34.45 and 28.7 acres, respectively.

| | | | | | | |
|---|---|---|---|---|---|---|
| **Gross Revenue/Customer** | $1,211 | $1,527 | $1,264 | $1,264 | $877 | $1,293 |
| **Adjusted Purchase Price of Net Book & Equip/Customer (Price/Customer)** | $2,327 | $2,788 | $2,365 | $2,309 | $1,469 | $1,610 |
| **Sale Price/ Net Book** | 1.73 | 2.32 | 1.43 | 2.31 | 1.87 | 1.65 |
| **Adjusted Sale Price/Net Book** | 1.31 | 1.87 | 1.26 | 1.75 | 1.60 | 1.28 |
| **Sale Price/ Gross Revenue** | 2.53 | 2.26 | 2.12 | 2.41 | 1.95 | 1.60 |
| **EBITDA ($000)** | $44,877 | $18,657 | $11,984 | $175,926 | $5,428 | $38,386 |

As part of his analysis, Mr. Sansoucy sought to separate the components of each transaction that did not relate to real and personal property, excluding items such as cash, receivables, current assets and liabilities, and pension liabilities. During his testimony, Mr. Sansoucy used the 1999 sale of Colonial Gas Company to Eastern to illustrate this process. The sale price in this transaction consisted of $150,000,000 in cash, $186,000,000 of new stock, and $138,000,000 of assumption of debt, for a total price of $474,000,000. From this sum, Mr. Sansoucy deducted "current assets," including Colonial's cash and cash equivalents, receivables, other accrued revenues, gas and other inventories, and cash prepayments. He also deducted "other assets" owned by Colonial, which included items such as tax credits, pension assets and deferred debits. The sum of these assets, $114,459,000, when deducted from the sale price of $474,000,000, left $359,541,000, representing payment for the balance of the company's assets, which Mr. Sansoucy stated were comprised almost exclusively of plant and equipment, and which are rate-regulated property.

Mr. Sansoucy considered several units of comparison he deemed relevant to estimating the value of Boston Gas' property in Boston including gross revenue per customer, adjusted purchase price per customer and the following ratios: sale price to gross revenue; sale price to net book value; and adjusted sale price to net book value.[22] These units of comparison are reflected in the above table, which depicts various elements of the transactions. Among these measures, Mr. Sansoucy placed particular importance on the adjusted sale price to net book value ratio, consistent with his discussion of the Colonial sale and the analysis he used to arrive at an adjusted sale price, which approximated the value of regulated assets. Mr. Sansoucy calculated that among his chosen sales, this ratio ranged from 1.26 to 1.87, and the 2000 sale of Eastern to KeySpan Corporation took place at what he concluded was an adjusted sale price to net

[22] Mr. Sansoucy also developed a sale price to EBITDA ratio from his chosen comparable sales. EBITDA, which is an abbreviation for Earnings before Interest, Taxes, Depreciation and Amortization, is calculated by taking operating income and adding back interest, depreciation and amortization expenses, and is integral to Mr. Sansoucy's income-capitalization analysis, discussed *infra*.

book ratio of 1.75.[23] Based on these calculations, Mr. Sansoucy concluded that 1.70 times net book value was an appropriate multiple for valuation of the personal property at issue. Mr. Sansoucy therefore multiplied the personal property's rounded net book value of $159,157,000 by 1.70 to arrive at an indicated value for the property of $272,000,000 under the sales-comparison approach.

The Board found that Mr. Sansoucy's sales-comparison methodology required adjustment to account for the discrepancy between his stated adjusted sale price to net book ratio of 1.75 for the KeySpan acquisition, and what the Board found to be the correct ratio of 1.49. Using this corrected value and the values for the remaining five transactions, the Board found that 1.47, the average of these values, was an appropriate ratio. Thus, by multiplying $159,157,000 by 1.47, the appropriate indicated value would be $233,960,790 under Mr. Sansoucy's sales-comparison approach.

In his reconciliation of market value, Mr. Sansoucy concluded that the sales-comparison approach understated the value of the personal property in Boston because his developed net book ratio did not account for the amount of new pipe added by Boston Gas from 2003 to 2006, which resulted in large depreciation expenses being taken by the appellant. To illustrate his point, Mr. Sansoucy stated that for fiscal years 2004 through 2006, approximately $60,000,000 of pipe was added to the system, yet the net book cost of pipe increased by only $14,724,000. On cross-examination, Mr. Sansoucy acknowledged an error in this calculation resulting in understatement of his stated increase in net book value by approximately 33%. This error, however, did not substantially undermine Mr. Sansoucy's assertion that the large depreciation expense effectively reduced the valuation under the sale-comparison approach.

### 3. Income-Capitalization Approach

Mr. Sansoucy began his income-capitalization approach with an analysis of the appellant's revenue and expenses for the years 1997 through 2003, as reflected in the following table.

| 1 | Description | 1997 (000) | 1998 (000) | 1999 (000) | 2000 (000) | 2001 (000) | 2002 (000) | 2003 (000) |
|---|---|---|---|---|---|---|---|---|

[23] Mr. Sansoucy acknowledged during cross examination that in his analysis of the KeySpan acquisition of Eastern, he had erred while calculating the sale price to net book ratio by excluding the net book cost of Colonial Gas, which had previously been acquired by Eastern. The appellant asserted that correction of this error resulted in a sale price to net book ratio of 1.18 instead of 1.75. The appellant's calculations, however, failed to account for the acquisition premium associated with the Colonial sale. Inclusion of this sum in the calculation increases the ratio to approximately 1.49. The assessors argued for inclusion of the acquisition of EnergyNorth in the Keyspan transaction calculation, which they characterized as an "additional component" of the transaction. The Board found, however, that there was insufficient evidence to conclude that the EnergyNorth transaction should be considered part of the Keyspan transaction for purposes of Mr. Sansoucy's analysis.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| 2 | TOTAL RETAIL SALES OF GAS | $207,000 | S191,635 | $153,389 | $99,613 | $222,575 | $147,471 | $228,826 |
| 3 | TOTAL OTHER OPERATING REVENUE | $7,557 | $l1,321 | $14,877 | $10,198 | $4,274 | $16,923 | $9,658 |
| 4 | TOTAL OPERATING REVENUE | $214,557 | $202,957 | $168,266 | $109,811 | $226,849 | $164,393 | $238,484 |
| 5 | TOTAL COST OF GAS | $122,480 | $108,516 | $83,336 | $58,322 | $153,138 | $89,135 | $158,668 |
| 6 | OPERATING EXPENSES OTHER THAN COST OF GAS | $41,772 | $39,052 | $36,180 | $27,819 | $34,732 | $31,493 | $31,295 |
| 7 | MAINTENANCE EXPENSE | $5,857 | $6,590 | $6,540 | $4,928 | $7,927 | $7,967 | $7,790 |
| 8 | DEPRECIATION | $l1,930 | $13,861 | $l1,027 | $7,453 | $13,306 | $12,326 | $14,875 |
| 9 | AMORTIZATION OF UTILITY PLANT | $1,942 | $1,896 | $1,627 | $1,093 | $6,316 | $979 | $1,365 |
| 10 | AMORTIZATION OF UTILITY ITCs | -$277 | -$282 | -$239 | -$141 | $0 | $0 | $0 |
| 11 | TAXES OTHER THAN INCOME TAXES | $7,912 | $8,367 | $7,383 | $3,926 | $6,450 | $4,476 | $4,977 |
| 12 | INCOME TAXES | $4,905 | $6,936 | $5,134 | $2,088 | $5,786 | -$13,804 | -$13,284 |
| 13 | PROVISION FOR DEFERRED FEDERAL INCOME TAES | $775 | -$383 | $360 | -$1,120 | -$8,264 | $14,654 | $16,761 |
| 14 | TOTAL OPERATING EXPENSES | $197,295 | $184,552 | $151,348 | $104,369 | $219,436 | $147,226 | $222,446 |
| 15 | NET OPERATING INCOME BEFORE INCOME TAX | $17,262 | $18,404 | $16,918 | $5,442 | $7,412 | $17,167 | $16,038 |
| 16 | TOTAL INCOME TAXES | $5,680 | $6,552 | $5,494 | $969 | -$2,478 | $851 | $3,476 |
| 17 | NET OPERATING INCOME | $11,582 | $11,852 | $11,424 | $4,473 | $9,891 | $16,316 | $12,562 |
| 18 | EBIDTAA | $36,537 | $40,432 | $34,827 | $14,816 | $24,556 | $31,323 | $35,755 |
| 19 | EBI AS A PERCENTAGE OF TOTAL OPERALING REVENUE | 17.03% | 19.92% | 20.70% | 13.49% | 10.82% | 19.05% | 14.99% |
| 20 | EXPENSE RATIO | 85.62% | 83.58% | 82.29% | 90.59% | 94.98% | 86.32% | 89.73% |
| 21 | NO. OF CUSTOMERS | 146,783 | 147,773 | 149,601 | 150,465 | 151,717 | 151,314 | 152,900 |
| 22 | GAS SALES IN CITY OF BOSTON | $214,557 | $202,957 | $168,266 | $109,811 | $226,849 | $164,393 | $238,484 |
| 23 | BOSTON SALES AS A PERCENTAGE OF GROSS REVENUE | 30.61% | 33.25% | 28.39% | 16.72% | 27.37% | 25.72% | 25.92% |

As part of this analysis, Mr. Sansoucy derived an estimate of EBIDTA for Boston based on the ratio of Boston's operating revenue relative to the operating revenue of the system as a whole. This analysis yielded an average EBIDTA of $31,100,000 for the seven years considered. Mr. Sansoucy chose to remove the years 2000 and 2001 from his EBIDTA calculations, having concluded that the EBIDTA figures for those years were anomalous.[24] [25]The average EBIDTA for the remaining five years was $35,700,000. Factoring in his estimate of $5,500,000 per year for excess operating and maintenance costs arrived at in his cost analysis, Mr. Sansoucy chose to employ an EBIDTA for Boston of $30,000,000.

Having arrived at what he considered to be a conservative EBIDTA for Boston, Mr. Sansoucy used an EBIDTA multiplier (ratio of EBIDTA to net book value) derived from his comparable-sales analysis to derive an indicated value for the property at issue. The EBIDTA multipliers for Mr. Sansoucy's chosen comparable sales ranged from 9.38 to 15.15. The mean and median multipliers were 11.78 and 11.68, respectively. Mr. Sansoucy chose 11.7 as an appropriate multiplier. This figure, multiplied by $30,000,000, the EBIDTA for Boston derived by Mr. Sansoucy, yielded an indicated value of $351,000,000 under the income-capitalization approach, which Mr. Sansoucy rounded to $350,000,000.

The Board found that Mr. Sansoucy's income-capitalization approach was generally sound, however, his estimate of excess operating and maintenance costs should be adjusted in a manner similar to the adjustment made to his RCNLD approach. More specifically, applying the appellant's excess expense figure to each mile of pipe in the Boston region would increase Mr. Sansoucy's $5,500,000 sum for excess operating costs to approximately $6,908,500. This sum is arrived at by applying the $1500 per mile expense shortfall associated with Mr. Sansoucy's methodology, as determined by the Board, to the 939 miles of pipe in Boston, to arrive at an additional expense of $1,408,500. The EBIDTA for Boston is in turn derived by subtracting the adjusted expense figure of $6,908,500 from the average EBIDTA of $35,700,000 employed by Mr. Sansoucy to arrive at an adjusted EBIDTA for Boston of $28,791,500. Applying Mr. Sansoucy's chosen EBIDTA multiplier of 11.7 yields an indicated value of $336,860,550.

The Board found that Mr. Sansoucy's income-capitalization analysis, although it required adjustment, was generally reliable. The Board also found that the income-capitalization approach, which is not typically used to estimate the value of special purpose property, was better suited as support for the value derived under the cost approach rather than as the primary valuation methodology.

**B. David J. Effron**

[24] EBIDTA for the years not excluded from the calculation ranged from $31,323,000 to $40,432,000; for 2000 and 2001, they were $14,816,000 and $24,556,000, respectively.

[25] For 2000, Mr. Sansoucy determined that the appellant had underreported total revenue in Boston, thereby altering the EBIDTA calculation. Mr. Sansoucy removed 2001 because of discrepancies relating to depreciation and amortization.

David J. Effron, a consultant with Berkshire Consulting Services, and a Certified Public Accountant licensed in New York, whom the Board qualified as an expert on utility accounting and the impact on rates of various utility transactions, testified on behalf of the assessors. Prior to his testimony in the present matters, Mr. Effron had presented testimony in more than 250 cases, primarily on behalf of state agencies before public utility commissions regarding a variety of public utility matters. Mr. Effron's testimony focused on three transactions involving rate-regulated gas utilities as follows:[26]

| Transaction/Date | Assets | Sale Price | Book[27] | Acquisition Adjustment | Price/ Net Book Value |
|---|---|---|---|---|---|
| **Southern Union Merger with Valley Resources 1/27/2000** | Valley Gas Company<br>Bristol Gas Company | $160,000,000 | $37,500,000<br>$35,400,000<br>$72,900,000 | $87,100,000 | 2.2 |
| **Southern Union Merger with Providence Energy 1/27/2000** | Providence Gas Company<br>N.Attleboro Gas Company[28]<br>Providence Energy Service Company<br>Providence Energy Fuel Company | $400,000,000 | $98,000,000<br>$140,700,000<br>$238,700,000 | $248,400,000 | 1.7 |
| **National Grid Acquisition of New England Gas 3/16/2006** | Providence Gas Company<br>Valley Gas Company<br>Bristol Gas Company<br>Small Appliance Company | $575,000,000 | $248,000,000<br>$77,000,000<br>$325,000,000 | $250,000,000 | 1.8 |

[26] The transactions involved primarily gas utility property located in Rhode Island and within the regulatory jurisdiction of the Rhode Island Public Utilities Commission ("RIPUC"). Mr. Effron testified that, with respect to regulated utilities, the regulatory framework in Rhode Island was similar to that in Massachusetts. He noted that the RIPUC would not allow an explicit recovery of an acquisition premium in rates, whereas in Massachusetts, no such outright prohibition exists.

[27] Where two numbers appear before a total in this column, the top number represents the assets' net book value, and the bottom, the amount of debt assumption.

[28] Removal of North Attleboro Gas Company assets from this chart results in reduction of the net book value and the debt acquisition figures for the transaction by $1,000,000 and $900,000, respectively. The North Attleboro Company, which operated in Massachusetts, was not acquired by National Grid in the 2006 transaction.

Mr. Effron noted that in the first two transactions, which were both completed on January 27, 2007, Southern Union paid acquisition premiums vastly in excess of the acquired entities' net book values. After these transactions were completed, Providence Energy and Valley Resources, which had been holding companies, ceased to exist and became an unincorporated division of Southern Union known as New England Gas. In 2006, National Grid, through its subsidiary Narragansett Electric Company, acquired New England Gas in a transaction also involving a substantial acquisition premium.[29]

With respect to the 2006 transaction, National Grid did not request inclusion of the acquisition premium in its rate base. Rather, the company proposed that its rate plan allow retention of a share of the established savings resulting from the transaction to allow recovery of the acquisition premium, a position Mr. Effron accepted during the proceedings relating to the matter.

During his testimony, Mr. Effron acknowledged that these transactions were so-called "enterprise" sales, involving all the entities' assets. Mr. Effron also stated that the 2006 transaction involved the sale of four unregulated subsidiaries. The evidence presented, however, did not suggest that the subsidiaries contributed to the sale price in a meaningful way, and the Board found that Mr. Effron credibly testified that the acquisition premiums were primarily associated with the purchase of regulated assets.

**C. Glenn C. Walker**

Glenn C. Walker, an employee of Sansoucy E&A, testified on behalf of the assessors regarding Mr. Sansoucy's Report, which he "co-authored." The Board qualified Mr. Walker, a Massachusetts Certified General Real Estate Appraiser, as an expert in utility valuation issues and as a general appraiser. Mr. Walker testified generally about his work reviewing, contributing to and ratifying the valuation methodologies employed in Mr. Sansoucy's appraisal report, as well as his development of the figures in Appendix H to the report, which involved development of capitalization rates used by Mr. Sansoucy. The Board found that Mr. Walker's testimony supported Mr. Sansoucy's testimony, but offered little substance beyond what had already been testified to by Mr. Sansoucy.

## V. Board's Additional Findings

The appellant's case, as largely represented in the testimony of Dr. Tierney and supporting witnesses, rests upon a direct and simple premise, namely that the fair market value of rate-regulated utility property is limited to its net book value. In support of this assertion, the appellant focuses on the distinction between sales of rate-regulated utility assets and so-called "enterprise sales," claiming that the seemingly ubiquitous acquisition premiums associated with recent transactions involving regulated utilities reflect payment for something other than regulated tangible assets. According to the appellant, such payment may be for other businesses, including unregulated businesses, which may comprise part of an acquisition or merger. It may also represent value inherent in the operating company, or intangibles including, *inter alia*, intellectual property, brand name, management acumen and customer base.

[29] Mr. Effron was involved with and submitted testimony regarding the 2006 acquisition of New England Gas as it related to the rate plan associated with the transaction.

The assessors assert that examination of transactions in the marketplace and evolution of regulatory policy and case law[30] inevitably lead to the conclusion that the fair market value of the personal and real property at issue in these appeals substantially exceeds its net book value. Through the testimony and appraisal report of Mr. Sansoucy, whom the Board found to be a credible witness, the assessors offered examples and analysis of several transactions involving regulated utilities, one of which was the acquisition of Eastern by Keyspan in 2000. Each of these transactions involved substantial acquisition premiums, which the assessors assert are primarily connected with the value of the utilities' tangible assets, and not simply elements of enterprise value. The Board found that the assessors' evidence supports this assertion. The Board also took note of the various regulatory filings and pre-filed testimony relating to DPU regulatory proceedings, which provided confirmation of the analysis of the assessors' experts.

With regard to the utility transactions examined during the hearing of these appeals, Mr. Sansoucy's analysis accounted for assets unrelated to rate-regulated property, including acquired entities unrelated to a utility's core business, as well as assets with identifiable value including "current assets" consisting of cash and cash equivalents, receivables, other accrued revenues, gas and other inventories, cash prepayments, and "other assets," which include items such as tax credits, pension assets and deferred debits. By this process, Mr. Sansoucy isolated the value of plant and equipment, all of which is rate-regulated utility property. While Mr. Sansoucy's analysis was not without error, such error did not undermine the assessors' central assertion that purchasers had paid substantially more than net book value for rate-regulated property.

The Board also viewed the assessors' evidence in light of the appellant's assertions regarding the primacy of net book value in valuation of rate-regulated assets and the fundamental distinction between a regulated utility's enterprise value and the value of its regulated assets.[31] In particular, the Board found that neither the appellant nor the balance of the evidence demonstrated that unrelated businesses, regulated or otherwise, accounted for all or even an appreciable portion of the acquisition premiums associated with the transactions examined by Mr. Sansoucy and Mr. Effron.

The Board also considered the potential value associated with the intangibles cited by Dr. Tierney as contributing to enterprise value, and how such value may have accounted for part or all of the acquisition premiums connected with the transactions considered by Mr. Sansoucy and Mr. Effron. In this regard, Dr. Tierney could not recall an instance of intellectual property owned by or appearing on the books of a public utility. Further, no intellectual property appears in the accounts of the appellant. Similarly "brand name" appears to hold no discernable value in the present case, as demonstrated by the change of name from Boston Gas to KeySpan on visible assets (including the LNG tank at Commercial Point), which change was contemporaneous with KeySpan's acquisition of Eastern. Had the brand name held value, it presumably would have remained in use. With regard to customer base, it is difficult to discern how a regulated utility's essentially captive customer base adds value to its enterprise, and the appellant has offered no evidence of such value. Finally, the appellant failed to specify, with

[30] Relevant case law and regulatory policy are discussed in the Opinion section of this Findings of Fact and Report.

[31] In weighing the evidence, the Board considered that the appellant did not present an appraisal or testimony from an individual qualified as an expert in appraising special purpose utility property.

reference to any entity examined in these appeals, including itself, how and to what extent the intangible components of an enterprise contributed to fair market value. In turn, the Board could not determine how and to what extent such value may have been distinct from the fair market value of the appellant's rate-regulated utility property, which is the subject of these appeals.

In sum, the Board found that the assessors demonstrated special circumstances arguing against net book value as the determinant of fair cash value in these appeals, and provided a method useful to derive the value of the personal property. In contrast, the appellant failed to offer persuasive evidence of the fair cash value of the property at issue, and in particular did not present expert testimony from a qualified appraiser of utility property.

Based on these subsidiary findings, the Board found and ruled that the appellant failed to meet its burden of demonstrating that the assessed value of the property at issue in these appeals exceeded its fair cash value for fiscal year 2004. The Board also found that the evidence presented provided a sufficient basis to estimate the fair cash value of the personal property. More specifically, as discussed, *supra,* the Board found that Mr. Sansoucy's RCNLD analysis, although not without error, was fundamentally sound. The Board made adjustment to this analysis to account for Mr. Sansoucy's error in estimating the diminution in value associated with Boston Gas' excess operating and maintenance expenses in Boston. Having made this adjustment, the Board arrived at an adjusted value of $336,848,000 under Mr. Sansoucy's cost approach. The Board next took into account the contemporaneous regulatory environment and case law, discussed *infra*, as well as the balance of the evidence, particularly that relating to several utility sales and their associated acquisition premiums, and determined that a valuation methodology affording equal weight to RCNLD and net book value yielded a reliable estimate of the fair cash value of the personal property.[32] The Board adopted this combined approach as a reasonable method to account for, *inter alia*, the residual value of the high proportion of fully depreciated pipe in Boston that had substantial remaining useful life, as well as demonstrated capability to increase earnings through PBR and expense reduction. In this manner, the Board found that the fair cash value of the personal property was $248,000,000 as of the relevant assessment date.

The Board was not able to determine the fair cash value of the real property at Commercial Point. As discussed, *supra*, neither Mr. Logue's nor Mr. Foster's appraisals, both of which the Board found were substantially flawed, provided a sufficient basis to establish a value different from what the assessors had derived for the parcel at Commercial Point. Absent a reliable estimate of the contributory value of the land component of the property at Commercial Point, valuation of the real property as a whole was not possible.

**VI. Summary**

[32] As previously noted, the adjusted value of the personal property under Mr. Sansoucy's RCNLD methodology was $336,848,000 and the net book value of the property was $159,157,892. When added together and divided by two to comport with the Board's 50%/50% weighting, these sums yield an indicated value of $248,002,946, which the Board rounded to $248,000,000.

On the basis of the evidence presented and reasonable inferences drawn therefrom, as well as pertinent statutes, regulations, case law and regulatory decisions, the Board found and ruled that: it had jurisdiction to hear and decide these appeals; through presentation of evidence and the testimony of its various witnesses, the appellant failed to demonstrate that the fair cash value of the property considered in these appeals was limited to its net book value, or to sustain its burden of establishing that the property's value was less than its assessed value for fiscal year 2004; the assessors presented substantial evidence demonstrating that a potential buyer would pay more than net book value for the personal property at issue in these appeals; Mr. Sansoucy's adjusted RCNLD valuation methodology and net book value, at a one-to-one ratio, provided an appropriate method to value the personal property; based on the combination of RCNLD and net book value, the fair cash value of the personal property as of January 1, 2003 was $248,000,000, which exceeded its assessed value of $223,200,000; and the evidence of record did not provide a sufficient basis to estimate the fair cash value of the Commercial Point property.

Accordingly, given the presumed validity of the assessments, the appellant's failure to meet its burden of proof, the Board's findings regarding the fair cash value of the personal property, and for the reasons discussed in the following Opinion, the Board decided these appeals for the appellee.

## OPINION

### I. Regulatory Environment and Burden

"All property, real and personal, situated within the commonwealth . . . shall be subject to taxation." G.L. c. 59, § 2. Assessors are required to assess real estate and personal property at their fair cash value. G.L. c. 59, § 38. The measure by which fair cash value is determined for taxation purposes 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. Board of Assessors of Taunton***, 393 Mass. 293, 295 (1984), (citing ***Boston Gas Co. v. Board of Assessors of Boston***, 334 Mass. 549, 566 (1956)). "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. Board of 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 tax. ***Schlaiker v. Board of Assessors of Great Barrington***, 365 Mass. 243, 245 (1974). The appellant must demonstrate that the assessed valuation of its property was improper. *See* ***Foxboro Associates v. Board of Assessors of Foxborough***, 385 Mass. 679, 691 (1982). An assessment is presumed valid until the taxpayer sustains its burden proving otherwise. ***Schlaiker***, 365 Mass. at 245. An owner of special-purpose property, which may present atypical valuation problems, retains the burden of proof. ***Foxboro Associates*** 385 Mass. at 691; ***Reliable Electronics Finishing Co. v. Board of Assessors of Canton***, 410 Mass. 381, 382 (1991).

Assessors also bear a burden with respect to the valuation of utility property, upon which a buyer's return has been limited by the seller's "rate base." *See* ***Boston Edison Company v. Board of Assessors of Watertown***, 387 Mass. 298, 305 (1982)("***Watertown***"). This burden is reflected in the requirement that an assessor present

"evidence showing that a potential buyer would pay more than the net book value" for utility property. ***Tennessee Gas Pipeline v. Board of Assessors of Agawam***, 428 Mass. 261, 263 (1998). Absent provision of such evidence, "net book value is the proper valuation method." ***Id***. The Court in ***Montaup Electric*** stated that a "taxpayer, which is a regulated utility, should not be required to establish the lack of special circumstances . . . until there is some evidence offered by the assessors to show that, because of such circumstances, the relevance of [net book value] is put in question." ***Montaup Electric***, 390 Mass. at 855. Once the assessors provide "'some evidence . . . to show that, because of such circumstances, the [net book value] is put in question'" the taxpayer must show "the absence of such circumstances." ***Tennessee Gas Pipeline***, 428 Mass. at 264, (citing ***Montaup Electric***, 390 Mass. at 855.)

The basis of these parallel burdens is the so-called "carryover-rate-base" rule, which bases rates that a purchasing utility may charge on the net book value of the property of the seller. The Federal Energy Regulatory Commission ("FERC") described the rule as "adopted in response to widespread abuses in the electric utility industry that arose through the practice of selling properties at large profits to other public utilities followed by the acquiring utility's inflating plant accounts (and rate base) by the premium paid. The result of this practice was that ratepayers paid higher rates for electric service but received no increase in benefits." ***In Re: Minnesota Power & Light Co.,*** 43 F.E.R.C. ¶ 61,104 (1988). The carryover-rate-base rule weighed heavily in ***Watertown,*** in which the Court considered an appeal by Boston Edison Company related to its rate-regulated distribution property. More specifically, the Court highlighted the "particular significance" of "the apparently longstanding position of the [DPU] that, if a regulated utility sells an asset to another regulated, public utility, the basis for that asset in the hands of the transferee remains the same as that of the transferor for rate-making purposes." ***Watertown***, 387 Mass. at 301. Thus, the transferee "would be allowed a return on the transferred property based on that property's net book, or rate base value, and not on any higher purchase price it might have paid." ***Id.*** Notwithstanding these statements, the Court in ***Watertown*** declined to set an upper limit on value tied to an entity's rate base. While it placed significant weight on the net book cost of utility property in determining the value of rate-regulated utility property, the Court concluded that "net book cost of [] property does not set an upper limit on the property's value for local taxation purposes," and noted that several other state courts had rejected the notion that the fair cash value of a regulated utility's property is limited to its net book value. ***Id.*** at 302-303.

As part of its analysis, the Court offered specific considerations that would warrant departure from use of net book cost to value utility property, including: 1) when the rate of return on an investment in the property may or is expected to exceed the current rate; 2) when the rate of return may exceed the market rate of return for an investment of similar risk; 3) when there is a possibility that the law or regulatory decisions might change to make an investment in the property more attractive; 4) when there is potential for utility growth; and 5) when there is a possibility of finding an unregulated buyer. ***Id.*** at 305-306.

In the years since ***Watertown***, the Supreme Judicial Court and this Board have considered several cases involving valuation of rate-regulated utility property and each, in some way, has illustrated the development of Massachusetts regulatory policy and the trend away from a strict carryover-rate-base valuation model.

In ***Boston Edison Company v. Assessors of Boston***, 402 Mass. 1 (1988)("***Boston Edison***"), the Court reviewed the Board's decision to estimate the fair cash value of Boston Edison's generating plant in Boston by affording equal weight to the net book cost and the depreciated reproduction cost methodologies. In ***Boston Edison***, the appellant argued that "net book value, or something not much above it, sets the fair market value of the real estate" and the assessors claimed that "net book cost ha[d] no relevance on the record." ***Id.*** at 12-13. Affirming the Board's approach to valuation, the Court noted that "the [B]oard not unreasonably saw in the decision of the Department of Public Utilities that we upheld in *Attorney Gen.* v. *Department of Pub. Utils.*, 390 Mass. 208 (1983), the possibility that the department might allow adjustments in a purchaser's rate base to reflect a prudent purchase price above the plant's net book cost." ***Id***. at 15. Indeed, the Court stated "[w]e are surprised at the [B]oard's comment that this court has an 'apparent commitment to the carry-over rate-base limitation.' We have no such commitment." ***Id.*** at 15 (additional citation omitted).

This Board, in ***Boston Edison Company v. Board of Assessors of the City of Everett,*** Mass. ATB Findings of Fact and Reports, 1996-759, ("***Boston Edison/Everett"***), considered valuation of utility property subject to rate regulation, in large part consisting of an electrical generating station in Everett, as well as "the regulatory environment for and potential purchasers of electric utilities." ***Id.*** at 813. As part of its analysis, the Board traced federal regulatory precedent relating to the carryover-rate-base policy in a detailed discussion of several FERC and Federal Power Commission (FERC's predecessor) cases. In particular, the Board cited FERC decisions involving "more than a half century of exceptions to the carry-over rate-base rule" and movement "in the early to mid-1980s . . . to a market based ratemaking policy, while still maintaining its practice of granting exceptions, on a case by case basis, to the carry-over rule." ***Id***. at 827. Notably, the Board also cited FERC's observation that "Massachusetts was leading the way to regulatory reform with its de-emphasis on the cost-of-service approach to ratemaking," stating that "FERC regarded Maine and Massachusetts as the 'leaders in developing the concepts of competitive procurement.'" ***Id***. at 833, (citing ***In re: Enron Power Enterprise Corp.,*** 52 F.E.R.C. ¶ 61,193 at 61,710 (1990)).

In its discussion of Massachusetts regulatory policy, the Board noted that in April of 1982, when faced with the question of how to treat costs associated with the Pilgrim II nuclear power plant, which had never been completed, the DPU chose to examine its cost-based ratemaking policy and its prior adherence to a "used and useful" standard under which a utility could only collect costs associated with a new electric generating facility after it was operative. The DPU, seeking to avoid what it characterized as a "perverse incentive" to complete plant construction regardless of cost, looked to other jurisdictions and noted that "'what [was] becoming increasingly more uniform nationwide [was] the treatment represented by the most recent decision of [FERC]. That treatment allow[ed] recovery of all *prudently incurred costs* in connection with the canceled plant.'" ***Id.*** at 835, (citing ***Re Boston Edison Co., D.P.U. 906***, 46 P.U.R. 4th 431, 436 (1982))("***Pilgrim***")(emphasis in original). Thus, the DPU allowed Boston Edison to recover costs associated with the construction of Pilgrim II it deemed "prudently incurred," even though the plant had not been completed and the assets in question did not satisfy the established "used and useful" standard.

The Board also looked to several DPU decisions including a series docketed as ***D.P.U. 86-36***. The Board noted that in the ***D.P.U. 86-36*** series, DPU favored a "pre-approval" approach over the "used and useful" standard, concluding that:

> The cost accounting principles used to establish rates for utility services under cost of service regulation, however, generally fail to incorporate successfully the underlying forces of efficiency inherent in competitive markets. Strict adherence to cost of service principles will result in prices which reflect whatever level of inefficiency is inherent in the firm's accounting costs.

***D.P.U. 86-36-1*** at 10.

The Board observed that the ***D.P.U. 86-36*** series focused primarily on "construction and major generation plant investments," but concluded that the series "still provided an insight to a potential purchaser on how the Massachusetts DPU might consider the question of cost recovery when an existing or substantial portion of an existing generating station is sold from one [regulated utility] to another." ***Boston Edison/Everett,*** Mass. ATB Findings of Fact and Reports, 1996-759 at 837. In this regard, the Board cited "[a]n affidavit from former Massachusetts DPU Commissioner Susan F. Tierney stat[ing] that any such question "would have been considered on a case-by-case basis." ***Id.*** at 837-38.

Taking into account DPU's decision in ***Pilgrim,*** the Supreme Judicial Court's decision in ***Boston Edison,*** and various DPU decisions**,** and having noted a marked departure from strict adherence to previously established cost-based rate determinations, the Board adopted a valuation methodology in ***Boston Edison/Everett*** based on a two-to-one ratio of depreciated replacement cost new to net book cost.

Soon after ***Boston Edison/Everett***, the Supreme Judicial Court had the opportunity to review DPU's valuation of rate-regulated utility property in ***Stow Municipal Electric Department v. Department of Public Utilities,*** 426 Mass. 341 (1998). In ***Stow,*** the Court considered the DPU's valuation of Stow's electricity distribution system, which the town had voted to "municipalize" and had previously been owned by the Town of Hudson. Stow, the buyer, asserted that original cost less depreciation (net book cost) was the sole acceptable method to value the system under applicable law and the Court's precedent, while Hudson argued that depreciated reproduction cost was the appropriate measure of the property's value. Stow petitioned the DPU for a determination of purchase price and damages, if any.

The DPU, under G.L. c. 164, § 43, was charged with "[setting] a purchase price that represent[ed] a 'fair value'". ***Id.*** at 345. Applying this standard, the DPU chose to weight equally the RCNLD and original cost less depreciation valuation methodologies. The Court affirmed the DPU's approach stating:

> The department's 50% weighting of reproduction cost new less depreciation was well within its discretion. First, the statute permits the department to consider "any other element which may enter into a determination of a fair value" in addition to the original cost. Reproduction cost new less depreciation, the current cost (less depreciation) of the materials and labor to reproduce the system, is such an

> element. We have said that reproduction cost is "probative of fair cash value" of utility property. (citations omitted).

***Id.*** at 345-46

The Court went on to state that "in other cases involving valuation of utility property, [it had] approved valuations combining original cost less depreciation and reproduction cost new less depreciation." ***Id.*** at 346. Moreover, the Court explicitly rejected Stow's argument that the DPU, in its deliberations, had "impermissibly speculated by discussing possible regulatory change," stating that:

> The department specifically considered its carry-over rate base policy, which it has recently changed from a mandatory rule always limiting a buyer of utility property to the seller's rate base to a case-by-case determination. We certainly cannot fault the department for considering the effect of this change and concluding that because the carry-over rate base rule might not apply to Stow, Stow should pay more than original cost less depreciation.

***Id***. at 347.

In sum, the Court explicitly affirmed the DPU's valuation of regulated utility property, which was well above net book value. This value was premised upon a distinct shift by the DPU from its prior regulatory policy "limiting a buyer of utility property to the seller's rate base to a case-by-case determination." ***Id.*** Further, the Court affirmed the probative value of the RCNLD approach toward valuation of utility property. ***Id.*** at 345-46.

In a 1999 case, holding companies that owned Boston Edison Company and several other companies sought rate approval in anticipation of a merger to create Nstar. *See* ***Joint Petition of Boston Edison Company et al, D.T.E. 99-19.*** As part of the petition, the entities involved requested recovery of an acquisition premium through customer rates, and made the merger contingent upon allowance of the request. As part of its decision allowing the recovery, the DPU stated its policy regarding recovery of acquisition premiums:

> The Department has stated that it will consider individual merger or acquisition proposals that seek recovery of an acquisition premium as well as the recovery level of such premiums, on a case by case basis (citations omitted). Under the Department's G.L. c. 164, § 96 public interest standard, a company proposing a merger or acquisition must demonstrate that the costs of the transaction are accompanied by benefits that warrant their allowance. Thus, an allowance or disallowance of an acquisition premium would be just one part of the cost/benefit analysis under the G.L. c. 164, § 96 standard.

The Supreme Judicial Court considered the appeal of the DPU's decision. *See* ***Attorney General v. Department of Telecommunications and Energy, Boston Edison Company, et al***, 438 Mass. 256 (2002)("***Nstar***"). The Court discussed the DPU's policy relating to merger–related costs (of which the acquisition premium in ***Nstar*** was part) and stated "[t]hat policy, simply put, favors mergers and acquisitions of utility companies within its jurisdiction, and permits recovery of merger-related costs, where consolidation

and recovery of costs will serve the "public interest," and is set forth in D.P.U. 93-167-A (1994) (*Mergers & Acquisitions*)." ***Id.*** at 261-62. Having laid out elements of the policy, the Court noted that the application of the "public interest" standard involves an "inquiry that is case specific and involves an analysis of many factors." ***Id.,*** (citing ***D.P.U. 93-167-A*** at 7-9). The court went on to address the DPU's reversal of its policy regarding recovery of acquisition premiums, stating:

> With respect to the recovery of acquisition premiums, the department recognized that acquisition premiums "represent a cost or disadvantage to the ratepaying public. The theoretical basis, however, for allowing a premium is that a transaction otherwise in the public interest would not occur, absent premium allowance, and further that the costs or disadvantages represented by the premium are warranted by the benefits thereby captured." The department therefore reversed its previous policy of per se disallowance of recovering an acquisition premium, stating that its recovery "will henceforth be judged on a case-by-case basis," and pursuant to the § 96 "public interest" standard. (citations omitted)

The cited cases reflect not only ratification by the Supreme Judicial Court and this Board of valuations for regulated utility property substantially in excess of net book value, but a marked change in the regulatory environment in Massachusetts as it impacts valuation of such property. In ***Watertown***, the Court reasonably asked why a purchaser of rate-regulated property would be willing to pay more than the property's net book value, given that the purchaser's return, under existing DPU policy, would be "based on that property's net book, or rate base value, and not on any higher purchase price it might have paid." ***Watertown***, 387 Mass. at 301. Refusing to rule out the possibility that a higher purchase price might be paid, the Court articulated circumstances under which such a price might be expected. These included when there is a possibility that the law or regulatory decisions might change to make an investment in the property more attractive. ***Id***. at 305. Subsequent case law and DPU decisions reflect not only the possibility of such a change, but its realization.

In ***Boston Edison***, the Court upheld valuation of regulated utility property giving equal weight to net book cost and depreciated reproduction cost, and affirmed the Board's view that the DPU "might allow adjustments in a purchaser's rate base to reflect a prudent purchase price above the plant's net book cost." ***Boston Edison***, 402 Mass. at 15. The Board in ***Boston Edison/Everett*** highlighted a shift in DPU policy relating to the standard for recovery of investment in assets to allow recovery of those investments that are "prudently incurred," and observed that the ***D.P.U. 86-36*** series shed light on how the DPU "might consider the question of cost recovery when an existing or substantial portion of an existing generating station is sold from one [regulated utility] to another," citing an affidavit from Dr. Tierney stating that the question "would have been considered on a case-by-case basis." ***Boston Edison/Everett,*** Mass. ATB Findings of Fact and Reports, 1996-759 at 837-38. In ***Stow,*** the Court upheld the DPU's determination that RCNLD weighted equally with net book value met the "fair value" standard to be applied to Stow's electricity distribution system under G.L. c. 164, § 43, and affirmed the DPU's shift from its prior policy "limiting a buyer of utility property to the seller's rate base to a case-by-case determination." ***Stow,*** 426 Mass. at 347. Finally, in ***Nstar,*** the Court

affirmed the DPU's decision to allow recovery of an acquisition premium in rates, reflecting DPU's reversal of another longstanding policy.

In sharp contrast to utilities operating at the time of ***Watertown***, a prospective purchaser of rate-regulated utility property as of the assessment date relevant to these appeals could expect case-by-case treatment from the DPU with respect to cost recovery in a purchase transaction, including a request for recovery of an acquisition premium. Moreover, the DPU's adoption of performance-based rates, or PBR, constituted a change in regulatory policy that in many instances will affect the price paid by a purchaser for rate-regulated utility property. As discussed, *supra*, PBR contemplates deviation from the return provided by the cost-based rate setting mechanism that strictly ties rates relating to a utility's regulated assets to the net book value of those assets. Under PBR, for years after the first year's "cast-off rate," which is based on the traditional cost-based rate-of-return formula, the DPU sets a fixed upward inflation adjustment to the cast-off rate and a downward productivity adjustment intended to encourage utilities to operate efficiently. Thus, a utility that operates more efficiently than the productivity offset anticipates can achieve a level of profitability not allowed under the traditional cost-based formula. This possibility can affect whether a purchaser would pay more for regulated utility property than its net book value.

The Board found and ruled that the cited cases and regulatory policy, collectively, negate any assertion that net book value is the sole determinant of a regulated utility's fair market value and raise a significant question regarding the weight it should be afforded in valuation matters. Moreover, the Board found that the unique nature of gas utility pipeline, the useful life of which vastly exceeds its depreciable life, gives the property a residual value well in excess of net book value, which is appropriately accounted for through use of a depreciation floor. Such a floor reflects the value associated not only with currently valid permits and licenses establishing rights of way, but the continued utility of and contribution to service provided by fully depreciated property. *See, e.g.,* ***In Re: MCI Consolidated Central Valuation Appeals: Boston and Newton***, Mass. ATB Findings of Fact and Reports, 2008-255, 317-18, *affd. in relevant part,* 454 Mass. 635 (2009)("***MCI***") (finding that a 30% to the good depreciation floor for telephone property appropriately reflected, *inter alia*, the property's "continuing vitality and maintenance . . . and consideration of the considerable original investment in associated direct and indirect costs"). Indeed, approximately 80% of the cost new value of the pipes at issue in this appeal were installed prior to 1942, evidence of how depreciation for rate purposes distracts from the actual value of the property for *ad valorem* tax purposes.

The Board also found that sales activity in the marketplace indicates that net book value is no longer a reliable indicator of a regulated utility's fair market value. As previously noted, the assessors, through the testimony and appraisal report of Mr. Sansoucy, presented several transactions involving regulated utilities, one of which was the acquisition of Eastern by KeySpan in 2000. Each transaction involved a substantial acquisition premium, and was analyzed by Mr. Sansoucy to account for assets unrelated to rate-regulated utility property, including assets with identifiable value such as "current assets" and "other assets." In this manner, Mr. Sansoucy isolated the value of assets that he concluded were comprised almost exclusively of plant and equipment, which is rate-regulated property. The Board found that Mr. Sansoucy's analysis supported the

conclusion that purchasers had paid substantially more than net book value for rate-regulated utility property.

The Board also considered whether, among the transactions presented, the evidence of record established that enterprise values and the value of regulated assets were sufficiently distinct so as to account for the acquisition premiums associated with the transactions. Taking into account elements of a utility company, including various intangibles, which Dr. Tierney testified are sources of value beyond rate-regulated utility assets, the Board found that the record before it did not reveal a distinction between enterprise value and the value of regulated assets that would account for an appreciable portion of the premiums. In particular, the Board found that the record did not contain persuasive evidence of specific value associated with intellectual property, "brand name," customer base, or any other intangible component of an enterprise. Absent such evidence, the Board could not determine how and to what extent value attributable to any of these assets may have been distinct from the fair market value of the appellant's rate-regulated utility property.

Based on the foregoing, the Board found and ruled that the evidence of record, particularly that relating to the marketplace sales of regulated utilities presented by the assessors, constitutes "evidence showing that a potential buyer would pay more than [] net book value" for regulated utility property. ***Tennessee Gas Pipeline,*** 428 Mass. at 263. This evidence also puts into question the import of net book value. *See* ***Montaup Electric***, 390 Mass. at 847. In light of these conclusions, the burden rests squarely with the appellant to make out its right as a matter of law to an abatement of tax. *See* ***Schlaiker*** 365 Mass. at 245. Moreover, given the evidence presented by the assessors, the appellant bears the burden of showing the absence of circumstances that indicate the property at issue would sell for more than net book value. *See* ***Montaup Electric***, 390 Mass. at 855.

The appellant's case in chief, which focused on the testimony of Dr. Tierney and supporting witnesses, hinges upon the premise that the fair market value of rate-regulated utility property is limited to its net book value. According to the appellant, any sale of a utility involving more than only rate-regulated property constitutes the sale of an enterprise, the price of which may exceed the value of the rate-regulated property involved. This difference, in the appellant's view, is necessarily associated with contribution to value from elements of the enterprise other than its rate-regulated property. Thus, any acquisition premium, regardless of its magnitude, is paid for value unrelated to rate-regulated assets.

As the discussion in these findings makes clear, the Board was not persuaded either by the appellant's assertions regarding net book value or the evidence presented to support them. The Board found that the appellant relied primarily on theory, and failed to establish that the various elements of an enterprise it claimed contribute to and comprise an acquisition premium did so with respect to several transactions examined in great detail during the course of these appeals. On this record, the Board cannot find that the appellant's singular reliance on net book value as the determinant of fair cash value is justified. As the appellant offered no other estimate of the fair cash value of the property at issue in these appeals (with the exception of Mr. Logue's flawed hypothetical valuation of the Commercial Point parcel) the Board found and ruled that the appellant failed to sustain its burden of demonstrating that assessed value of the real and personal property considered in these appeals exceeded its fair cash value for fiscal year 2004.

For the reasons stated previously, the Board also found that it was not able to arrive at an estimate of value for the real property at Commercial Point. More specifically, neither Mr. Logue nor Mr. Foster, the real estate valuation experts presented by the parties, provided a sufficient basis to value the Commercial Point parcel. Absent such information, the Board found that the record did not provide a basis to determine the value of the property as whole. The Board found, however, that the evidence of record was sufficient to estimate the fair cash value of the appellant's personal property in Boston as of January 1, 2003.

**II. Valuation of Personal Property**

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 reproduction. ***Correia v. New Bedford Redevelopment Authority***, 375 Mass. 360, 362 (1978). "The [B]oard is not required to adopt any particular method of valuation." ***Pepsi-Cola Bottling Co. v. Assessors of Boston,*** 397 Mass. 447, 449 (1986). Regardless of which method is employed to determine fair cash value, the Board must determine the highest price a hypothetical willing buyer would pay to a hypothetical willing seller in an assumed free and open market. *See* ***Irving Saunders Trust v. Board of Assessors of Boston,*** 26 Mass. App. Ct. 838 (1989).

Given that all of the personal property at issue is subject to rate regulation, the Board is particularly mindful of the longstanding principle that "[w]hen assessing the value of property owned by a utility, the [B]oard must consider the impact of government regulations." ***Watertown,*** 387 Mass. at 304. The Court in ***Watertown*** also noted, however, that the value of property for rate-making purposes "may have little to do with what the property would sell for on a free and open market. The original cost of property, reduced by a fixed annual rate of depreciation, hardly is a guaranteed measure of the fair market value of that property." ***Id.*** at 303-304. Aware of these principles, the Court in ***Montaup Electric*** acknowledged the value of market sales and capitalized net earnings to value property, and stated that "[i]n valuing special purpose property, the current replacement cost, or reproduction cost of the property less depreciation (DRC), may also prove probative of fair cash value." ***Montaup Electric,*** 390 Mass. at 850; *see also* ***Stow,*** 426 Mass. at 345 (reiterating its prior statement that "reproduction cost is 'probative of fair cash value' of utility property"(additional citation omitted)). Affirming that the DPU was within its discretion in giving equal weight to the RCNLD and original cost less depreciation valuation approaches to value Stow's electricity distribution system, the Court stated that "[a]s a general principle, the [RCNLD] approach . . . constitutes an appropriate method of valuing special purpose property." ***Id***. (citing ***Watertown*** 387 Mass. at 304). Moreover, this Board in ***Boston Edison/Everett*** eschewed the comparable-sales and income approaches in favor of the RCNLD approach, which it concluded was a more reliable method to value regulated utility property. For Massachusetts cases in which RCNLD has been used to value utility property, the varying weight given to RCNLD and net book value has depended upon the facts and circumstances of the particular case. *See generally* ***Boston Edison,*** 402 Mass. 1; ***Stow,*** 426 Mass. 341***; Boston Edison/Everett*** Mass. ATB Findings of Fact and Reports, 1996-759.

Consistent with this precedent, and under the facts present in the current appeal, the Board found that the RCNLD valuation methodology weighted equally with net book

value was the most appropriate approach to value the appellant's personal property in Boston. As discussed at length in the findings of fact, *supra*, the Board found Mr. Sansoucy's RCNLD analysis fundamentally sound. In particular, the Board found the following with regard to Mr. Sansoucy's analysis: cost-index trending was an appropriate means to determine the cost new of the property;[33] the HWI for the North Atlantic Region and historical cost records provided by Boston Gas yielded reliable figures for the cost new of the property; the allowance for excess cost of construction was reliable; Mr. Sansoucy appropriately sought to account for physical depreciation, and functional and economic obsolescence; the allowance for physical depreciation, and in particular Mr. Sansoucy's choice of a depreciation floor of 20% "to the good" were reasonable; and Mr. Sansoucy's estimation of economic obsolescence was reasonable.

Having found Mr. Sansoucy's RCNLD analysis sound, and after making adjustment for Mr. Sansoucy's error relating to estimation of excess operating expenses, which comprised a portion of his allowance for functional obsolescence, the Board found an adjusted value of $336,848,000 under the cost approach. The Board next took into account the contemporaneous regulatory environment and case law, which reflect significant change since ***Watertown***, as well as the balance of the evidence, particularly that relating to several utility sales and their associated acquisition premiums, and determined that a valuation methodology affording equal weight to RCNLD and net book value yielded a reliable estimate of the fair cash value of the personal property. The Board also found that equal weighting of RCNLD and net book value was consistent with the combined valuation approaches ratified by the Supreme Judicial Court and the Board in ***Boston Edison***, ***Stow*** and ***Boston Edison/Everett***. In this manner, the Board found that the fair cash value of the personal property was $248,000,000 as of January 1, 2003.

In reaching its opinion of fair cash value in these appeals, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation that an expert witness suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. ***Foxboro Associates,*** 385 Mass. at 683; ***New Boston Garden Corp. v. Assessors of Boston,*** 383 Mass. 456, 473 (1981); ***Assessors of Lynnfield v. New England Oyster House, Inc.,*** 362 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). Applying these principles, the Board selected the most probative evidence in the record regarding valuation of the appellant's personal property in Boston for fiscal year 2004. In this regard, the Board found that a one-to-one ratio of the adjusted RCNLD methodology presented by Mr. Sansoucy and net book value provided the most reliable basis for estimating the personal property's fair cash value.

**III. Conclusion**

Having considered all of the evidence, the Board found and ruled that the appellant failed to sustain its burden of demonstrating that the assessed value of the property at issue in these appeals was greater than its fair cash value. The Board also

[33] The Supreme Judicial Court affirmed use of cost-index trending in the context of a depreciated reproduction cost analysis in ***MCI. MCI,*** 454 Mass. at 639.

found and ruled that the fair cash value of the personal property at issue was $248,000,000 as of January 1, 2003, which exceeded the assessed value of $223,200,000.

On this basis, the Board decided these appeals for the appellee.

**THE APPELLATE TAX BOARD**

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

**A true copy,**

**Attest: _____**
**Clerk of the Board**

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**In Re VERIZON NEW ENGLAND, INC.**
**CONSOLIDATED CENTRAL VALUATION**
**APPEALS: BOSTON AND NEWTON**[1]

Docket No. C265966[2,3]

Promulgated:
October 1, 2009

ATB 2009-851

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 valuations for fiscal years 2003 through 2009 determined and certified by the Commissioner of Revenue ("Commissioner"), pursuant to G.L. c. 59, § 39, for the "machinery, poles, wires and underground conduits, wires and pipes" ("§ 39 property") of Verizon New England Inc. ("Verizon"), located in the cities of Newton and Boston.

Commissioner Scharaffa heard these appeals. He was joined by Chairman Hammond and Commissioners Egan, Rose, and Mulhern in the decisions for the appellant Board of Assessors of the City of Newton ("Newton Assessors") in the fiscal year 2003 through 2008 appeals brought by the Newton Assessors; in the decisions for the appellant Board of Assessors for the City of Boston ("Boston Assessors") in the fiscal year 2005 through 2008 appeals brought by the Boston Assessors; in the decisions for the appellees Verizon and Commissioner in the fiscal year 2009 appeals brought by the Newton Assessors and the Boston Assessors; and in the decisions for the appellees Commissioner and either the Newton Assessors or the Boston Assessors in the fiscal year 2005 through 2009 appeals brought by Verizon against the Commissioner and either the Newton Assessors or the Boston Assessors.

These findings of fact and report are made pursuant to the Appellate Tax Board ("Board")'s own motion and later requests by the Commissioner, Verizon, and the Newton Assessors under G.L. c. 58A, § 13 and 831 CMR 1.32.

*William A. Hazel*, Esq. and *James F. Ring*, Esq. for the appellant and appellee Verizon.

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[1] There are 970 individual appeals associated with these consolidated appeals for which the Boston and Newton appeals were selected as lead cases.

[2] The Board originally used docket number C273560 from an appeal brought by the Assessors of Agawam as the lead docket number for these consolidated appeals. To better reflect that Newton and Boston are the lead communities for purposes of trial and valuation, with the other consolidated appeals being held in abeyance, the Board has now substituted the earliest docket number from the Assessors of Newton and Assessors of Boston appeals.

[3] The docket numbers of all the individual appeals relating to Newton and Boston are listed in Appendix A by fiscal year, appellant, and appellee.

*Anthony M. Ambriano*, Esq. for the appellant and appellee Boston Assessors.

*Richard G. Chmielinski*, Esq. for the appellant and appellee Newton Assessors.

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

## FINDINGS OF FACT AND REPORT

### Introduction

The Boston Assessors, the Newton Assessors (collectively, "Assessors"), the boards of assessors of various other municipalities, and Verizon each appealed from certain central valuations of § 39 property certified by the Commissioner for fiscal years 2003 through 2009, pursuant to G.L. c. 59, § 39. Verizon and the Boston Assessors appealed the Commissioner's certified central valuations for fiscal years 2005 through 2009. The Newton Assessors appealed the Commissioner's certified central valuations for fiscal years 2003 through 2009. The Framingham Board of Assessors appealed the Commissioner's certified central valuation for fiscal year 2003, and the board of assessors of various other municipalities appealed the Commissioner's certified central valuations for fiscal years 2005 through 2009.

On May 30, 2007, the Board issued two orders, which consolidated and bifurcated for trial and decision all of the § 39 appeals filed by Verizon, the Boston Assessors, the Newton Assessors, and the boards of assessors of various other municipalities, for fiscal years 2003 through 2007 ("May 30th Orders") into: (1) an "Initial Phase," to deal with all issues other than valuation, including but not limited to whether poles and wires laid over public ways are subject to central valuation and tax under G.L. c. 59, §§ 18 and 39; and (2) a "Valuation Phase." On July 10, 2007, the Board amended the May 30th Orders to include the fiscal year 2008 § 39 appeals of Verizon, the Newton Assessors, the Boston Assessors, and the boards of assessors of various other municipalities. On September 7, 2007, the May 30th Orders were further amended to denote that the Initial Phase was to include all issues other than valuation, while reserving the following specific issues for the Valuation Phase (as numbered in the Board's September 7th Order): Issue 2 – whether Verizon's late return filings following the Commissioner's grants of extensions defeat the Board's jurisdiction for fiscal years 2006 and 2007; Issue 3 – whether construction work in progress ("CWIP") is subject to tax; Issue 4 – whether embedded warranties are to be included in original costs; and Issue 5 – whether so-called "dark fiber" is subject to tax.[4]

As for Issue 2, the Board previously found and ruled in another consolidated § 39 telephone company central valuation appeal for fiscal years 2004, 2005, and 2006 entitled ***In Re: MCI Consolidated Central Valuation Appeals: Boston and Newton***, Mass. ATB Findings of Fact and Reports 2008-255 ("***MCI***"), *affirmed in part and reversed in part, sub nom* ***In the Matter of the Valuation of MCI Worldcom Network Services, Inc.***, 454 Mass. 635 (2009), that under certain circumstances the Commissioner may grant extensions of time for telephone companies to file their returns under G.L. c. 59, § 41. The Board examines *infra* whether similar such circumstances exist in these consolidated appeals. As for Issue 3, the Board previously found and ruled in ***MCI*** that CWIP is

[4] The parties generally consider "dark fiber" to be cables that are part of Verizon's telecommunications plant, but, for whatever reason, are not "lit," that is not in service.

subject to tax. ***Id.*** at 2008-373-74. As for Issue 4, Verizon no longer contests the inclusion of embedded warranties in original costs. And lastly regarding Issue 5, the Board also found and ruled in ***MCI*** that dark fiber is subject to tax. ***Id.*** at 314-15, 332, 373. The Board reaffirms and adopts here its rulings in ***MCI*** as they relate to Issues 2, 3, and 5 in these consolidated appeals. With respect to Issue 3, however, Verizon has raised several new arguments distinct from those proffered in ***MCI*** contending that CWIP is not subject to tax as § 39 property. Accordingly, the Board examined the new arguments raised by Verizon in these consolidated appeals with respect to Issue 3, but does not further directly address Issues 3, 4, and 5 in this Findings of Fact and Report.

The Initial Phase, in which the Boston Assessors and the Newton Assessors were the only boards of assessors that actively participated, was submitted to the Board on a Statement of Agreed Facts and attached exhibits. On March 3, 2008, the Board issued an Order in which it found and ruled 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;[5] 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;[6] 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."

On April 1, 2008, the Board ordered the fiscal year 2009 § 39 appeals of Verizon, the Assessors, and the boards of assessors of various other municipalities included in the Valuation Phase of the proceedings.[7] The Boston Assessors and the Newton Assessors

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[5] On June 29, 2009, the Legislature amended G.L. c. 59, § 18, Fifth and created another source of authority for specifically taxing poles and the wires thereon erected upon public ways by adding the following two sentences:

> Poles, underground conduits, wires and pipes of telecommunications companies laid in or erected upon public or private ways and property shall be assessed to their owners in the cities or towns where they are laid or erected. For purposes of this clause, telecommunications companies shall include cable television, internet service, telephone service, data service and any other telecommunications service providers.

2009 Mass. H.B. 4129, Outside Section 25.

[6] The Board likewise found and ruled in ***MCI*** that it may not increase the central valuations determined and certified by the Commissioner under § 39 in municipalities where the boards of assessors had not properly appealed them. ***MCI*** at 2008-355. The SJC affirmed this ruling in ***In the Matter of the Valuation of MCI Worldcom Network Services, Inc.***, 454 Mass. at 646-48.

[7] In consideration of the parties' and the Board's intention to consolidate all Verizon-related § 39 appeals for all fiscal years, as demonstrated by the parties' previous agreements and Board orders, as well as the Board's Order of April 1, 2008 consolidating all Verizon-related fiscal year 2009 § 39 appeals in the Valuation Phase of these proceedings, the Board now also joins all Verizon-related fiscal year 2009 § 39 appeals into the Initial Phase of the proceedings.

were the only boards of assessors that actively participated in the Valuation Phase. As a result, the Board issued final decisions in these consolidated appeals pertaining to Verizon's § 39 property located in Newton and Boston only. Accordingly, this Findings of Fact and Report likewise pertains to Verizon's § 39 property located in Newton and Boston only.

At the start of the hearing for the Valuation Phase, the Newton Assessors, along with Verizon and the Commissioner, entered into and filed with the Board a "Stipulation of Agreed Values" concerning Verizon's § 39 property situated in Newton for fiscal years 2003 and 2004, which the Board adopts. The agreed values are $48,017,000, a $13,134,800 increase over the $34,882,200 certified value for fiscal year 2003 and $47,151,100, a $13,761,200 increase over the $33,389,900 certified value for fiscal year 2004. Verizon reserved its right to appeal the legal issue of whether poles and wires over public ways are taxable. The Board finds that the agreed values are substantially higher than the Commissioner's corresponding certified values. A summary of the Board's valuation findings regarding the § 39 property located in Newton for fiscal years 2003 and 2004 are summarized in the following table.

| Fiscal Year | Certified Value ($) | Agreed Value ($) | Difference ($) | Difference (%) |
|---|---|---|---|---|
| **2003** | 34,882,200 | 48,017,000 | 13,134,800 | 37.7 |
| **2004** | 33,389,900 | 47,151,100 | 13,761,200 | 41.2 |

Accordingly, this Findings of Fact and Report will address: (1) the Board's jurisdiction over these consolidated appeals; (2) the Initial Phase associated with these consolidated appeals filed with the Board for fiscal years 2003 through 2009[8] by Verizon against the Commissioner, the Assessors and the boards of assessors of various other municipalities, and by the Assessors and the boards of assessors of various other municipalities against Verizon and the Commissioner; and (3) the Valuation Phase associated with these consolidated appeals with respect to Verizon's § 39 property in Newton and Boston for fiscal years 2005 through 2009.[9]

The fiscal years 2003 through 2008 jurisdictional information and the Initial Phase of these consolidated appeals were presented to the Board through Statements of Agreed Facts with numerous exhibits attached, as well as post-trial and reply briefs. The jurisdictional information was later augmented with a Supplemental Statement of Agreed Facts with exhibits attached for fiscal year 2009. The Valuation Phase of these consolidated appeals was presented to the Board through the above-described evidence along with the submission of additional Statements and Supplemental Statements of Agreed Facts with in excess of two hundred exhibits attached; the testimony of lay and expert witnesses and the introduction of additional exhibits, including expert valuation reports, at the hearing of these consolidated appeals; as well as post-trial and reply briefs. At the hearing for the Valuation Phase of these consolidated appeals, for procedural purposes, the Assessors and Verizon were designated as appellants with the Commissioner as appellee.

[8] See footnote 7, *supra*.

[9] As indicated *supra*, Verizon and the Boston Assessors did not file appeals for fiscal years 2003 and 2004, and the Newton Assessors, Verizon, and the Commissioner agreed to Verizon's § 39 property's value in Newton for these two fiscal years, which the Board also adopted.

**The Parties**

Verizon was formed as a New York corporation in 1883 under the name of New England Telephone & Telegraph Company and registered to do business in Massachusetts in 1884. It is the original provider of telephone service in the Commonwealth. In August, 2000, the company changed its name to Verizon New England, Inc. Under the Telecommunications Act of 1996, Verizon is the incumbent local exchange carrier ("ILEC") for the Commonwealth while more recent providers of telephone service in Massachusetts are generally referred to as competitive local exchange carriers ("CLECs").

The Commissioner is responsible for the administration of delineated tax matters as provided for in the General Laws. The Bureau of Local Assessment ("BLA") is the Bureau within the Department of Revenue ("DOR"), Division of Local Services, responsible for reviewing and making recommendations to the Commissioner regarding her obligations under G.L. c. 59, § 39.

Newton is a municipal corporation situated within the Commonwealth. The Newton Assessors are charged with, among other things, assessing § 39 property within Newton once the Commissioner has centrally valued that property and certified those values to the Newton Assessors. Similarly, Boston is a municipal corporation situated within the Commonwealth. The Boston Assessors also are charged with, among other things, assessing § 39 property within Boston once the Commissioner has centrally valued that property and certified those values to the Boston Assessors. The various other municipalities in these consolidated appeals are likewise situated within the Commonwealth. Their boards of assessors are charged with, among other things, assessing § 39 property within their municipalities once the Commissioner has centrally valued that property and certified those values to their boards of assessors.

**Central Valuation of Verizon's § 39 Property**

Pursuant to G.L. c. 59, § 39, the Commissioner is mandated to perform an annual valuation of telephone and telegraph companies' "machinery, poles, wires and underground conduits, wires and pipes." Corporate telephone utilities, such as Verizon, are exempt from tax on all property, except "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water." G.L. c. 59, § 5, cl. 16(1). Accordingly, Verizon's real estate, poles, underground conduits, wires, and pipes, as well as its generators and power equipment, used in the manufacture of electricity, remain taxable and subject to central valuation by the Commissioner. The Commissioner must complete this valuation and certify values to each owner and board of assessors of each municipality where this property is located by May 15$^{th}$ of each year. The local board of assessors then assesses personal property taxes in accordance with the central valuation determined by the Commissioner, subject to appeal of the values under G.L. c. 59, § 39.

Verizon's § 39 property, the certified central values of which are at issue in these consolidated appeals, is composed of Verizon's outside plant and its electronic machinery and generators. Verizon's outside plant consists of an underground component, which is composed of conduits and wires and an aerial component, which is composed of poles and wires. For both the underground and the aerial components, the wires include metallic copper lines and fiber optics. The metallic copper network now includes the electronically enhanced digital subscriber lines ("DSL") that allow for analog and digital

or telephone and Internet connections over the same line by utilizing different frequencies or band widths. Verizon's fiber optics include so-called business-as-usual ("BAU") fiber and the more recently developed FTTP network, which delivers the proprietary FIOS product. The metallic copper network serves both Newton and Boston and the rest of the Commonwealth. The FTTP network, on the other hand, is in place and operational in Newton, but not in Boston, with the exception of a limited deployment in the Dorchester section of the City.

For the fiscal years at issue, the Commissioner issued prescribed tax forms under G.L. c. 59, § 41 for use in the central valuations. The form is denoted as State Tax Form 5941, "FISCAL YEAR [year] – Telephone or Telegraph Company: Return of personal property subject to valuation by the Commissioner of Revenue." Forms 5941 as used for fiscal years 2003 through 2009 were revised and/or amended every year. The Forms 5941 and the related instructions required § 39 "telephone and telegraph companies," including Verizon, to provide the original cost of their personal property indicated by the Commissioner to be subject to central valuation and reportable. In accordance with G.L. c. 59, § 41, these telephone and telegraph companies were required to make their returns on or before the March first preceding the fiscal year for which the § 39 property is being valued. By May 15th, the Commissioner then valued the personal property as reported by the telephone and telegraph companies in their Forms 5941 according to valuation methodologies established each year and certified those values to the affected telephone and telegraph companies and the municipalities where the § 39 property was located.

**The Valuation Hearing**

The Newton Assessors, who presented their case first, offered Elizabeth Dromey as their sole witness, while the Boston Assessors, appearing second, did not present any witnesses. Through Ms. Dromey, who has been the Director of Assessment Administration for Newton since 1995, the Newton Assessors, and then the Boston Assessors during their examination of her, introduced exhibits which added the Commissioner's values for Verizon's CWIP and its poles and wires over public ways in Newton and Boston to the Commissioner's certified values for Newton and Boston for fiscal years 2005 through 2008. A summary of these values for Newton and Boston are contained in the following two tables, respectively.

**Newton**

| Fiscal Year | DOR's Certified Values* ($) | CWIP** ($) | Poles & Wires Over Public Ways** ($) | Total Value ($) |
|---|---|---|---|---|
| 2005 | 20,798,600 | 317,900 | 7,941,400 | 29,057,900 |
| 2006 | 19,203,900 | 17,558,900 | 8,532,700 | 45,295,500 |
| 2007 | 22,874,000 | 130,300 | 31,772,100 | 54,776,400 |
| 2008 | 23,676,700 | 630,100 | 26,526,100 | 50,832,900 |
| 2009 | 57,738,100 | 234,300*** | 33,398,900*** | 57,738,100 |
| | | | **Grand Total** | $237,700,800 |

## Boston

| Fiscal Year | DOR's Certified Values* ($) | CWIP** ($) | Poles & Wires Over Public Ways** ($) | Total Value ($) |
|---|---|---|---|---|
| 2005 | 174,141,000 | 909,300 | 39,114,300 | 214,164,600 |
| 2006 | 157,810,600 | 1,419,100 | 42,051,800 | 201,281,500 |
| 2007 | 157,177,700 | 1,268,300 | 42,427,100 | 200,873,100 |
| 2008 | 178,164,300 | 4,948,600 | 51,500,000 | 234,612,900 |
| 2009 | 230,655,200 | 1,414,600*** | 50,906,800*** | 230,655,200 |
| | | | **Grand Total** | $1,081,587,300 |

*These figures reflect the Commissioner's certified values based upon Verizon's original property reports set forth in its Forms 5941.
**These figures reflect the parties' valuation for these categories based on Verizon's July 23, 2008 revised data listings.
***For fiscal year 2009 only, the Commissioner included the values for these categories in her certified values.

The values in the above Newton and Boston tables' "Total Value" column for each fiscal year represent the values that the Newton Assessors and the Boston Assessors ascribe to Verizon's § 39 property situated in Newton and Boston, respectively.

Verizon presented four witnesses at the hearing of these appeals: Jeffrey Beavin; Gary Williams; Chris Parker; and Jerome Weinert. Mr. Beavin, as Verizon's Manager of Financial Controls & Analysis, explained how Verizon accounts for its investment in Massachusetts property, plant, and equipment. In accordance with FCC regulations and standard accounting practices in the telecommunications industry, Verizon used mass-asset accounting and retirement unit costs ("RUCs"), under which groups of homogeneous assets are accounted for based on the average costs of placing those assets in service in a given year. This approach is consistent with the Commissioner's central valuation methodology. With respect to poles, Mr. Beavin explained how Verizon capitalizes the cost of poles in accordance with its ownership or reimbursement share.

Mr. Beavin also discussed some of the issues created when Verizon changed its accounting software to the People Soft accounting program. These issues included some assets not being assigned to a particular municipality and others not having their "highway [or public] versus private" indicator carried over. In the former situation, Verizon allocated the assets to municipalities in a proportional way, and in the latter situation, Verizon "erred" on the side of designating the affected property private and taxable. In addition, as part of the accounting software conversion process, Verizon received FCC approval to restate all pre-1981 vintage year assets to the 1981 vintage year. Mr. Beavin also defined CWIP as an incomplete project, which is not generating revenue. Accordingly, Verizon did not consider the costs associated with CWIP to be part of the RUC process and did not report that property until the project was completed. Consequently, Mr. Beavin explained, Verizon did not include CWIP on its Forms 5941 filed with the Commissioner and did not consider it to be reportable § 39 property until actually placed in service. The Board found that Mr. Beavin's testimony was credible, but disagreed with the conclusion regarding CWIP.

As a manager in Verizon's property tax group, Gary Williams has been responsible for the preparation and filing of Forms 5941 since fiscal year 2003. According to Mr. Williams, Verizon did not include its aerial plant over public ways or its CWIP in its fiscal year 2003 through 2008 Forms 5941 because neither the Commissioner nor Verizon considered that property to be taxable. On or about July 23, 2008, following the Board's decision in ***MCI*** and its March 3, 2008 Order resolving the issues raised in the Initial Phase of these consolidated appeals, and to assist the parties and this Board in the Valuation Phase, Verizon submitted the revised asset listings to the Commissioner reporting its aerial plant over public ways and its CWIP for fiscal years 2003 through 2009.

While testifying that previous Forms 5941 had been filed containing the best available information at that time, Mr. Williams also explained that resolving the designation issues raised by Verizon's conversion to the People Soft accounting system had resulted in some different values in the § 39 property listings (other than machinery) for fiscal years 2005 and 2006. The changed values were discovered when, during discovery in these consolidated appeals, the Commissioner and the Assessors requested that Verizon produce FCC original cost information for the aerial plant over public ways and for the CWIP that was not reported to the Commissioner on the Forms 5941 for fiscal years 2003 through 2008. This information was requested so that the Commissioner could calculate the values that she would have certified had Verizon's aerial plant over public ways and CWIP been included on the Form 5941 for each of those fiscal years. In complying with the request, the newly generated July 23, 2008 asset lists for fiscal years 2005 and 2006 revealed that the resolution of the issues raised by the conversion to the new accounting system had resulted in different property listings and values beyond the addition of aerial plant over public ways and CWIP. The differences between the originally certified values and the July 23, 2008 revised-asset-list-based values (without regard to machinery and not including aerial plant over public ways and CWIP) for fiscal years 2005 and 2006 are summarized for Newton and Boston in the following two tables, respectively.

**Newton**

| | Certified Value | July 28, 2008 Value | Difference |
|---|---|---|---|
| **Fiscal Year 2005** | $20,375,400 | $18,235,000 | -$2,140,400 |
| **Fiscal Year 2006** | $18,652,200 | $18,734,500 | +$82,300 |

**Boston**

| | Certified Value | July 28, 2008 Value | Difference |
|---|---|---|---|
| **Fiscal Year 2005** | $165,721,700 | $149,920,400 | -$15,801,300 |
| **Fiscal Year 2006** | $152,453,100 | $153,136,300 | +$683,200 |

The Board found that while Mr. Williams' testimony was credible, the July 28, 2008 asset lists for fiscal years 2005 and 2006 did not provide better evidence of Verizon's § 39 property than the corresponding Forms 5941 filed years earlier.

Chris Parker was Verizon's third witness. As the Outside Plant Manager for Boston and the South Shore area, he provided extensive testimony regarding Verizon's network, particularly the outside plant in Newton and Boston, Verizon's engineering records, and Verizon's telecommunications network. Mr. Parker described Verizon's

network as being composed of wire centers. The wire centers are organized like a bicycle wheel on its side with the central office or exchange ("CO"), containing the electronic equipment and generators, in the center or hub and the wiring or cables extending out like spokes from the CO. Verizon deploys metallic copper wires, and more recently added fiber optic cables that are used for its BAU fiber, and its FTTP fiber that offers its proprietary FIOS service. It was not until the late 1980s and 1990s that Verizon first integrated and later, as data service requirements increased, expanded its use of fiber optics in its network by installing BAU fiber, primarily for business applications. By 2004, Verizon began marketing its latest generation of fiber optics for telephone, Internet and video services under the proprietary name of FIOS, which, as of the hearing date, existed in approximately 63 Massachusetts municipalities, including Newton but not Boston (with the exception of a small area in Dorchester). These wires and cables emanate from the CO building in underground conduits that are serviced through manholes and eventually emerge as aerial plant along utility poles. The underground conduit structures vary in the number of internal ducts and are encased in concrete. The wires run through and are protected by the ducts in the conduit. Typically 1,200 pairs of copper wires, which conceivably could service 1,200 customers, may run through one duct. There may also be intra-ducts within a duct to separate, organize and protect fiber-optic cable.

Mr. Parker testified that the utility poles may be owned solely by Verizon or jointly with the electric company that provides service in the municipality where the pole is located. The jointly owned poles typically carry the electric service at the top of the pole followed by the neutral space, then below that any attachments by cable television or other communications providers and, finally, the lowest cable attached is the metallic copper and fiber optic cable owned and operated by Verizon. The electric company and Verizon receive modest annual per pole attachment fees from CLECs and the cable companies for their use of the jointly owned poles. Pole records indicate that there are many poles in use in Massachusetts that pre-date 1981 and even some that were originally placed in service in the 1930s and 1940s.

Mr. Parker also described the paper, vellum, and electronic engineering records maintained and constantly updated and reconciled by Verizon. He explained the conversion process that the company has been undertaking to transition all of the records to a digital format called intelligent computer graphic system ("ICGS"). Similarly, the paper pole records have been converted to a "mechanized" spreadsheet database called pole records system or "PRS." The records contained in the ICGS and PRS enable the engineers to accurately determine the location, characteristics and components of the outside plant. The Board found that Mr. Parker's testimony was generally credible.

Lastly, in its case-in-chief, Verizon called Jerome Weinert from AUS Consultants to testify as its valuation witness. The Board previously qualified him as an expert in ***MCI*** in the areas of depreciation and functional obsolescence and in valuing telephone companies. For these consolidated appeals, the parties stipulated to his qualifications and expertise. On these bases, the Board qualified him as an expert in these consolidated appeals. In his testimony, Mr. Weinert explained his replacement cost new less depreciation methodology ("CORLD") in which he first determined a "preliminary cost indicator" and then tested for and applied an economic obsolescence percentage. In general, Mr. Weinert obtained his preliminary cost indicator by trending the historic original cost of the § 39 property to current reproduction cost new and then adjusting

for lack of utilization of metallic cable and associated conduit, and for depreciation, and then accounting for plant removal costs. He tested for and calculated economic obsolescence by comparing the value of all of Verizon's Massachusetts property determined using his CORLD approach to that same property's value determined using a discounted cash flow ("DCF") analysis. Mr. Weinert also critiqued the Commissioner's methodology and offered some rebuttal testimony. A summary of the values that he derived for Verizon's § 39 property in Newton and Boston for fiscal years 2005 through 2009 is contained in the following table.

| Fiscal Year | Newton Value | Boston Value |
|---|---|---|
| 2005 | 18,327,026 | 117,882,848 |
| 2006 | 32,354,568 | 106,454,004 |
| 2007 | 39,446,557 | 100,845,536 |
| 2008 | 35,654,909 | 98,897,256 |
| 2009 | 35,019,843 | 80,295,254 |

More specifically, Mr. Weinert based his original costs, the starting point for his methodology, on Verizon's July 23, 2008 revised asset lists, not the property reported to the Commissioner by Verizon on the Forms 5941. Mr. Williams explained that Verizon's July 23, 2008 revised asset lists contained not only CWIP and aerial plant over public way, which had not been reported on the Forms 5941 for fiscal years 2005 through 2008, but also adjustments from Verizon's accounting software conversion. For fiscal year 2005, without considering CWIP or aerial plant over public ways, Mr. Weinert's reliance on the July 23, 2008 revised asset lists resulted in lower starting values than those reported on the Forms 5941 for Newton and Boston by $2,969,406 and $24,837,415, respectively. For fiscal year 2006, the July 23, 2008 revised asset lists, again without considering CWIP or aerial plant over public ways, resulted in starting values that were slightly higher than the values reported on the Forms 5941 for Newton and Boston by $146,437 and $1,161,639, respectively. Mr. Weinert considered the information contained in the asset lists to be the best available data at the time he performed his valuations. Summaries of the original costs that Mr. Weinert used in his methodology for Newton and Boston for fiscal years 2005 through 2009 are contained in the following table.

| | FY 2005 $ | FY 2006 $ | FY 2007 $ | FY 2008 $ | FY 2009 $ |
|---|---|---|---|---|---|
| **Newton** | 49,662,478 | 67,069,425 | 76,940,620 | 77,534,473 | 84,635,056 |
| **Boston** | 341,908,249 | 338,959,466 | 340,258,246 | 352,304,681 | 352,082,724 |

Mr. Weinert next determined the cost to reproduce new the property contained in the assets lists using the tables in the Turner Plant Index ("TPI") and the assumption that the property was placed in service near the middle of the year. Summaries of the reproduction costs new ("RCN") that Mr. Weinert calculated for Newton and Boston for fiscal years 2005 through 2009 are contained in the following table.

| | FY 2005 $ | FY 2006 $ | FY 2007 $ | FY 2008 $ | FY 2009 $ |
|---|---|---|---|---|---|
| **Newton** | 70,212,955 | 91,685,266 | 109,294,644 | 117,742,985 | 127,615,131 |
| **Boston** | 500,508,905 | 494,453,068 | 541,480,570 | 602,919,706 | 617,624,114 |

Mr. Weinert then changed this RCN to a reproduction cost new adjusted for utilization ("CORU"), which he considered equivalent to a replacement cost new, to reflect the price that a buyer would pay for Verizon's property that was likely to be used. Mr. Weinert explained that a buyer would not pay for excess capacity, which would remain unused.

In making this modification from RCN to CORU, Mr. Weinert determined that a utilization adjustment was necessary to account for the reduced use of metallic wires and cables and associated conduits in Verizon's Newton and Boston systems. Mr. Weinert attributed this reduction to increased competition in the telecommunications market from CLECs and wireless and cable providers, as well as Voice Over Internet Protocol ("VOIP") and also to changes in technology. Mr. Weinert employed the "cost-of-capacity method" to quantify his utilization adjustment.

This method entails finding the utilization rate of the metallic wires and cables and associated conduits and the scale factor. Mr. Weinert relied on the methodology described in AMERICAN SOCIETY OF APPRAISERS, VALUING MACHINERY AND EQUIPMENT: THE FUNDAMENTALS OF APPRAISING MACHINERY AND TECHNICAL ASSETS (2nd ed. 2005) 61-65 ("VALUING EQUIPMENT AND MACHINERY"). To determine the utilization rate, Mr. Weinert compared the number of "assigned" pairs of metallic copper wires to the total number of pairs in the Massachusetts, Newton, and Boston networks. He obtained this data from Verizon's Loop Engineering Information System ("LEIS"). Mr. Weinert stated that the number of "assigned" pairs took future service and maintenance demands into account. Summaries of the utilization percentages that Mr. Weinert developed for the Massachusetts, Newton and Boston networks for fiscal years 2005 through 2009 are contained in the following table.

| | **FY 2005** | **FY 2006** | **FY 2007** | **FY 2008** | **FY 2009** |
|---|---|---|---|---|---|
| | **%** | **%** | **%** | **%** | **%** |
| **Massachusetts** | 51.8 | 50.3 | 49.0 | 47.8 | 46.2 |
| **Newton** | 46.0 | 44.1 | 42.3 | 40.6 | 38.3 |
| **Boston** | 36.4 | 35.0 | 33.8 | 33.1 | 31.7 |

In determining the scale factors, Mr. Weinert also used data from Verizon's LEIS to obtain historical cost information for the various sizes and types of Verizon facilities to study how the cost of various sizes and types of Verizon facilities vary with capacity. From these analyses, he determined his cost-to-capacity scale factor for the various metallic wire and cable and associated conduit accounts specific to Verizon's Massachusetts plant. As Mr. Weinert explained, a scale factor, applied to the utilization percentage as an exponent, is necessary when using the cost-to-capacity method because the methodology assumes that not all costs vary with size on a linear basis. VALUING MACHINERY AND EQUIPMENT at 62. A summary of the scale factors that Mr. Weinert developed for use in his methodology for fiscal years 2005 through 2009 is contained in the following table.

| **Account** | **Scale Factor** |
|---|---|
| Aerial Metallic Wire | 0.64 |
| Underground Metallic Wire | 0.68 |
| Buried Metallic Wire | 0.51 |

| | |
|---|---|
| Submarine Metallic Wire | 0.70 |
| Intrabuilding Metallic Wire | 0.93 |
| Conduit | 0.53 |

In keeping with the method illustrated in VALUING EQUIPMENT AND MACHINERY at 61-65, Mr. Weinert then applied each account's scale factor as an exponent to the Massachusetts, Newton, and Boston systems' utilization percentages for fiscal years 2005 through 2009 to determine the utilization factor adjustment for his methodology. Summaries of his development of his utilization factor adjustments for Newton and Boston for fiscal years 2005 through 2009 are contained in the following two tables, respectively.

**Newton**

| | | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|---|
| **Utilization %** | | 0.460 | 0.441 | 0.423 | 0.406 | 0.383 |
| **Account** | **Scale Factor** | **Utilization Factor** | | | | |
| Aerial | 0.64 | 0.608 | 0.592 | 0.577 | 0.562 | 0.541 |
| Underground | 0.68 | 0.590 | 0.573 | 0.557 | 0.542 | 0.521 |
| Buried | 0.51 | 0.673 | 0.659 | 0.645 | 0.631 | 0.613 |
| Submarine | 0.70 | 0.581 | 0.564 | 0.548 | 0.532 | 0.511 |
| Intrabuilding | 0.93 | 0.486 | 0.467 | 0.449 | 0.432 | 0.410 |
| Conduit | 0.53 | 0.663 | 0.648 | 0.634 | 0.620 | 0.601 |

**Boston**

| | | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|---|
| **Utilization %** | | 0.364 | 0.350 | 0.338 | 0.331 | 0.317 |
| **Account** | **Scale Factor** | **Utilization Factor** | | | | |
| Aerial | 0.64 | 0.524 | 0.511 | 0.499 | 0.493 | 0.479 |
| Underground | 0.68 | 0.503 | 0.490 | 0.478 | 0.472 | 0.458 |
| Buried | 0.51 | 0.597 | 0.585 | 0.575 | 0.569 | 0.557 |
| Submarine | 0.70 | 0.493 | 0.480 | 0.468 | 0.461 | 0.447 |
| Intrabuilding | 0.93 | 0.391 | 0.377 | 0.365 | 0.358 | 0.344 |
| Conduit | 0.53 | 0.585 | 0.573 | 0.563 | 0.557 | 0.544 |

Mr. Weinert then applied the appropriate utilization factor adjustment to the RCN of each metallic wire and cable and related conduit account for fiscal years 2005 through 2009, but not to fiber optic cable or other accounts. These adjustments resulted in the development of his CORU. Summaries of the original cost, RCN and now CORU for fiscal years 2005 through 2009 for Newton and Boston are contained in the following two tables, respectively.

**Newton**

| | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|
| | $ | $ | $ | $ | $ |
| Original Cost | 49,662,478 | 67,069,425 | 76,940,620 | 77,534,473 | 84,635,056 |
| RCN | 70,212,955 | 91,685,266 | 109,294,644 | 117,742,985 | 127,615,131 |
| CORU | 50,255,393 | 69,626,682 | 83,441,000 | 88,036,487 | 95,722,718 |

| | Boston | | | | |
|---|---|---|---|---|---|
| | **FY 2005** | **FY 2006** | **FY 2007** | **FY 2008** | **FY 2009** |
| | **$** | **$** | **$** | **$** | **$** |
| Original Cost | 341,908,249 | 338,959,466 | 340,258,246 | 352,304,681 | 352,082,724 |
| RCN | 500,508,905 | 494,453,068 | 541,480,570 | 602,919,706 | 617,624,114 |
| CORU | 326,580,490 | 303,014,874 | 319,667,676 | 654,257,326[10] | 354,941,252 |

Mr. Weinert next calculated depreciation, using a method, which included what he termed "normal," or mostly physical, depreciation and functional obsolescence, to reflect the fact that the property being valued is not new. His normal depreciation was determined based on the age of the property and its normal service life; his functional obsolescence was based on what he believed was the impact on the property's normal life caused by factors such as changing technology, service requirements, and competition over time. To quantify his normal depreciation, Mr. Weinert used a "condition formula" in which the remaining life of property was divided by the sum of its age and remaining life. Mr. Weinert stated that the "condition formula" takes into account the age, service life, and survival characteristics or expectations for each category of § 39 property. The service lives changed within asset categories depending upon the "service drivers" in effect when the asset was placed in service in order to reflect the "life expectancy" of the asset. Mr. Weinert addressed functional obsolescence by varying the normal life to reflect the overall effect on service life of the various obsolescence factors. He depreciated the § 39 property to a "floor" of five percent, meaning that when the value diminished to this predetermined level, it is not further depreciated in value until the property is taken out of service. A summary of his resultant replacement cost new less normal and functional depreciation ("CORULD") for Newton and Boston for fiscal years 2005 through 2009 is contained in the following table.

| | **FY 2005** | **FY 2006** | **FY 2007** | **FY 2008** | **FY 2009** |
|---|---|---|---|---|---|
| | **$** | **$** | **$** | **$** | **$** |
| **Newton** | 21,839,715 | 37,508,897 | 46,302,425 | 44,417,214 | 47,955,746 |
| **Boston** | 138,447,247 | 127,561,447 | 124,780,139 | 129,638,470 | 117,347,310 |

The final step in Mr. Weinert's methodology for reaching his preliminary cost conclusion was to determine the liability that Verizon may have to remove property that is at the end of its useful life or at least make it safe for abandonment and then to subtract that amount from the CORULD figures. Mr. Weinert assessed this potential liability by determining salvage, net of removal costs, for each property account. He relied, at least in part, on the FCC's estimated range for removal costs. Overall, Mr. Weinert determined that an 11% provision for abandonment/removal costs for Verizon's § 39 property in Newton and Boston was appropriate. He then discounted these costs to their present value as of the relevant assessment dates to account for the future incurrence of these costs. Summaries of his preliminary cost conclusions derived by deducting abandonment/removal costs from his CORULD figures for Newton and Boston for fiscal years 2005 through 2009 are contained in the following two tables, respectively.

[10] This is the figure that appears in several places in Mr. Weinert's appraisal report

**Newton**

| | FY 2005 $ | FY 2006 $ | FY 2007 $ | FY 2008 $ | FY 2009 $ |
|---|---|---|---|---|---|
| **CORULD** | 21,839,715 | 37,508,897 | 46,302,425 | 44,417,214 | 47,955,746 |
| **Aban./Removal** | 1,663,583 | 2,092,476 | 2,495,634 | 2,644,371 | 2,667,074 |
| **Prelim. Cost** | 20,176,132 | 35,416,421 | 43,806,791 | 41,772,843 | 45,288,672 |

**Boston**

| | FY 2005 $ | FY 2006 $ | FY 2007 $ | FY 2008 $ | FY 2009 $ |
|---|---|---|---|---|---|
| **CORULD** | 138,447,247 | 127,561,447 | 124,780,139 | 129,638,470 | 117,347,310 |
| **Aban./Removal** | 8,670,603 | 11,033,240 | 12,787,618 | 13,771,688 | 13,507,169 |
| **Prelim. Cost** | 129,776,644 | 116,528,207 | 111,992,521 | 115,866,782 | 103,840,141 |

Lastly, in his CORLD methodology, Mr. Weinert checked for economic or external obsolescence. He defined economic obsolescence as obsolescence outside the property that is most often indicated by insufficient earnings. Specifically, he reviewed Verizon's earnings to determine if the earnings warranted an investment in the § 39 property at his preliminary cost indicator level. If earnings are considered insufficient, economic obsolescence is determined by discounting the earnings shortfall. He evaluated economic obsolescence at the Massachusetts state-wide level by comparing the value of Verizon's Massachusetts § 39 property derived using his preliminary cost approach conclusion to the values derived using a DCF method.

More specifically, Mr. Weinert stated that he reviewed and analyzed Verizon's income statements and balance sheets, and by relying on that historic information, developed his assumptions or "drivers" regarding various DCF factors such as future revenue, future expenses, and future capital cost. For each fiscal year, his DCF analysis started with a base revenue to which he applied his drivers to project future revenue and expenses. The difference between these amounts were subsequently reduced to present value taking into account such matters as taxes, depreciation, and capital expenditures. In this way, he derived his present value of anticipated future cash flows for each fiscal year. A summary of the values derived from his CORULD and DCF techniques, the difference between which enabled him to develop his economic obsolescence percentage, is contained in the following table.

| | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|
| **CORLD $** | 4,373,763,532 | 4,231,715,734 | 4,053,294,604 | 4,106,506,507 | 3,976,002,061 |
| **DCF $** | 3,973,824,327 | 3,865,871,583 | 3,649,856,819 | 3,505,079,015 | 3,074,476,714 |
| **Eco. Obs. %** | -9.16 | -8.65 | -9.95 | -14.65 | -22.67 |

Mr. Weinert calculated his final cost indicators of Verizon's § 39 property in Newton and Boston for fiscal years 2005 through 2009 by applying the economic obsolescence percentages that he developed to his related preliminary costs conclusions. Summaries of his calculations for Newton and Boston are contained in the following two tables, respectively.

**Newton**

| | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|
| **Prelim. Cost $** | 20,176,132 | 35,416,421 | 43,806,791 | 41,772,843 | 45,288,672 |
| **Eco. Obs. %** | -9.16 | -8.65 | -9.95 | -14.65 | -22.67 |
| **Final Cost Indicators $** | 18,327,026 | 32,354,568 | 39,446,557 | 35,654,909 | 35,019,843 |

**Boston**

| | FY 2005 | FY 2006 | FY 2007 | FY 2008 | FY 2009 |
|---|---|---|---|---|---|
| **Prelim. Cost $** | 129,776,644 | 116,528,207 | 111,992,521 | 115,866,782 | 103,840,141 |
| **Eco. Obs. %** | -9.16 | -8.65 | -9.95 | -14.65 | -22.67 |
| **Final Cost Indicators $** | 117,882,848 | 106,454,004 | 100,845,536 | 98,897,256 | 80,295,254 |

Mr. Weinert also used his DCF approach as a stand-alone valuation. In addition, he performed a capitalized income analysis and a historic cost less depreciation rate-base approach to value. Mr. Weinert did not rely on any of these methods for his final estimates of Verizon's § 39 property's value, except to the extent that he used his DCF approach to develop economic obsolescence for his CORLD methodology. He also considered and discussed, but ultimately did not rely on, a market approach.

The Commissioner called two witnesses, Marilyn Browne, Chief of the Commissioner's Bureau of Local Assessment ("BLA") and 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. As it has done in previous telecommunications appeals, the Board qualified Mr. Sansoucy as an expert in valuing utility and telephone company property and as an engineer. Ms. Browne explained the BLA's responsibilities, including its annual role in centrally valuing the § 39 property of telephone and telegraph companies and then certifying those values to the boards of assessors of the municipalities where the § 39 property is located. She related that prior to fiscal year 2004, the BLA had valued telephone companies' "poles, wires and underground conduits, wires and pipes" that were not over public ways by depreciating their original cost by 10% per year down to a floor of 30% of original cost. The "machinery," which then consisted of telephone companies' generators, was valued at 90% of their original cost. After 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"), which resulted in the BLA valuing significantly more machinery property under § 39 because limited liability companies ("LLCs") no longer qualified for the corporate utility exemption under G.L. c. 59, § 5, cl. 16(1)(d) for their non-manufacturing machinery, the BLA recognized the need to modify its existing valuation methodology and implement a new mass appraisal system for the upcoming fiscal year 2004 valuations.

Because of his engineering and appraisal experience, Mr. Sansoucy was selected by a DOR procurement team to evaluate the existing valuation system and implement an automated mass appraisal methodology that could be readily updated and would produce defensible values. Ms. Browne's and Mr. Sansoucy's testimony and other evidence reveal that after extensive analysis, Mr. Sansoucy concluded that the BLA's existing methodology was deficient in many respects, and he recommended a method of valuation

that used a "composite multiplier" based upon a reproduction cost new less depreciation approach to value ("RCNLD").

As an overview, his methodology trended the original cost of 23 categories of property as set forth in companies' Forms 5941 using the TPI. For generators, he used the Handy-Whitman Index. His methodology then adjusted the property for physical, functional and economic forms of depreciation using Federal Communications Commission ("FCC") depreciation schedules that used the same 23 property categories. The depreciation was straight-line based on the FCC range of useful lives, which was periodically reviewed and incorporated physical and functional depreciation and economic obsolescence based on actual experience. Mr. Sansoucy adopted a 30% floor for all of the § 39 property except generators, for which he used a 60% floor, recognizing the continuing vitality and incumbency of the property. The composite multiplier combined the trending and depreciation steps, and Mr. Sansoucy annually updated the composite multiplier and reviewed the efficacy of his methodology and any assumptions.

Beginning with fiscal year 2005 and on Mr. Sansoucy's recommendation, the BLA adopted an additional economic depreciation deduction of 25%. Ms. Browne and Mr. Sansoucy related that this deduction resulted from meetings with and memoranda and studies submitted by a great many telephone companies as well as Mr. Sansoucy's analyses. For fiscal year 2006 and thereafter, and again on Mr. Sansoucy's recommendation, the BLA determined that the additional economic depreciation deduction should not be applied to new property, that is, property which had been in service for less than one year. Beginning in fiscal year 2008, the 25% economic depreciation deduction was no longer applied to generators. For fiscal year 2009, in response to the Board's March 3, 2008 Order in these consolidated appeals and its Decision in ***MCI***, the Commissioner included telephone property over public ways in her values and a new category for reporting CWIP.

More specifically, and as reviewed in ***MCI*** at 2008-288-295 and recounted by the evidence here, Mr. Sansoucy's methodology begins with the reported original cost of the categorized § 39 property and its vintage year or year of purchase as reported by Verizon on the relevant Forms 5941. That original cost is then trended to a "cost new," which is the cost to currently reproduce the § 39 property as of the valuation date, by using trending indices. For telephone companies' personal property, such as wires, conduits and electronic machinery, Mr. Sansoucy recommended the TPI Index, which is a commercially available publication that is updated 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 an 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 that Mr. Sansoucy recommended includes the loss of physical, functional, and economic service over time, and utilizes FCC service lives for each FCC property category account in accordance with FCC Docket No. 98-137 (December 17, 1999).[11] The 23 categories of property that are contained in the FCC

[11] See In Re 1998 Biennial Review, 15 FCC Rcd 242 (FCC 1999).

service life tables are also 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 almost 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 annual depreciation deductions. The depreciation method that Mr. Sansoucy recommended also utilizes a floor. 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, incumbency, income production and maintenance, as well as its salvage value. Included in incumbency is the considerable original investment in associated direct and indirect costs,[12] as well as the notion of exclusivity. Mr. Sansoucy noted that other jurisdictions, such as New York State, also use floors.

Mr. Sansoucy combined the two component steps, the cost new factor and the depreciation percentage, into his "composite multiplier" to allow for a single calculation. He created the composite multiplier by taking the trended cost new mathematical factor and multiplying it by the depreciation percentage (adjusted by the appropriate 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 with a single mathematical input for each line item on the Commissioner's fiscal year 2005 through 2009 Internet spreadsheet.

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 depreciation floor 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 least 60% of its value. Mr. Sansoucy's market-based

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[12] According to THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (13th ed. 2008), 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, management, 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, among other costs. ***Ibid.*** at 387-88.

evaluation demonstrated that a viable sales market exists for used generators of the type needed in the telecommunications industry.

For fiscal years 2005 through 2008, as well as in prior fiscal years, and as discussed in ***MCI*** at 2008-292, the BLA valued only property "in service." Form 5941 implicitly 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. Consequently, the BLA did not consider CWIP to be § 39 property and taxable. Beginning in fiscal year 2009, as a result of the Board's March 3, 2008 Order in these consolidated appeals and its Decision in ***MCI***, the Commissioner included telephone property over public ways in her values and a new category for reporting CWIP.

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 through 2009, the filing format required companies to enter installation and cost information on an interactive DOR Internet spreadsheet that included pull down menus with community lists, 23 property categories, FCC account codes and vintage years.

For fiscal years 2005 through 2009, an additional 25% economic obsolescence deduction 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 because of technological advances. As discussed in ***MCI*** at 2008-294, the 25% estimate was determined at least partly on 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. Mr. Sansoucy also considered information and data submitted by various telecommunications companies and his own analyses. For fiscal year 2005, the additional 25% economic obsolescence deduction was applied to all property; for fiscal year 2006 and thereafter, the additional deduction was not applied to property in service less than one year. Mr. Sansoucy also testified that, although the deduction was initially applied to generators, it was stopped beginning in fiscal year 2008 because Mr. Sansoucy believed that generators maintain their value in the marketplace. Summaries of Mr. Sansoucy and the BLA's certified valuations of Verizon's § 39 property for fiscal years 2005 through 2009 for Newton and Boston are contained in the following tables, respectively.

**Certified Values for Newton**

| FY | Private Poles & Wires Underground Conduits Wires & Pipes $ | Machinery $ | CWIP $ | Poles & Wires Over Public Ways $ | Total $ |
|---|---|---|---|---|---|
| 05 | 20,375,400 | 423,200 | 0 | 0 | 20,798,600 |
| 06 | 18,652,200 | 551,700 | 0 | 0 | 19,203,900 |
| 07 | 22,591,300 | 282,700 | 0 | 0 | 22,874,000 |
| 08 | 23,276,000 | 400,700 | 0 | 0 | 23,676,700 |
| 09 | 23,636,000 | 468,900 | 234,300 | 33,398,900 | 57,738,100 |

**Certified Values for Boston**

| FY | Private Poles & Wires Underground Conduits Wires & Pipes $ | Machinery $ | CWIP $ | Poles & Wires Over Public Ways $ | Total $ |
|---|---|---|---|---|---|
| 05 | 165,721,700 | 8,419,300 | 0 | 0 | 174,141,000 |
| 06 | 152,453,100 | 5,357,500 | 0 | 0 | 157,810,600 |
| 07 | 153,127,600 | 4,050,100 | 0 | 0 | 157,177,700 |
| 08 | 171,518,800 | 6,645,500 | 0 | 0 | 178,164,300 |
| 09 | 170,411,700 | 7,922,100 | 1,414,600 | 50,906,800 | 230,655,200 |

Mr. Sansoucy testified that, in his opinion, the Commissioner's certified values for fiscal years 2005 through 2009 were an accurate reflection of Verizon's § 39 property's fair cash values. He also critiqued Mr. Weinert's valuation methodologies and values.

On the basis of the foregoing testimony, agreed statements of facts, and exhibits, as well as the Board's subsidiary findings, *supra*, and reasonable inferences drawn therefrom, the Board makes the following additional findings of fact.

**Telecommunications Marketplace and Verizon's Business Operations**

The Telecommunications Act of 1996 ("1996 Act") introduced the deregulation of the local exchange industry and dramatically changed the competitive arena of the telecommunications industry. The historic monopolistic practices were discarded for ones that foster competition. Pursuant to the 1996 Act, the FCC required ILECs, like Verizon, to lease their network facilities to competitors on a non-discriminatory unbundled basis or to sell services to competitors at predetermined wholesale rates for rebranding and resale under their own names. Consequently, CLECs began competing in local exchange markets and, along with established carriers, expanded networks anticipating increased demand because of, among other things, the growing demand for access to the Internet. At the same time, wireless telecommunication services continued to grow while technological advances increased land-line capacity.

The Massachusetts Department of Telecommunications and Energy, now The Massachusetts Department of Telecommunications and Cable ("DTC"), oversees Verizon's activities in Massachusetts to ensure the company's conformance with FCC rules governing the relationships between Verizon and competitive carriers. In response to requests from Verizon or its competitors, or as a result of its own investigation, the DTC regulates the compensation that Verizon receives from competitors for their use of Verizon's facilities. In 2007, as a result of a petition submitted by Verizon, the DTC reduced the amount that the wholesale rate was discounted for competitive carriers using Verizon's facilities, effectively increasing the fees paid to Verizon.

The competitive system has affected Verizon. Operating revenues have declined from 1998 to 2007 by a total of approximately 21%. During this time, total telephone calls rose steadily from 1998 through 2001 but since then experienced a decline. The competitive landline environment and wireless industry have stressed Verizon's voice business and caused Verizon to expand its services. In addition to Verizon's voice communications business, it operates and generates revenues through its data and video services. Data and Internet services include DSL on existing copper lines, BAU, and FIOS. The video cable services follow from Verizon's franchising efforts and its FIOS

product. The Verizon fiber-based FIOS product is not a system to which Verizon is obligated to provide competitive access. By the close of 2007, Verizon had obtained 63 Massachusetts cable TV franchises and was pursuing franchises in 25 additional communities. In Newton, Verizon's gross revenues from its FIOS product increased from $312,640 in the 2nd Quarter of 2007 to $1,087,439 in the 2nd Quarter of 2008. In its 2007 10-K filing, Verizon disclosed its intention to continue to deploy FTTP to provide fiber optic services while upgrading electronic technology to lower the cost and maintain the reliability of its existing wire-line based systems in order to "be the premier broadband and entertainment service provider in the mass market, while maintaining the level of network reliability currently provided by our telephony network."

**Reporting and Jurisdiction**

General Laws, c. 59, § 41 provides that telephone companies shall annually make a return to the Commissioner regarding their § 39 property "in the form and detail prescribed by the Commissioner" by the March first deadline contained in § 41. This statutory section does not specifically provide the Commissioner with the authority to grant extensions. As the Board noted in ***MCI*** at 2008-335, however, § 41 contains a savings provision for telephone companies "unable to comply . . . for reasons beyond [their] control." Thus, 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 here that § 41, read as a harmonious whole, does not expressly prohibit authorized filings submitted after the March 1st deadline.

For fiscal year 2003, Verizon filed its Form 5941 by letter and return dated March 14, 2002, which the Commissioner received on computer disc and by hardcopy on March 19, 2002, in accordance with an extension granted by the Commissioner. For fiscal year 2004, Verizon filed its Form 5941 via e-mail transmission to the Commissioner on Monday, March 3, 2003 and by letter and return dated Monday, March 3, 2003, which the Commissioner received on computer disc and by hardcopy on March 4, 2003. For fiscal year 2005, Verizon filed its Form 5941 by letter and return dated February 27, 2004, which the Commissioner received on computer disc and by hard copy on March 1, 2004.

For fiscal year 2006, Verizon filed its Form 5941 by letter and return dated March 10, 2005, which the Commissioner received on computer disc and by hard copy on March 11, 2005 in accordance with an extension granted by the Commissioner. For fiscal year 2007, Verizon filed its Form 5941 by letter and return dated March 7, 2006, which the Commissioner received on computer disc and by hard copy on March 8, 2007 in accordance with an extension granted by the Commissioner. For fiscal year 2008, Verizon filed its Form 5941 by letter and return dated February 27, 2007, which the Commissioner received on computer disc and by hard copy on March 1, 2007. For fiscal year 2009, Verizon filed its Form 5941 dated February 29, 2008 together with a filing letter dated February 28, 2008. The filing was electronically submitted on February 29, 2008. The Commissioner received the hard copy filing on Monday, March 3, 2008.

According to these facts, Verizon submitted its fiscal year 2003, 2006, and 2007 Forms 5941 beyond the statutory due date of March 1st. Verizon, however, did not appeal the fiscal year 2003 central valuation of its § 39 property so the timeliness of its

Forms 5941 filing for that fiscal year is not a jurisdictional issue here. As for fiscal years 2006 and 2007, Verizon's Form 5941 filings were timely pursuant to extensions granted by the Commissioner. Moreover, the Board finds that the circumstances described in ***MCI*** relating to the filing of MCI's fiscal year 2006 Forms 5941 after March 1st are also present here. More specifically, the Commissioner did not put Forms 5941 or its instructions into a finalized version until after March 1st, and the Commissioner did not issue final corrective instructions on filing Form 5941 until a mailing dated April 4, 2005. *See* ***MCI*** at 2008-269-70.

Furthermore, for fiscal years 2006 and 2007, the Commissioner maintained a continuing practice of granting, periodically, extensions to telephone companies, including Verizon, to make or file their returns on their Forms 5941 after March 1st. ***MCI*** at 2008-271. This course of conduct between Verizon and the Commissioner is of probative value on the issue of Verizon's inability "to comply . . . for reasons beyond [its] control" in making its returns to the Commissioner on its Forms 5941. The Commissioner's granting of extensions under these circumstances at least implied reasons beyond Verizon's control in making its returns to the Commissioner on Forms 5941. Post March 1st changes and corrections in the Form 5941 and its instructions, the Commissioner's failure to promulgate any formal guidance, the shifting state of the law regarding what legal entity should report what property, and the concomitant confusion engendered were all beyond the control of Verizon and justified Verizon making its fiscal year 2006 and 2007 returns to the Commissioner beyond the March 1st date and the Commissioner's authorizing extensions under her power to audit and insure compliance. *See* ***MCI*** at 2008-271-72.

Verizon, the Newton Assessors, and the Boston Assessors timely filed their petitions challenging the central valuations made by the Commissioner. Summaries of the dates on which these appellants filed their related Petitions Under Formal Procedure with the Board for the designated fiscal years are contained in the following table.[13]

[13] "Every owner and board of assessors to whom any such valuation shall have been so certified may, on or before the fifteenth day of June then next ensuing, appeal to the [B]oard from such valuation." G.L. c. 59, § 39. Furthermore, "If any petition . . . is, after the period allowed for filing appeals with the [B]oard, delivered by United States mail, or by such alternative private delivery service as the [B]oard may by rule permit, to the [B]oard, the date of the United States postmark, or other substantiating mark permitted by rule of the [B]oard, affixed on the envelope or other appropriate wrapper in which such petition is mailed or delivered shall be deemed to be the date of delivery, if such petition was mailed in the United States in an envelope or other appropriate wrapper, first class postage, or delivered to such alternative private delivery service, properly addressed to the [B]oard." G. L. c. 58A, § 7. In addition, when the last day of a filing period falls on a Saturday, Sunday, or legal holiday, filings made on the following business day are considered timely. G.L. c. 4, § 9. *See* ***Graham v. Assessors of West Tisbury***, Mass. ATB Findings of Fact and Reports 2007-321, 325, aff'd, Mass. App. Ct. No. 07-P-1024, Memorandum and Order under Rule 1:28 (November 28, 2008).

**Verizon, Newton Assessors, and Boston Assessors**

| Fiscal Year | Verizon Petitions Filed* | Newton Assessors Petitions Filed | Boston Assessors Petitions Filed |
|---|---|---|---|
| 2003 | None | 06/12/02 | None |
| 2004 | None | 06/13/03 | None |
| 2005 | 06/14/04 | 06/15/04 | 06/14/04 |
| 2006 | 06/14/05 | 06/15/05 | 06/14/05 |
| 2007 | 06/14/06 | 06/15/06 | 06/15/06 |
| 2008 | 06/07/07 | 06/15/07 | 06/15/07 |
| 2009 | 06/04/08 | 06/16/08** | 06/16/08** |

*In Fiscal Year 2005, Verizon filed 67 petitions challenging values certified for 67 municipalities including Newton and Boston. In Fiscal Year 2006, Verizon filed 114 petitions challenging values certified for 114 municipalities including Newton and Boston. In Fiscal Year 2007, Verizon filed 116 petitions challenging values certified for 116 municipalities including Newton and Boston. In Fiscal Year 2008, Verizon filed 288 petitions challenging values certified for 288 municipalities including Newton and Boston. In Fiscal Year 2009, Verizon filed 351 petitions challenging values certified for 351 municipalities including Newton and Boston.

**June 15, 2008 fell on a Sunday.

On this basis, the Board found and ruled that it had jurisdiction over Verizon's, the Newton Assessors' and the Boston Assessors' appeals relating to Verizon's § 39 property located in Newton and Boston.

**Initial Phase**

In the Initial Phase of these consolidated appeals, the Board examined: (1) 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; (2) whether municipalities that did not file petitions under § 39 may nonetheless seek to establish substantially higher values for Verizon's § 39 property than the corresponding values certified by the Commissioner where Verizon has challenged those values; and (3) whether the Board's rulings and decisions in this phase of these consolidated appeals may only, as Verizon argues, be applied prospectively. Based on all of the evidence and its analyses of the relevant law, the Board answers these question yes, no, and no, respectively.

**Poles and the Wires Thereon on Public Ways**

As the Board related *supra*, the Commissioner promulgates State Tax Form 5941 to be utilized by telephone and telegraph companies in the reporting of their taxable personal property under § 39. Under her statutory obligation, the Commissioner values the reported § 39 property, which she considers to be subject to central valuation, and on or before May 15th of each year, certifies values to the owner and the boards of assessors of each municipality where the property is located.

Before fiscal year 2009, the Commissioner's instructions to State Tax Form 5941 specified that poles and wires located over public ways owned by corporate telephone and telegraph companies were not taxable and thus were not to be reported to the Commissioner. Accordingly, before fiscal year 2009, the Commissioner did not require Verizon to report its poles and wires erected upon public ways. In addition, the Commissioner's instructions did not specify how the taxpayer was to determine whether its poles and wires were erected on public or private property. The Commissioner intentionally did not include Verizon's poles and wires over public ways in her certified values for fiscal years 2005 through 2008. With the exception of fiscal year 2005, for

which Verizon may have mistakenly reported some poles and wires over public ways, for fiscal years 2005 through 2008, Verizon did not report any of its poles and wires over public ways to the Commissioner. Newton and Boston issued personal property tax bills to Verizon based upon the Commissioner's certified values. These tax bills did not include an assessment based on Verizon's poles and wires erected upon or over public ways.

The Board finds that at all relevant times Verizon owned metallic copper wires and fiber optic cables that were located both over and under private property and public property, including public ways. Verizon owned telephone poles (often jointly with electric companies) together with the above-ground wires thereon, with the poles being affixed to real property that was either private property or public property, including public ways.

The telephone poles support not only wires owned by Verizon, but also wires and other equipment owned by others, including telecommunications providers and electric companies. In some instances, Verizon was compensated for such use by others. Some poles also support street lights owned by electric companies.

Verizon maintains procedures to account for all of its poles and wires, both reported and unreported to the Commissioner, under a June 30, 1986 Accounting Practice. The June 30, 1986 Accounting Practice was the operative Verizon internal procedure governing aerial plant (which included poles and wires) for Massachusetts personal property tax purposes. Verizon utilized the Accounting Practice in the reporting of its Form 5941 property to the Commissioner. At all relevant times, Verizon owned poles and wires in Massachusetts that are encompassed by the Accounting Practice.

Both Verizon and the Commissioner contended that poles and the wires thereon on public ways were not subject to personal property taxation and central valuation. They argued that decisional law and the relevant statutes, as well as the Commissioner's past practice of not valuing, assessing or taxing this property, require the Board to adopt their contention that poles and the wires thereon on public ways were not taxable. The Board disagrees with this premise. To the extent that it is a findings of fact, and, as more fully explained its Opinion below, the Board finds here that, poles and the wires thereon on public ways were taxable as § 39 property, and were, therefore, subject to central valuation by the Commissioner under G.L. c. 59, § 39 for all the fiscal years at issue in these consolidated appeals. The Board further finds that the values assigned to poles and wires over public ways by the parties for fiscal years 2005 through 2008, which were based on Verizon's July 23, 2008 revised asset listing for poles and wires over public ways, and the values for poles and wires over public ways included in the Commissioner's certified values for fiscal year 2009 were based on the best available information and are correct.[14] The values for poles and wires over public ways for fiscal years 2005 through 2009 are summarized in the following table.

**Values for Poles and Wires Over Public Ways**

| Fiscal Year | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Newton ($) | 7,951,400 | 8,532,700 | 31,772,100 | 26,526,100 | 33,398,900 |
| Boston ($) | 39,114,300 | 42,051,800 | 42,427,100 | 51,500,000 | 50,906,800 |

[14] Also see the Board's findings, *infra*, regarding the application of economic obsolescence in the Commissioner's valuation methodology with respect to property in service less than one year and generators.

**Valuation Higher Than That Certified By Commissioner**

Verizon has filed approximately 900 petitions in their appeals challenging the Commissioner's certified values for its § 39 property located in various municipalities, other than Newton and Boston, for fiscal years 2005 through 2009. The vast majority of those various other municipalities did not file similar appeals challenging the Commissioner's certified values. The Boston Assessors did not file appeals for fiscal years 2003 and 2004. Insofar as it may be finding of fact, and as more fully explained in its Opinion below, the Board finds that under § 39, "the appellant" bears the burden of proving that the certified value of the § 39 property "is substantially higher or substantially lower, as the case may be, than the valuation certified by the Commissioner," and consequently, if a municipality has failed to file a timely appeal with this Board, it is not an "appellant" and therefore has no standing to establish a value substantially higher than the value certified by the Commissioner. The Boston Assessors, therefore, had no standing to challenge the certified values for Verizon's § 39 property located in Boston for fiscal years 2003 and 2004.

**Prospective Application of the Board's Rulings and Decisions in This Phase**

Based on all of the evidence and the Board's analysis of the applicable law, which is explained in its Opinion below, and insofar as it may be a finding of fact, the Board finds that its rulings and decisions in these consolidated appeals apply to all years at issue in the Initial Phase of these consolidated appeals, fiscal years 2005 through 2008, as well as fiscal year 2009,[15] and cannot, as Verizon, argues, be applied prospectively only.

**Valuation Phase**

In the Valuation Phase of these consolidated appeals, the Board examined: (1) whether the new arguments presented by Verizon necessitate a ruling that, contrary to its ruling in ***MCI*** regarding MCI's CWIP, Verizon's CWIP is not taxable as § 39 property; and (2) whether the fair cash values of Verizon's § 39 property in Newton for fiscal years 2003 through 2009 or Boston for fiscal years 2005 through 2009 are substantially higher or substantially lower than the Commissioner's corresponding certified values. Based on all of the evidence and after analyzing the relevant law, and insofar as they may be findings of fact, the Board answers these questions no and yes, respectively. Because the jurisdictional question, which had been reserved for the Valuation Phase, has already been discussed in detail, *supra*, what follows are the Board's findings regarding whether Verizon's CWIP is taxable and whether the fair cash value of Verizon's § 39 property is substantially higher or substantially lower than the Commissioner's corresponding certified values.

**Construction Work in Progress**

Verizon posits several arguments in support of its theory that its CWIP, which it readily admits exists in Massachusetts, Newton, and Boston and is susceptible of being valued, is not taxable for *ad valorum* property tax purposes. First, Verizon argues that CWIP owned by corporations is not taxable. Second, Verizon contends that its CWIP is exempt from taxation as intangible personal property. Third, Verizon suggests that CWIP relating to poles, wires and underground conduit is not taxable because G.L. c. 59, § 18, Fifth does not impose a tax on poles, wires and underground conduit unless and

[15] See footnote 7, *supra*.

until they are "erected upon" private ways or "laid-in" private or public ways. Finally, Verizon maintains that any ruling that CWIP is taxable may be applied prospectively only.

To the extent that it is a finding of fact, and, as more fully explained its Opinion below, the Board finds here that, whether it was owned by a corporation or not, CWIP was personal property, was taxable, and, as § 39 property, was subject to central valuation by the Commissioner under G.L. c. 59, § 39 for all the fiscal years at issue in these consolidated appeals and the Board's findings in this regard will not be applied prospectively only. The Board also finds that Verizon did not demonstrate that it incurred costs in a fiscal year at issue that related to tangible property which it did not yet own. The Board further finds that the values assigned to CWIP by the parties for fiscal years 2005 through 2008, which were based on Verizon's July 23, 2008 revised asset listing for CWIP, and the values for CWIP included in the Commissioner's certified values for fiscal year 2009 were based on the best available information and are correct.[16] The values for CWIP for fiscal years 2005 through 2009 are summarized in the following table.

| | CWIP | | | | |
|---|---|---|---|---|---|
| **Fiscal Year** | **2005** | **2006** | **2007** | **2008** | **2009** |
| **Newton ($)** | 317,900 | 17,558,900 | 130,300 | 630,100 | 234,300 |
| **Boston ($)** | 909,300 | 1,419,100 | 1,268,300 | 4,948,600 | 1,414,600 |

**The Board's Findings Regarding Verizon's Expert Valuation Witness, Mr. Weinert's, Valuation Methodology**

After reviewing and analyzing Mr. Weinert's CORLD methodology, which is his primary valuation tool, the Board finds that it contains numerous flaws that compromise the efficacy of the values derived from it. The more serious flaws include: (1) the use of Verizon's July 23, 2008 revised asset listings as the starting point for fiscal year 2005 and 2006 valuations, instead of the costs and vintage years of the assets reported on Verizon's Forms 5941;[17] (2) the use of a utilization deduction in conjunction with other forms of functional and economic obsolescence; (3) the use of a net salvage deduction; (4) the use of certain techniques and calculations for depreciation; and (5) the approach and assumptions for determining economic obsolescence.

With respect to the July 23, 2008 revised asset listings for fiscal years 2005 and 2006, the Board finds that Verizon failed to prove that they were more accurate than the list of assets reported on Verizon's corresponding Forms 5941. When Verizon first submitted the relevant Forms 5941 on or about March 1, 2004 and March 1, 2005, its

[16] Also see the Board's findings, *infra*, regarding the application of economic obsolescence in the Commissioner's valuation methodology with respect to property in service less than one year and generators. The Board presumes that the Commissioner did not apply economic obsolescence to CWIP and agrees with that decision. Under the circumstances present in these consolidated appeals, the Board finds that economic obsolescence should not be applied until CWIP becomes part of Verizon's operating system.

[17] The Board finds, however, that the data reported for CWIP and poles and wires over public ways is the best available information and compliments the data regarding assets already reported on corresponding Forms 5941.

authorized signatory affirmed that "this return and all accompanying lists . . . are true, correct and complete to the best of my knowledge and belief." Not until Verizon prepared the July 23, 2008 revised asset lists during discovery in these consolidated appeals did Verizon raise the specter of its § 39 property having been reported for the wrong municipality or over-reported. Verizon never filed or sought to file amended or supplemental Forms 5941 to address purported discrepancies between its original filings and these later lists.

Moreover, the July 23, 2008 revised asset lists did not provide vintage years for property that, in conjunction with Verizon's accounting-system change, had been rolled-up into the 1981 vintage year. The evidence indicates that up to 16% of the § 39 property in Newton and Boston had vintage years prior to 1981. Verizon never demonstrated that its July 23, 2008 revised asset lists, which rolled-up all 1981 and pre-1981 property into a single 1981 vintage year resulted in a more accurate reflection of Verizon's § 39 property for fiscal years 2005 and 2006 than the listing submitted on its Forms 5941. To the contrary, Mr. Sansoucy testified that "[t]he effect is that the values produced . . . with the '81 roll-up in all categories will consistently understate the final value if the correct vintages were provided." Several examples discussed by the Assessors in their brief and submitted into evidence by the Commissioner demonstrated this deflating phenomenon for certain categories of § 39 property, including underground metallic cable and utility poles.[18] The Board concludes that by not using pre-1981 vintage years, the value of older property is often understated in the cost methodology because the length of the trending period to bring original cost to cost new is truncated and the time cost of money and inflation are not offset by depreciation. Accordingly, the Board finds that Verizon failed to prove that the July 23, 2008 revised asset lists were more accurate than the asset listings on the corresponding Forms 5941, and Mr. Weinert's use of the July 23, 2008 revised asset lists as the starting point for his valuation methodology for fiscal years 2005 and 2006 was improper.

With respect to Mr. Weinert's use of a utilization deduction in his CORLD methodology, the Board finds, among other flaws, that it is unnecessary and duplicative of aspects of functional and economic obsolescence. Mr. Weinert applies his utilization adjustment to his replacement cost, which, in his analysis, is the same as his reproduction

[18] For example, the Assessors described in their brief how in Mr. Weinert's CORULD methodology, he used a 2.444 cost multiplier/translator to convert the trended original cost of underground metallic cable with a vintage year of 1981 to a reproduction cost new. Because of the roll-up, however, this account included all pre-1981 vintage year underground metallic cable including that with a 1970 vintage year, which would have had a cost multiplier/translator of 4.62, almost double that used by Mr. Weinert, but for the roll-up. As Mr. Sansoucy showed in his calculations, the corresponding reproduction cost new of this underground metallic cable almost doubles as well. Thus, any pre-1981 vintage year underground cable contained in Mr. Weinert's 1981 account is valued lower than it should be and consequently skews downward his calculation of reproduction cost new, which ultimately lowers his fair cash value estimates. In another example, the Commissioner showed how a 1945 utility pole with an original cost of $200, but reported with a 1981 vintage year results in a difference of 870% in the final valuation of the pole ($95 with the 1981 roll-up as opposed to $731 using the true vintage year of 1945).

cost new. His rationale for using this deduction is his belief that the Verizon system contains excess capacity because with:

> The advent of competition and alternate providers of local exchange service, i.e., competitive carriers (CLECs), cable broadband and telephone, wireless carriers, and Voice Over Internet Protocol (VOIP) providers, Verizon Massachusetts has lost substantial access lines to these providers resulting in significant under-utilization of Verizon Massachusetts's outside plant facilities.

The Board observes that Mr. Weinert's reference to reduced demand and increased competition as justifications for his utility deduction to compensate for excess capacity is more appropriately classified as and addressed in the form of economic obsolescence. As stated in VALUING MACHINERY AND EQUIPMENT, the text upon which Mr. Weinert relied for developing this deduction, "[e]conomic obsolescence . . . has been previously defined as the loss in value or usefulness of a property caused by factors external to the asset. These factors include increased cost of raw materials, labor, or utilities . . .; reduced demand for the product; increased competition; environmental or other regulations; or similar factors." ***Ibid.*** at 96-97. Furthermore, in referencing FCC Order 03-36[19] as the impetus for Verizon's FIOS product, Mr. Weinert also considers regulatory change as a basis for his utilization deduction and for metallic cable obsolescence. In the Board's view, Mr. Weinert's utilization deductions attempt to account for the same or similar factors underpinning his functional and economic obsolescence deductions thereby rendering them duplicative, excessive, and improper.

Interestingly, Mr. Weinert's cost-of-capacity method for computing his utilization deduction is found in the economic obsolescence section of VALUING MACHINERY AND EQUIPMENT where the text states that: "[w]herever the operating level of a plant or an asset is significantly less than its rated or design capability, and the condition is expected to exist for some time, the asset is less valuable than it would otherwise be. Such a penalty for inutility can be a measure of the loss in value from this form of economic obsolescence." ***Ibid.*** at 97. The factors that Mr. Weinert considered in developing his utilization deduction are some of the same factors that VALUING MACHINERY AND EQUIPMENT recommends for consideration for analyzing economic obsolescence.

In addition, the Board finds that Mr. Weinert takes an overly restrictive view of the utility of copper wires and related conduit in Verizon's incumbent telecommunications system. The record is replete with evidence supporting the propositions that copper wires and conduit are essential and dynamic parts of Verizon's existing system and will remain so for the foreseeable future. At all relevant times, Verizon's copper wires and related conduits continued to provide service to its and CLECs' customers for which Verizon receives an increasing amount of revenue. In Boston, there is virtually no fiber optic service, leaving telecommunications service almost entirely dependent on copper wires, related conduits, and poles. In addition, the advent of DSL Internet service has allowed Verizon to add service to existing copper

[19] This Order, among other things, marks the end of ILECs, like Verizon, being required to provide their broadband facilities to competitors. It also marks the beginning of Verizon's entry into broadband services through the deployment of broadband facilities in local exchanges.

lines by using frequencies not previously utilized for voice communication. Technological advances, such as DSL, have enabled Verizon to extend the life of and provide new uses for existing copper wires. Furthermore, in Newton, for example, existing copper wires are often used to support aerial fiber optic cable strung along poles obviating the need for the installation of other structural support. The Board further finds that excess capacity is intentionally incorporated into Verizon's copper wire network for other legitimate business purposes connected to the savvy operation of its telecommunications system such as maintenance, overcapacity, peak capacity, customer churn, and prospective growth. Witnesses for Verizon readily acknowledged that copper wires are also utilized in conjunction with fiber optics in hybrid systems.

Even Verizon's own panel testimony at the Total Element Long Range Incremental Cost ("TELRIC") proceeding in Massachusetts, identified as DTE Docket No. 01-20, recognized that "network elements and systems cannot be engineered to operate at 100% utilization" and "copper cable continues to be the economically efficient design choice for many feeder loops nearer to the servicing center." The testimony further reveals that the utilization rate for distribution cable is 40%, thus supporting Mr. Sansoucy's premise that Verizon intentionally designed its telecommunications system with significant over-capacity to account for a host of factors.

Mr. Sansoucy also was critical of Mr. Weinert's use of a utilization deduction because it assumes Verizon's copper wires and related conduit have no use other than for voice transmission. The Board finds that his criticism is well-founded and supported by the weight of the evidence. Under the circumstances present in these consolidated appeals, the Board finds that Mr. Weinert's utilization deduction overlaps with functional and economic obsolescence and does not reflect the reality of copper wire and related conduit usage by Verizon or what a prospective purchaser of the telecommunications system would foresee for the immediate future.

In addition, the Board finds that Mr. Weinert's deductions for the potential future costs relating to the abandonment or removal of retired property, which he terms net salvage, are not appropriate. These deductions are not only speculative but they run counter to Verizon's own accounting practices dealing with negative net salvage values.[20] Mr. Sansoucy credibly testified that these deductions are not appropriate in an *ad valorum* valuation unless the expenses are required to be incurred as with the decommissioning of a nuclear plant. There is no such regulatory requirement here, and, moreover, Verizon's accounting practices require negative net salvage deductions to be taken as an expense when incurred.[21]

In addition, copper wires, even if not in service, may provide structural support for fiber cable or assistance in the installation of new cable. Similarly, conduits may provide placement and protection for other components and future uses. The likelihood

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[20] The Financial Accounting Standards Board ("FASB") Financial Accounting Standard No. 143, "Accounting for Asset Retirement Obligations," requires the exclusion of costs of removal from depreciation rates for assets for which the removal costs exceed salvage.

[21] To the extent that Verizon incurred these expenses, they were included in the historical data upon which Mr. Weinert relied in making his expense projections for his DCF approach, which was the basis for his CORLD's economic obsolescence technique.

of their removal and the incursion of any costs associated with their removal are highly speculative. Accordingly, the Board finds that this deduction was inappropriate.

Mr. Weinert's depreciation calculations employed a staggered life system, in which he reduced the service life of each category of § 39 property, based upon technological innovations, which he termed "service life drivers," within certain intervals of time. He then applied each service life to an Iowa curve to calculate depreciation.[22] His depreciation was intended to include what he termed "normal," or mostly physical, depreciation and functional obsolescence. According to Mr. Weinert's appraisal report, "normal depreciation was determined based on the age of the property and its normal service life; while, functional obsolescence was based on the impact on the property's normal life caused by factors such as changing technology, service requirements, and competition over time." Mr. Weinert observed that functional obsolescence results "in decreased utility of existing equipment, and therefore decrease in value to its owner." Mr. Weinert addressed functional obsolescence by shortening the normal service life of property using his service life drivers, which he claimed reflect appropriate obsolescence factors.

Once again, however, the Board finds that Mr. Weinert is double counting his deductions by applying depreciation to account for factors that he purportedly already removed in his utilization deduction step. As the Board stated in ***MCI*** while quoting from page 357 of 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." ***MCI*** at 2008-357. Here, in the Board's view, Mr. Weinert has used these techniques inconsistently by employing a utilization deduction to convert reproduction cost new values to replacement cost values and then taking further deductions in the name of depreciation for functional obsolescence, which his utilization deduction was intended to cure. The Board also notes that Mr. Weinert's service life drivers were highly subjective and were not founded on what the Board considers to be verifiable data.

The Board further finds that the 5% floor that Mr. Weinert uses in his depreciation approach is too low. In Mr. Sansoucy's words "the property is still in existence, used, useful and operating, it does not depreciate any further by virtue of its continued age." Moreover, it is an integral part of Verizon's incumbent operating system, and "the cost of permits, location, surveys, franchises, approvals, construction, the one-time interest cost necessary for creating the entire property, and the engineering to create the entire property are all sunk in value in the existing property." The Board finds that Mr. Weinert's 5% floor did not adequately consider and incorporate the retained value associated with these factors and, accordingly, finds that his methodology was further flawed by his use of only a 5% floor.

With respect to his economic obsolescence deductions, the range of Mr. Weinert's percentage deductions, from 8.65% to 22.67%, was lower than the Commissioner's 25% and, at first blush, and without regard to other depreciation and obsolescence amounts, seemingly reasonable; however, this observation belies the flaws in Mr. Weinert's

[22] The record is somewhat confusing regarding Mr. Weinert's use of Iowa curves. He references them and includes numerous pages of them in his appraisal report, but he also speaks of using "straight-line age-life [depreciation, which] is a reasonable approximation of the Iowa Type Curves and simplifies the condition calculation."

methodology. Perhaps the most troubling aspect of Mr. Weinert's economic obsolescence deductions was how they were calculated to transform the values that Mr. Weinert derived for his preliminary cost conclusions using his CORLD approach into the final values that he derived using his DCF method. By using the difference between his preliminary cost conclusions and his final DCF value conclusions for his measure of economic obsolescence, Mr. Weinert transformed the value conclusions developed using his CORLD approach into the value conclusions derived using his DCF method.

This transformation is perhaps best illustrated using an example. For fiscal year 2009,[23] Mr. Weinert derived a value of $3,074,476,714 for Verizon Massachusetts using his DCF approach. He developed a preliminary cost value of $3,976,002,061 for Verizon Massachusetts using his CORLD approach. Mr. Weinert considered the $901,525,347 difference between these two values to be the applicable measure of economic obsolescence for use in his CORLD approach. Mr. Weinert converted that difference to a percentage by dividing the difference by the preliminary cost value. The mathematics related to this example is summarized in the table below.

| | |
|---|---|
| a) Preliminary Cost Conclusion | $ 3,976,002,061 |
| b) DCF Value Conclusion | $ 3,074,476,714 |
| c) External (economic) Obsolescence (a-b) | $ 901,525,347 |
| d) External (economic) Obsolescence (c÷a) | 22.67% |

Using Newton to further this example, Mr. Weinert then applied his economic obsolescence adjustment of 22.67% to his preliminary cost conclusions for Newton as summarized in the tables below.

| | |
|---|---|
| a) Preliminary Cost Conclusion | $ 45,288,672 |
| b) Economic Obsolescence | ($ 10,268,829) |
| c) Percent Economic Obsolescence | 22.67% |
| d) Final Cost Approach Value Indicator | $ 35,019,843 |

Not surprisingly, given Mr. Weinert's technique for developing his measure of economic obsolescence, the $35,019,843 value that he derived for Newton using his CORLD approach exactly equals the $35,019,843 value that he allocated to Newton from his DCF approach.

Moreover, Mr. Weinert's technique for determining economic obsolescence will always produce this transformational result regardless of the preliminary cost value conclusions. Even varying the inputs that Mr. Weinert uses to arrive at his preliminary cost conclusions will have no effect on his final value conclusions because Mr. Weinert's economic obsolescence technique will always result in his final value conclusions equaling his DCF values. Under these circumstances, the Board finds that the method that Mr. Weinert used to determine and apply economic obsolescence for his CORLD approach is faulty because, among other reasons, it serves to eviscerate his CORLD methodology of any analytical consequence by transforming the preliminary values

[23] Because Mr. Weinert uses fiscal year 2009 figures in the narrative section of his appraisal report, the Board likewise focuses on that fiscal year. The analysis, however, is equally applicable to the earlier fiscal years at issue, for both Boston and Newton, notwithstanding certain inconsistencies and mistakes in Mr. Weinert's methodology.

derived from his CORLD method into the final values derived from his DCF method, which, for *ad valorum* taxation purposes, is not a favored approach.

In examining the underpinnings of Mr. Weinert's DCF analysis itself, the Board finds that it was premised on several highly subjective and speculative assumptions as well as various conceptual errors. First, Mr. Weinert based his income projections on Verizon's historical data for calendar years 2000 to 2007 "assuming similar performance and trends" to the "historical results." Surprisingly, he did not ask for or use Verizon's projections and simply based his forecasts on past revenue information. There was no analysis of "the regulatory, competitive and technological changes in the industry" that Mr. Weinert stated in his appraisal report require that "the inputs to the appraisal procedures . . . reflect adjustments to historical data or . . . the use of differing assumptions than those assumptions which were relied upon in the past." Mr. Weinert did not even separately analyze historic or projected FIOS revenues, which were derived from a proprietary product that he, at least in other areas of his valuation analysis, considered crucial to Verizon's future and was at least partly responsible for the purported demise of the use of copper cables. While other evidence indicated that FIOS revenues were generating growth momentum throughout Massachusetts and in Newton, Mr. Weinert did not directly address FIOS revenue growth in his DCF analysis, despite including the substantial costs associated with its build-out. The Board finds that Mr. Weinert's failures in these regards served to suppress his revenue projections. As Mr. Sansoucy admonished, using only historical data is backward looking and does not constitute a genuine projection as intended by a DCF method.

Second, the Board finds that Mr. Weinert failed to account for all of Verizon's revenues related to the § 39 property at issue in these consolidated appeals. Verizon affiliates use Verizon facilities to furnish services such as FIOS and Internet services. The affiliates pay Verizon access charges, and those charges are included in Verizon's revenue. The affiliates, however, collect the retail revenue from the customers purchasing these services. A similar arrangement is used for non-affiliates who also collect retail charges for services provided over Verizon's facilities. Consequently, the revenue, which Mr. Weinert analyzed for his DCF method, did not reflect the true earning capacity of the § 39 property, and his revenue projections were somewhat understated as a result.

Third, Mr. Weinert did not demonstrate that Verizon's historic data were consistent with that of its competitors. Therefore, he never showed that he relied on competent market data in his analysis. The Board finds that even a DCF analysis should reference market data for the purposes associated with these consolidated appeals.

Fourth, Mr. Weinert took a deduction for income taxes in each year of his DCF analysis of 34% of his "Earnings Before Interest and Income Taxes." Without providing any real support for this deduction, he testified that 34% included both federal and state income taxes and was the "the statutory rate." Interestingly, the actual rates, which do appear in Mr. Weinert's appraisal report, were significantly lower than his so-called "statutory rate" in six of the eight years that he examined. The actual rates are summarized in the following tables.

**Tax Years 2000-2003**

| **Tax Year** | **2000** | **2001** | **2002** | **2003** |
|---|---|---|---|---|
| **Inc. bef. Inc. Tax** | 644,327,518 | 475,262,316 | 270,773,003 | -184,931,410 |
| **Inc. Tax** | 206,815,205 | 166,718,632 | 59,134,223 | -111,624,213 |

| | | | | |
|---|---|---|---|---|
| **Inc. Tax Rate** | 32.1% | 35.1% | 23.6% | -60.4% |

**Tax Years 2004-2007**

| **Tax Year** | **2004** | **2005** | **2006** | **2007** |
|---|---|---|---|---|
| **Inc. bef. Inc. Tax** | 66,258,964 | 153,951,732 | 55,664,509 | 110,801,121 |
| **Inc. Tax** | -7,470,099 | 16,486,705 | -3,004,982 | 897,358 |
| **Inc. Tax Rate** | -11.3% | 10.7% | -5.4% | 0.8% |

Mr. Sansoucy posited that a before-tax capitalization rate should be used to account for such taxes. The Board finds that the deductions for income taxes, which Mr. Weinert took in his DCF method, lacked sufficient support.

Fifth, Mr. Weinert deducted property taxes as an expense in his DCF method. The methodology espoused in VALUING MACHINERY AND EQUIPMENT, upon which Mr. Weinert extensively relied for many parts of his valuation assignment, is to "add[] the effective tax rate to the conventionally derived discount rate." ***Ibid***. at 174. Mr. Weinert failed to follow this approach.

In addition to these five enumerated issues concerning Mr. Weinert's DCF methodology, the Board also disagrees with his allocations of his DCF values for Massachusetts to Newton and Boston. Mr. Weinert appears to have used different allocations methods for Newton and Boston, and those methods were not based on any accepted appraisal authority. Moreover, Mr. Weinert applied "discount rates with inflation" to discount cash flows that do not appear to reflect the effects of inflation. This pairing is illogical and is an improper appraisal practice under the circumstances.

Furthermore, in the Statement of Appraisal Standard 2, contained in the *Uniform Standards of Professional Practice* (2008-2009 ed.) ("USPAP"), the Appraisal Institute recognizes that [b]ecause DCF analysis is profit oriented and dependent on the analysis of uncertain future events, it is vulnerable to misuse." Accordingly, USPAP suggests that a DCF analysis be applied in conjunction with "other approaches" to value. Here, Mr. Weinert relied solely on his DCF method for determining the value of Verizon Massachusetts. USPAP also suggests that "the assumptions" used in the DCF analysis "be both market and property specific." Here, for his revenue and expense inputs, Mr. Weinert relied solely on Verizon's historical data without any reference to competitors. In addition, USPAP suggests that if the appraiser uses commercial software, he "should cite the name and version of the software and provide a brief description of the methods and assumptions inherent in the software." Mr. Weinert also failed to do that here.

Lastly in this regard, the value indications that Mr. Weinert derived from his DCF analysis are significantly different from the value indications that he developed using a direct capitalization approach. The percentage differences are summarized in the following table.

| **Fiscal Year** | **2005** | **2006** | **2007** | **2008** | **2009** |
|---|---|---|---|---|---|
| **Difference (%)** | 28.8 | 38.5 | 27.8 | 23.5 | 18.1 |

As stated in THE APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (12th ed. 2001):

> Both direct capitalization and yield capitalization are market-driven, and when applied correctly each should result in similar value indications for a subject property. In applying the income capitalization approach, the appraiser need not be limited to a single capitalization method. With adequate information and proper use, direct and yield capitalization methods should produce similar value indications. If differences arise, the appraiser should check that the various techniques are being applied correctly and consistently.

***Ibid.*** at 495. The value indications derived by Mr. Weinert's two income capitalizations approaches here indicate that his techniques were not applied "correctly and consistently."

In sum, the Board finds that the more serious flaws associated with Mr. Weinert's CORLD valuation methodology include: (1) the use of Verizon's July 23, 2008 revised asset listings as the starting point for fiscal year 2005 and 2006 valuations, instead of the costs and vintage years of the assets reported on Verizon's Forms 5941; (2) the use of a utilization deduction in conjunction with other forms of functional and economic obsolescence; (3) the use of a net salvage deduction; (4) the use of certain techniques and calculations for depreciation; and (5) the approach and assumptions for determining economic obsolescence.

**The Board's Findings Regarding the Commissioner's Valuation Methodology**

As the Board found in ***MCI*** at 2008-311-12, the Board also finds here that 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, objectivity 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 her best information and belief. *See* G.L. c. 59, §§ 39–42.

The Commissioner's starting point for fulfilling her statutory mandate under G.L. c. 59, § 39 to centrally value each telephone and telegraph company's § 39 property by May 15th before the start of the corresponding fiscal year is each company's completed Form 5941, which constitutes the "return" required by G.L. c. 59, § 41. The Board finds that these forms are an appropriate beginning to her cost methodology. The inventory reported on Forms 5941 in these consolidated appeals "relate[d] so far as is possible, to the situation of the company and its property on January first of the year when made." The Board finds in these consolidated appeals, however, that the value of both CWIP and poles and wires over public ways should also have been included in the Commissioner's

2005 through 2008 certified valuations of Verizon's § 39 property. While the Commissioner included those values in her fiscal year 2009 certified valuations, she did not do so for earlier fiscal year certifications. The Board finds that the data for CWIP and poles and wires over public ways reported on Verizon's July 23, 2008 asset lists is the best available information for that property for fiscal years 2005 through 2008.

For fiscal years 2005 through 2008, the Commissioner had a policy of not centrally valuing CWIP or poles and wires over public ways. The Board finds that for Massachusetts *ad valorem* property tax purposes and as posited by the Assessors, this policy was erroneous because, as more fully explained in the Opinion below, the relevant statutes required that *all* property owned in the municipalities on the valuation date that was not specifically exempt, should have been valued. Consequently, on the evidence here, CWIP and poles and wires over public ways constitute § 39 property, which should have been reported to the Commissioner by the telephone companies and centrally valued by the Commissioner as they were for fiscal year 2009. Accordingly, the Board finds that the Commissioner's reliance on the fiscal year 2009 version of Forms 5941, which included values for Verizon's CWIP and poles and wires over public ways, as the starting point in her trended reproduction cost new less depreciation valuation methodology was appropriate.

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.[24] For the trending of telephone personal property and the generators, the Commissioner relied on the TPI Index and the Handy-Whitman Index, respectively. Mr. Weinert also relied on the TPI Index but used a mid-year convention instead of the end-of-the-year convention that the Commissioner used. As the Board found in ***MCI*** at 2008-316 and finds here, 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 function well within a standardized central valuation system. The Board further finds that Mr. Sansoucy's selection and the Commissioner's adoption of an end-of-the-year convention were acceptable for § 39 central valuation purposes.

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 works well with an automated system, is predictable and is verifiable. Mr. Sansoucy also recognized that utility property is well maintained to assure its full functionality and is almost without exception 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 reviews its service lives on an on-going basis and will change them, if warranted. In addition, because of the similarity of equipment and

[24] The composite multiplier also includes the appropriate depreciation floors.

similar pace of technological change among telecommunications providers, as well as the convergence of services offered by these providers, the Board finds, as it did in ***MCI*** at 2008-316-17, 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 "a floor is where the depreciation is stopped after a certain number of years have occurred so that if the property is still in existence, used, useful, and operating, it does not depreciate any further by virtue of its continued ag[ing]." Based primarily on the justifications contained in Mr. Sansoucy's testimony and report, the Board, again as in ***MCI*** at 2008-316-19, agreed with the Commissioner's use of straight-line depreciation and the FCC service lives with suitable floors.

The Board also finds, as it did in ***MCI*** at 2008-318, that a 30% floor was appropriate for the telephone property because, as Mr. Sansoucy suggested, it reflected the property's continuing vitality as part of a revenue producing system, its incumbency and exclusivity, and its maintenance, as well as the considerable original investment in associated direct and indirect costs, particularly regarding the outside plant. Mr. Sansoucy testified that it is not uncommon to incorporate a floor concept for *ad valorum* taxation purposes, citing New York State as an example. After applying his adjustment for economic obsolescence, the effective floor is actually only 22.5%. As it did in ***MCI*** at 2008-318, the Board also concurs here with the 60% floor that Mr. Sansoucy selected, and the Commissioner adopted, for generators. This limit properly reflected the generators' limited use, high degree of maintenance, and retained residual value, which Mr. Sansoucy confirmed with market data.

The Board also finds, as it did in ***MCI*** at 2008-318-19, 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 through 2009, the Commissioner subtracted an additional 25% economic obsolescence from the values obtained from the automated central valuation methodology. This deduction resulted from Mr. Sansoucy's studies and analyses of general market trends for a variety of telephonic companies in Massachusetts as well as submissions from and discussions with knowledgeable representatives from the telecommunications industry indicating that the Commissioner's proposed values were excessive because of, among other things, technological advances, competition, and the overall state of the industry. Mr. Sansoucy also examined ARMIS reports[25] and 10-K filings for Verizon New England, as well as public filings for Verizon Massachusetts, which, in the first case, indicated declining revenue of approximately 22% from its peak in 1997 to its trough in 2007 and, in the second instance, a 40% increase in call volume per access line coupled with a 35% decrease in access lines. Mr. Sansoucy interpreted this information to mean that economic pressures on telecommunications companies clearly existed, but they were not "something that is falling off the cliff." Recognizing

[25] Verizon files annual reports with the FCC known as ARMIS Reports.

the inherent difficulty in quantifying economic obsolescence, the Board, as it did in ***MCI*** at 2008-319-20, finds that the Commissioner's use of a 25% deduction to account for economic obsolescence was reasonable under the circumstances present in these consolidated appeals.

For fiscal year 2006 and thereafter, the Commissioner, on Mr. Sansoucy's recommendation, did not apply the 25% economic obsolescence deduction to property in service less than one year. Beginning in fiscal year 2008, the Commissioner, again on Mr. Sansoucy's recommendation, did not apply the 25% economic obsolescence deduction to generators. In fiscal year 2009, the Commissioner added categories for reporting CWIP and poles and wires over public ways and included them in her certified central valuations consistent with the Board's March 3, 2008 Order in the Initial Phase of these consolidated appeals and its decision in ***MCI***.

With respect to these adjustments in Mr. Sansoucy and the Commissioner's methodology, the Board finds that the economic obsolescence adjustment should be applied to property in service less than one year and also to generators because they are part of the telecommunications system as soon as they are connected to it and, as a result, they immediately experience the same economic obsolescence that all the other components experience as part of that system. Neither Mr. Sansoucy nor the Commissioner offered any appraisal authority for singling out the generators, or property in service less than one year, from the application of economic obsolescence otherwise applied to Verizon's § 39 property. The Board further finds that Mr. Sansoucy and the Commissioner's valuation methodology will always effectively value generators at least 45% to the good even after applying the economic obsolescence. That percentage is still within the value range that Mr. Sansoucy determined was appropriate for the second-hand generator market that he researched, albeit at the lower end.

Notwithstanding the Board's findings in these regards, the record does not contain sufficient information for the Board to determine the extent to which the Commissioner's failure to apply the economic obsolescence deduction to property less than one year old and generators affects the fair cash values for the § 39 property in Newton and Boston. In any event, Verizon does not directly contest this issue, and the Assessors generally accept the Commissioner's certified values for fiscal years 2005 through 2009 provided the values for CWIP and poles and wires over public ways are added to the 2005 through 2008 certified values. Accordingly, and in keeping with the Supreme Judicial Court's comments and holding in ***In the Matter of the Valuation of MCI Worldcom Network Services, Inc.***, 454 Mass. at 646, the Board will not substitute its own judgment regarding this deduction for the Commissioner's in these circumstances.

Summaries of the Board's findings regarding the fair cash values of Verizon's § 39 property in Newton and Boston for fiscal years 2005 through 2009 are contained in the following two tables, respectively.

**Newton**

| Fiscal Year | Commissioner's Certified Values ($) | CWIP ($) | Poles & Wires Over Public Ways ($) | Total Value ($) |
|---|---|---|---|---|
| 2005 | 20,798,600 | 317,900 | 7,941,400 | 29,057,900 |
| 2006 | 19,203,900 | 17,558,900 | 8,532,700 | 45,295,500 |
| 2007 | 22,874,000 | 130,300 | 31,772,100 | 54,776,400 |
| 2008 | 23,676,700 | 630,100 | 26,526,100 | 50,832,900 |

| | | | | |
|---|---|---|---|---|
| 2009 | 57,738,100 | 234,300 | 33,398,900 | 57,738,100 |

**Boston**

| Fiscal Year | Commissioner's Certified Values ($) | CWIP ($) | Poles & Wires Over Public Ways ($) | Total Value ($) |
|---|---|---|---|---|
| 2005 | 174,141,000 | 909,300 | 39,114,300 | 214,164,600 |
| 2006 | 157,810,600 | 1,419,100 | 42,051,800 | 201,281,500 |
| 2007 | 157,177,700 | 1,268,300 | 42,427,100 | 200,873,100 |
| 2008 | 178,164,300 | 4,948,600 | 51,500,000 | 234,612,900 |
| 2009 | 230,655,200 | 1,414,600 | 50,906,800 | 230,655,200 |

The differences between the Board's findings and the Commissioner's certified values for Verizon's § 39 property located in Newton and Boston for fiscal years 2005 through 2009 are summarized in the following two tables, respectively.

**Newton**

| Fiscal Year | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Board's Fair Cash Values ($) | 29,057,900 | 45,295,500 | 54,776,400 | 50,832,900 | 57,738,100 |
| Commissioner's Certified Values ($) | 20,798,600 | 19,203,900 | 22,874,000 | 23,676,700 | 57,738,100 |
| Difference ($) | **8,259,300** | **26,091,600** | **31,902,400** | **27,156,200** | **0** |
| Difference (%) | **40** | **136** | **140** | **115** | **0** |

**Boston**

| Fiscal Year | 2005 | 2006 | 2007 | 2008 | 2009 |
|---|---|---|---|---|---|
| Board's Fair Cash Values ($) | 214,164,600 | 201,281,500 | 200,873,100 | 234,612,900 | 230,655,200 |
| Commissioner's Certified Values ($) | 174,141,000 | 157,810,600 | 157,177,700 | 178,164,300 | 230,655,200 |
| Difference ($) | **40,023,600** | **43,470,900** | **43,695,400** | **56,448,600** | **0** |
| Difference (%) | **23** | **28** | **28** | **32** | **0** |

The Board finds that, based on the actual dollar differences and the percentage differences between the Commissioner's certified values and the Board's findings on fair cash value, the Assessors proved that the fair cash values of Verizon's § 39 property located in Newton and Boston were substantially higher than the values certified by the Commissioner for fiscal years 2005 through 2008. Based on Newton's, Verizon's and the Commissioner's "Stipulation of Agreed Values" and the actual dollar differences and the percentage differences between the Commissioner's certified values and the agreed values, the Board further finds that the fair cash values of Verizon's § 39 property located in Newton were substantially higher than the values certified by the Commissioner for fiscal years 2003 and 2004, as summarized in the table repeated below.

| Fiscal Year | Commissioner's Certified Value | Agreed Value ($) | Difference ($) | Difference (%) |
|---|---|---|---|---|

| | ($) | | | |
|---|---|---|---|---|
| **2003** | 34,882,200 | 48,017,000 | 13,134,800 | 37.7 |
| **2004** | 33,389,900 | 47,151,100 | 13,761,200 | 41.2 |

Verizon failed to prove that the fair cash values of its § 39 property located in Newton and Boston were substantially lower than the values certified by the Commissioner for fiscal years 2005 through 2009.

**Summary**

In sum, the Board finds and rules that:

(1) It has jurisdiction over the consolidated appeals relating to Newton and Boston;

(2) In accordance with the "Stipulation of Agreed Values" submitted to the Board by the Newton Assessors, Verizon, and the Commissioner, the fair cash value of Verizon's § 39 property located in Newton for fiscal year 2003 is $48,017,000, a $13,134,800 increase over its certified value and for fiscal year 2004 is $47,151,100, a $13,761,200 increase over the certified value for fiscal year 2004. These values are substantially higher than the values certified by the Commissioner;

(3) 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;

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

(5) The Board's rulings and decisions in the Initial Phase of these consolidated appeals apply to all fiscal years at issue in these consolidated appeals, fiscal years 2003 through 2009, and cannot, as Verizon argues, be applied prospectively only;

(6) The Board's rulings and decisions in the Valuation Phase of these consolidated appeals regarding the taxability of CWIP apply to all years at issue in the Valuation Phase of these consolidated appeals, fiscal years 2003 through 2009, and cannot, as Verizon argues, be applied prospectively only;

(7) The Board's findings, rulings and decisions in the Valuation Phase of these consolidated appeals regarding the valuation of Verizon's § 39 property located in Newton and Boston apply to all years at issue in the Valuation Phase of these consolidated appeals, fiscal

years 2003 through 2009, but only to Newton and Boston, respectively; and

(8) Verizon is taxable on all its CWIP under G.L. c. 59, § 2 and G.L. c. 59, § 18, First.

On the basis of these findings and rulings and its subsidiary and ultimate findings regarding valuation, *supra*, the Board finds that the Newton Assessors proved that the fair cash value of Verizon's § 39 property located in Newton was substantially higher than the valuations certified by the Commissioner for fiscal years 2003 through 2008. The Board further finds that the Boston Assessors proved that the fair cash value of Verizon's § 39 property located in Boston was substantially higher than the valuations certified by the Commissioner for fiscal years 2005 through 2008. The Board also finds that Verizon failed to prove that the fair cash value of its § 39 property located in Newton and Boston was substantially lower than the valuations certified by the Commissioner for fiscal years 2005 through 2009.

Therefore, with respect to the fiscal year 2003 through 2008 appeals brought by the Newton Assessors, the Board decided them for the appellant Newton Assessors as follows:

| Docket Number | Fiscal Year | Commissioner's Certified Values ($) | Board's Values ($) | Increase to Values ($) |
|---|---|---|---|---|
| C265966 | 2003 | 34,882,200 | 48,017,000 | 13,134,800 |
| C269574 | 2004 | 33,389,900 | 47,151,100 | 13,761,200 |
| C273836 | 2005 | 20,798,600 | 29,057,900 | 8,259,300 |
| C279719 | 2006 | 19,203,900 | 45,295,500 | 26,091,600 |
| C285500 | 2007 | 22,874,000 | 54,776,400 | 31,902,400 |
| C290518 | 2008 | 23,676,700 | 50,832,900 | 27,156,200 |

With respect to the fiscal year 2005 through 2008 appeals brought by the Boston Assessors, the Board decided them for the appellant Boston Assessors as follows:

| Docket Number | Fiscal Year | Commissioner's Certified Values ($) | Board's Values ($) | Increase to Values ($) |
|---|---|---|---|---|
| C273728 | 2005 | 174,141,000 | 214,164,600 | 40,023,600 |
| C279581 | 2006 | 157,810,600 | 201,281,500 | 43,470,900 |
| C285613 | 2007 | 157,177,700 | 200,873,100 | 43,695,400 |
| C290511 | 2008 | 178,164,300 | 234,612,900 | 56,448,600 |

In accordance with G.L. c. 59, § 39, the Newton Assessors and the Boston Assessors are authorized to assess additional taxes for said fiscal years based on the increases to the valuations established by the Board.

With respect to the fiscal year 2009 appeals brought by the Newton Assessors in Docket Number C296729 and the Boston Assessors in Docket Number C296568, the Board decided them for the appellees, Verizon and the Commissioner.

With regard to the following appeals brought by Verizon against the Commissioner and the Assessors of Newton, the Board decided them for the appellees:

| Docket Number | Fiscal Year |
|---|---|

| | |
|---|---|
| C273602 | 2005 |
| C279520 | 2006 |
| C285320 | 2007 |
| C289619 | 2008 |
| C295777 | 2009 |

With regard to the following appeals brought by Verizon against the Commissioner and the Assessors of Boston, the Board decided them for the appellees:

| **Docket Number** | **Fiscal Year** |
|---|---|
| C273564 | 2005 |
| C279464 | 2006 |
| C285261 | 2007 |
| C289483 | 2008 |
| C295606 | 2009 |

## OPINION
### Initial Phase

As the Board previously found, ruled, and discussed in its March 3, 2008 Order, which addressed the issues raised in the Initial Phase of these consolidated appeals, the Board reiterates here its findings and rulings 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 property 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 2009,[26] and cannot, as Verizon argues, be applied prospectively only.

**Poles and the Wires Thereon on Public Ways**

The Board finds and rules that Verizon was 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 for the fiscal years at issue.

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 Beco-Com, LLC v. Commissioner of Revenue, et al,*** Mass. ATB Findings of Fact and Reports, 2003-410, *aff'd* 443 Mass. 198 (2005) ("***RCN Beco-Com***"), both this Board and the Supreme Judicial Court ("Supreme

[26] See footnote 7, *supra*.

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 Beco-Com,*** Mass. ATB Findings of Fact and Reports at 2003-471.

In upholding the Board on all the legal issues it decided, the Supreme Judicial Court noted that "RCN concedes that its non-machinery tangible personal property (in Newton, its wires[27] and underground conduits) is taxable under G.L. c. 59, § 18, First." ***RCN Beco-Com,*** 443 Mass. at 208. RCN had argued, however, that G.L. c. 59, § 18, Second 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 "[t]he 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 Beco-Com,*** 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 (3rd ed. 1938) 278. In contrast, § 18, Fifth, like § 18 Second at issue in ***RCN Beco-Com,*** 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) (holding 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 consolidated appeals that § 18, Fifth is the exclusive provision under which Verizon may be taxable on its poles and wires; rather, as the Court held in ***RCN Beco-Com,*** § 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 Beco-Com,*** 443 Mass. at 208.

The attempt by Verizon and the Commissioner to distinguish the clear holding of ***RCN Beco-Com*** that all of RCN's personal property was subject to taxation, including its

[27] 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 Beco-Com*** concerning the taxability of wires under § 18, First is equally applicable to poles erected on public ways.

wires laid in or erected upon public ways, on the ground that Verizon was 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 Beco-Com,*** 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 Beco-Com,*** 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 [B]oard, 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 [B]oard 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 Beco-Com*** specifically relied on § 18, First in ruling that the "the [B]oard was correct in finding that all of RCN's personal property was subject to taxation." ***RCN Beco-Com,*** 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 Communications,*** and ***RCN Beco-Com*** 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 boards of assessors "in attempting to value a portion of a system that crossed municipal boundaries and the resulting disparate valuations for affected companies." ***RCN Beco-Com,*** 443 Mass. at 198. Section 39 would be 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 Beco-Com*** 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.

**Valuation Higher Than That Certified by the 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. In ***MCI***, the Board faced the same issue and interpreted § 39 there as it does here. Recently, in ***In the Matter of the Valuation of MCI Worldcom Network Services***, ***Inc.***, 454 Mass. at 646-47, the Supreme Judicial Court agreed with Board's interpretation in ***MCI***. Accordingly, the Board rules here 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 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." As the Supreme Judicial Court stated in ***In the Matter of the Valuation of MCI Worldcom Network Services***, ***Inc.***, 454 Mass. 635 (2009):

> That sentence has never been cited by a Massachusetts appellate case, nor has it been codified in the general laws, G.L. c. 58A (board's enabling act). Indeed, the "act" to which the language refers makes no reference to the commissioner's valuation of telephone company property, or § 39 appeals from those valuations. . . . Even if that sentence retains any force, it is subordinated to the contrary, plain language of § 39, which was rewritten in 1955 to require that the "appellant" bears the burden of proving the commissioner's valuation to be too high or too low. See St. 1955, c. 344, § 31. "[W]hen the provisions of two statutes are in conflict, 'the more specific provision, particularly where it has been enacted subsequent to a more general rule, applies over the general rule.'" ***Commonwealth v. Harris***, 443 Mass. 714, 739, 825 N.E.2d 58 (225)(Marshall, C.J., concurring in part and dissenting in part), quoting ***Doe v. Attorney Gen. (No. 1)***, 425 Mass. 210, 215, 680 N.E.2d 92 (1997).

***Id.*** at 647-48.

Accordingly, the Board rules here that this provision has no validity in the context of § 39 appeals.

**Fiscal Years Affected by Board's Ruling**

The Board's rulings and decisions in the Initial Phase of these consolidated appeals apply to all years at issue in these appeals, fiscal years 2003 through 2009,[28] 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 appeals before it. *See* G.L. c. 59, § 39 (requiring the 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 the 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.

[28] See footnote 7, *supra*.

***Massachusetts Hospital Association, Inc. v. Department of Medical Security,*** 412 Mass. 340, 346 (1992). Further, the Court in ***RCN Beco-Com*** 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 Beco-Com***, 443 Mass. at 207.

In addition, as described above, the Board's 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 Communications,*** and finally adopted by it in ***RCN Beco-Com.*** Accordingly, the Board's ruling is applicable for all fiscal years at issue in these consolidated appeals.

**Valuation Phase**

**Reporting Requirements & Jurisdiction**

The question arises as to whether the Board has jurisdiction over Verizon's appeals for fiscal years 2006 and 2007 where Verizon failed to submit Forms 5941 by the preceding March 1st. The Board, however, finds and rules that it does have jurisdiction over the appeals that Verizon filed for these fiscal years.

In its findings, *supra*, the Board found that for each of the years at issue, Verizon timely made returns to the Commissioner on Forms 5941. In rendering this finding, the Board also found, *supra*, that the course of conduct between Verizon and the Commissioner was of probative value on the issue of Verizon'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 the fiscal year 2006 and 2007 appeals constituted reasons beyond Verizon'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 Verizon, justified Verizon making its returns to the Commissioner after the March 1st date for these two fiscal years.

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. The Board determined that the Commissioner was not prejudiced by the post-March 1st filings and she has 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 Verizon in making its returns to the Commissioner on appropriately informative Forms 5941 for fiscal years 2006 and 2007 were not fatal to the Board's jurisdiction over these appeals because they fell within the "for reasons beyond [Verizon'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.)

As the Board ruled in ***MCI*** at 2008-336-38, the Board likewise rules here 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***, 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.) ***RCN Beco-Com*** 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 fiscal year 2006 and 2007 consolidated appeals, Verizon submitted returns beyond the March 1st statutory deadline. The Board found, however, that the course of conduct between MCI and the Commissioner, including the Commissioner's granting of extensions and her numerous pronouncements and revisions resulting from the shifting state of the law, establishes that Verizon'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 Verizon's control. *See* ***MCI*** at 2008-338-39.

Lastly, and consistent with its findings and rulings in ***MCI*** at 2008-339, the Board also finds and rules here 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 her discretionary granting of extensions and rejecting returns, created snares for the unwary, which constituted "reasons beyond [Verizon]'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 provisions.).

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

**Construction Work in Progress**

Verizon offers various theories suggesting that its CWIP is not taxable. First, Verizon argues that CWIP owned by corporations is not taxable. Next, Verizon posits that its CWIP is exempt from taxation as intangible personal property. Thirdly, Verizon suggests that CWIP relating to poles, wires and underground conduits is not taxable because G.L. c. 59, § 18, Fifth does not impose a tax on poles, wires and underground conduits unless and until they are "erected upon" private ways or "laid in" private or public ways. Finally, Verizon contends that any ruling that CWIP is taxable should be applied prospectively only. These arguments are contrary to the rulings of this Board in the Initial Phase of these consolidated appeals and in ***MCI***, and the rulings of this Board and the holdings of the Supreme Judicial Court in ***RCN Beco-Com***, and, to the extent that they are based on facts, are unsupported by the evidence and the Board's findings.

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 (emphasis added). Section 18 of Chapter 59 commences with the preamble, "*All* 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 . . . ." (Emphasis added). Clause First of c. 59, § 18 provides that "*All* tangible personal property, including that of persons not inhabitants of the commonwealth, except ships

and vessels, shall, unless exempted by section five, be taxed to the owner in the town where it is situated on January first . . . ." (Emphasis added). Thus for personal property tax purposes, *all* personal property, not just property completed or in service, is subject to tax.

As this Board previously stated and ruled in ***MCI***:

> 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. [92,] 94 [(1984)]. 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.

***MCI*** at 2008-373-74.

In the Board's March 3, 2008 Order issued in the Initial Phase of these consolidated appeals and in its discussion regarding the taxability of poles and the wires thereon on public ways, *supra*, the Board confirmed its ruling in ***MCI*** and that "the Court in ***RCN Beco-Com*** specifically relied on § 18, First in ruling that 'the board was correct in finding that *all* of RCN's personal property was subject to taxation.' ***RCN Beco-Com***, 443 Mass. at 209" (emphasis added). The same is true with respect to Verizon's § 39 property in these consolidated appeals.

Verizon's argument that clause First cannot be applied to a corporation is unavailing and has already been rejected by this Board. As articulated in its March 3, 2008 Order and its discussion regarding the taxability of poles and the wires thereon on public ways, *supra*, the Board finds and rules that:

> 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*** [***Beco-Com***], 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.

Accordingly, Verizon's corporate status is immaterial to the taxability of its § 39 property under clause First.

Verizon further argues that even if CWIP is taxable property, that property is exempt under G.L. c. 59, § 5, clause Twenty-fourth, which exempts from taxation "[a]ll intangible property." In analyzing Verizon's claim of exemption, the Board is cognizant of the principle that "[a]n exemption is a matter of special favor or grace and to be recognized only where the property falls clearly and unmistakably within the express words of legislative command." ***Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue***, 384 Mass. 794, 796 (1981) (citations omitted). A claim of exemption must fail if the operative facts merely cast doubt on its claim of exemption. ***Boston Symphony Orchestra v. Board of Assessors of Boston***, 294 Mass. 248, 257 (1936). ***Trustees of Boston University v. Board of Assessors of Brookline***, 11 Mass. App. Ct. 325, 331 (1981)(proof of exemption must leave issue free of doubt). A taxpayer bears a heavy burden to demonstrate its right to a claimed exemption. ***Assessors of Boston v. Garland School of Home Making***, 296 Mass. 378, 384 (1937).

Verizon, however, has not provided sufficient evidence that its cost entries for CWIP represent intangible, rather than tangible, personal property. While Verizon introduced an exhibit (V-3) and some summary testimony regarding what it refers to as "intangibles," such as permitting, labor and engineering costs, it never identified the amount of those costs which it claims represent "intangibles." Verizon has not shown sufficient connection between its CWIP accounting entries and what it claims to be "intangible property."

Moreover, it is well-established that the cost approach to value includes all direct and indirect costs. THE APPRAISAL OF REAL ESTATE (13th ed. 2008) at 386. Direct costs include material, labor and related expenditures incurred in the purchase and installation of an asset into functional use, while indirect costs include, among other things, engineering, architect, and professional fees, license and permit fees, and administrative fees. VALUING MACHINERY at 50-51. *See also* THE APPRAISAL OF REAL ESTATE (13th ed. 2008) at 386 ("To develop cost estimates for the total building, appraisers must consider direct (hard) and indirect (soft) costs. Both types of cost are essential to a reliable cost estimate."). The categories of direct and indirect costs include all of the types of expenses that Verizon claims are "intangible" property.[29] The Board finds no factual predicate, and no legal authority cited, for Verizon's claim of exemption and, accordingly, rejects it.

Verizon next argues that the language of clause Fifth, that property be "laid in or erected upon" property in order to be taxable, express a requirement of final placement or readiness for service. The Board rules that this argument fails for several reasons. First, as the Board found and ruled in its March 3, 2008 Order and its discussion, *supra*, and as the Supreme Judicial Court held and this Board found in ***RCN Beco-Com***, the property is taxable under clause First so there is no reason to consider the language of clause Fifth.

[29] See footnote 11.

Second, and as the Board found with respect to Verizon's "intangible" argument, Verizon has produced no evidence to show what portion, if any, of its CWIP was not laid in or erected upon a public or private way. The Board will not speculate in this regard. Third, there is nothing in the plain statutory language that imposes a requirement that the property be either finally placed in or ready for service. As this Board ruled in ***MCI*** in rejecting a similar claim that property must be "in service," the plain meaning of clause First is that *all* property is to be assessed and taxed. "The Legislature in using this word, expresses no limitations or equivocations." ***MCI*** at 2008-373.

Lastly and similar to its request in the Initial Phase of these consolidated appeals regarding its poles and wires over public ways, Verizon urges the Board to apply prospectively only any decision that Verizon's CWIP is taxable personal property. As the Board discussed in its March 3, 2008 Order and *supra*:

> The Board's rulings and decisions in these appeals apply to all years at issue in these appeals, . . . 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.

**Valuation of Verizon's § 39 Property in Newton and Boston**

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. *See* ***Assessors of Haverhill v. New England Tel. & Tel. Co.***, 332 Mass. 357, 359 (1955)("The value to be determined by the commissioner under § 39 is the fair cash value of the property."). 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. v. Assessors of Boston***, 334 Mass. 549, 566 (1956)). "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 central valuation of telephone company special-purpose property has the burden of proof even if the property poses unusual problems of valuation. ***MCI*** at 2008-374-75; *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 must show that the Commissioner's valuation of its § 39 property is incorrect or improper and results in certified values that are substantially higher or substantially lower, 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. ***In the Matter of the Valuation of MCI Worldcom Network Services, Inc.***, 454 Mass. at 646; see ***MCI*** at 2008-277-78.

As discussed in ***MCI***, the relevant statutory sections do not contain definitions of "substantially higher or substantially lower," and they do not otherwise provide direction for measuring or interpreting these terms. ***MCI*** at 2008-274. Under these circumstances, the Board looks to the common and approved usage of the term "substantially." G.L. c. 4, § 6, ¶ Third. In ***MCI***, the Board turned to several dictionary definitions. ***MCI*** at 2008-277-78. The Board reaffirms here its findings in ***MCI*** regarding the meaning of "substantially" and accordingly rules, that "'substantially higher or substantially lower' than the Commissioner's valuation, as used in § 39, means a considerable or large amount and not a mere trifle or nominal amount." ***MCI*** at 2008-277-78.

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 and DCF methods are often unreliable for valuing utility property. ***MCI*** at 2008-375; *see also* ***Boston Edison Co. v. Assessors of Boston***, 402 Mass. 1, 17 (1988); ***Iantosca v. Assessors of Weymouth***, Mass. ATB Findings of Facts and Reports 2008-929, 952 ("The [DCF] analysis has never been relied on by the Board as a primary valuation methodology."). While Mr. Sansoucy and the Commissioner did not use or perform an income capitalization or DCF approach in centrally valuing Verizon's § 39 property, Mr. Weinert did perform both such approaches. While he did not rely on them in his final valuation of Verizon's § 39 property, he did use his DCF method to measure the amount of economic obsolescence to apply in his CORLD methodology.

With respect to Mr. Weinert's DCF approach, the Board found that it was based on several highly subjective and speculative projections and assumptions as well as various conceptual errors, which rendered the values derived from it unreliable and neither credible nor probative. Moreover, the Board found that, as a valuation technique, Mr. Weinert's DCF approach valued Verizon Massachusetts as an entire business entity and then attempted to back-out the value of the § 39 property. In ***MCI***, the Board found and ruled that such proffered evidence "was not reliable, credible, or probative." ***MCI*** at 2008-375-76. The Board rules here that, under the circumstances present in these consolidated appeals, Mr. Weinert's DCF approach is not a suitable valuation tool for valuing Verizon's § 39 property located in Massachusetts, Newton or Boston or for determining the appropriate amount of the economic obsolescence to apply in Mr. Weinert's CORLD approach.

In addition, the Board finds and rules that the sales-comparison approach is virtually impossible to implement when, as here, there are effectively no reliable or comparable sales of telecommunications property. Such sales almost always involve entire business entities or such portions of them that the actual value of the § 39 property (or its equivalent) is extremely difficult to discern. *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* ***MCI*** at 2008-376; ***Boston Edison Co. v. Assessors of Watertown***, 387 Mass. 298, 304 (1982). In these consolidated appeals, the Board found that the most appropriate method to use to value Verizon's § 39 property was a cost analysis. The parties' valuation experts concurred on this point. The Board also found that the Commissioner's valuations were essentially correct except for her omission of the values related to CWIP and poles and wires over public ways for fiscal years 2003 through 2008 and her failure to deduct economic obsolescence for property in service less than one year for fiscal years 2006 through 2009 and for generators for fiscal years 2008 and 2009. The Board rules that, for these fiscal years, the Commissioner's failure to incorporate CWIP and poles and wires over public ways into her valuation resulted in values substantially lower than Verizon's § 39 property's fair cash value. *See* ***MCI*** at 2008-344-51. The Board further rules that, once CWIP and poles and wires over public ways are accounted for, and notwithstanding some minor discrepancies, the Commissioner's RCNLD methodology was and is an appropriate approach to use under the circumstances for valuing Verizon's § 39 property for fiscal years 2005 through 2009. *See* ***MCI*** at 2008-377.

Furthermore, the Board finds and rules that Mr. Weinert's CORLD methodology is fatally flawed in several important respects, including: his use of Verizon's July 23, 2008 revised asset listings as the starting point for his fiscal year 2005 and 2006 valuations; his use of a utilization deduction in conjunction with other forms of functional and economic obsolescence; his use of a net salvage deduction; his use of certain techniques and calculations for ascertaining an appropriate amount of depreciation; and the approach and assumptions that he adopted for determining economic obsolescence. The Board rules that these flaws, considered solo or in concert, rendered the values that Mr. Weinert derived from his CORLD methodology unreliable and, therefore, neither credible nor probative.

With respect to Mr. Weinert's use of Verizon's July 23, 2008 revised asset listings as the starting point for his fiscal year 2005 and 2006 valuations, the Board also rules, after considering all of the evidence, that those lists are not the most accurate rendition of Verizon's § 39 property for fiscal years 2005 and 2006, excepting CWIP and poles and wires over public ways for which those lists constitute the best available evidence; the Forms 5941 are.

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. v. Assessors of Boston***, 383 Mass. 456, 473 (1981); ***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 submitted in § 39 appeals, 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), provided:

> [t]he appellant has [met] its burden of proving that the value of the [§ 39] property is substantially higher or substantially lower than the valuation certified by the commissioner. G.L. c. 59, § 39. If the appellant fails to meet that burden, the [B]oard is not empowered to substitute its own valuation of the § 39 property. *Cf.* ***Assessors of Sandwich v. Commissioner of Revenue***, 393 Mass. 580, 586 (1984) ("Only if the taxpayer has met that burden does the [B]oard undertake an independent valuation of the property").

***In the Matter of the Valuation of MCI Worldcom Network Services, Inc.***, 454 Mass. at 646.

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 ***Assessors of Quincy v. Boston Consol. Gas Co.***, 309 Mass. 60, 72 (1941)).

Based on all of the evidence and reasonable inferences drawn therefrom, the Board finds and rules that the Newton Assessors for fiscal years 2003 through 2008 and the Boston Assessors for fiscal years 2005 through 2008 proved that the fair cash values of Verizon's § 39 property was substantially higher than the certified valuations produced by the Commissioner's methodology, which for those fiscal years failed to include the considerable values associated with CWIP and poles and wires over public ways.

**Conclusion**

On this basis, with respect to the fiscal year 2003 through 2008 appeals brought by the Newton Assessors, the Board decided them for the appellant Newton Assessors; with respect to the fiscal year 2005 through 2008 appeals brought by the Boston Assessors, the Board decided them for the appellant Boston Assessors; and with respect to the fiscal year 2009 appeals brought by the Newton Assessors and the Boston Assessors, the Board decided them for the appellees, Verizon and Commissioner. With respect to the appeals brought by Verizon against the Commissioner and either the Newton Assessors or the Boston Assessors, the Board decided all of them for the appellees, Commissioner and either the Newton Assessors or the Boston Assessors.

**APPELLATE TAX BOARD**

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

**A true copy,**
**Attest: _____**
**Clerk of the Board**

# Appendix A

## Appeals Related to the City of Newton

| Docket No. | Fiscal Year | Appellant | Appellees |
|---|---|---|---|
| C265966[30] | 2003 | Newton Assessors | Verizon/Commissioner |
| C269574 | 2004 | Newton Assessors | Verizon/Commissioner |
| C273836 | 2005 | Newton Assessors | Verizon/Commissioner |
| C279719 | 2006 | Newton Assessors | Verizon/Commissioner |
| C285500 | 2007 | Newton Assessors | Verizon/Commissioner |
| C290518 | 2008 | Newton Assessors | Verizon/Commissioner |
| C296729 | 2009 | Newton Assessors | Verizon/Commissioner |
| C273602 | 2005 | Verizon | Newton Assessors/Commissioner |
| C279520 | 2006 | Verizon | Newton Assessors/Commissioner |
| C285320 | 2007 | Verizon | Newton Assessors/Commissioner |
| C289619 | 2008 | Verizon | Newton Assessors/Commissioner |
| C295777 | 2009 | Verizon | Newton Assessors/Commissioner |

## Appeals Related to the City of Boston

| Docket No. | Fiscal Year | Appellant | Appellees |
|---|---|---|---|
| C273728 | 2005 | Boston Assessors | Verizon/Commissioner |
| C279581 | 2006 | Boston Assessors | Verizon/Commissioner |
| C285613 | 2007 | Boston Assessors | Verizon/Commissioner |
| C290511 | 2008 | Boston Assessors | Verizon/Commissioner |
| C296568 | 2009 | Boston Assessors | Verizon/Commissioner |
| C273564 | 2005 | Verizon | Boston Assessors/Commissioner |
| C279464 | 2006 | Verizon | Boston Assessors/Commissioner |
| C285261 | 2007 | Verizon | Boston Assessors/Commissioner |
| C289483 | 2008 | Verizon | Boston Assessors/Commissioner |
| C295606 | 2009 | Verizon | Boston Assessors/Commissioner |

[30] This is the lead docket number for these consolidated appeals. See footnote 2, *supra*.

**IN THE MATTER OF THE VALUATION OF BELL ATLANTIC MOBILE OF MASSACHUSETTS CORPORATION, LTD.**

**SJC-10509**

**SUPREME JUDICIAL COURT OF MASSACHUSETTS**

***456 Mass. 728; 926 N.E.2d 133; 2010 Mass. LEXIS 212***

**January 7, 2010, Argued**
**May 12, 2010, 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.
*Bell Atl. Mobile of Mass. Corp. v. Comm'r of Revenue, 451 Mass. 280, 884 N.E.2d 978, 2008 Mass. LEXIS 234 (2008)*

**COUNSEL:** Anthony M. Ambriano for Board of Assessors of Boston & another.

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

Douglas M. Reeves, of New Jersey (Kathleen King Parker with him) for the taxpayer.

Martha Coakley, Attorney General, & Daniel A. Shapiro & Daniel J. Hammond, Assistant Attorneys General, for Commissioner of Revenue, amicus curiae, submitted a brief.

**JUDGES:** Present: Marshall, C.J., Ireland, Spina, Cowin, Cordy, Botsford, & Gants, JJ.

**OPINION BY:** BOTSFORD

**OPINION**

**[**134] [*728]** BOTSFORD, J. The present case is a sequel to this court's decision in *Bell Atl. Mobile of Mass. Corp. v. Commissioner of Revenue, 451 Mass. 280, 884 N.E.2d 978 (2008)* (*Bell Atl. Mobile I*). In that case, we reviewed appeals brought before the Appellate Tax Board (board) under *G. L. c. 59, § 39* (*§ 39*), in which Bell Atlantic Mobile of Massachusetts Corporation, Ltd. (Bell **[*729]** Atlantic Mobile, or the taxpayer) and the board of assessors of Newton had each appealed from the Commissioner of Revenue's (commissioner's) central valuation of Bell Atlantic Mobile's personal property for fiscal year (FY) 2004. **[***2]** We affirmed the board's determination that Bell Atlantic Mobile was not a "telephone company" within the meaning of *§ 39* and therefore not entitled to central valuation. *Bell Atl. Mobile I, supra at 282-283*. Before the date of our decision, however, the commissioner had continued to certify central valuations of Bell Atlantic Mobile's property for years before and after 2004. In the present case, we must decide whether the board has jurisdiction under *§ 39* to hear appeals, timely filed with the board pursuant to that statute by certain municipal boards of assessors, to challenge the commissioner's certified central valuations for those additional years, even though, as *Bell Atl. Mobile I* indicates, the central valuations were made in error. We conclude that the statute confers jurisdiction on the board to hear the assessors' appeals [1].

1 We acknowledge the two amicus briefs filed by the Commissioner of Revenue (commissioner).

1. *Background*. Pursuant to *§ 39*, on or before May 15 of each year, the commissioner must value centrally "machinery, poles, wires and underground conduits, wires and pipes" (*§ 39* property) of all telephone and telegraph companies. The valuations must be certified **[***3]** to the owners of the *§ 39* property and to the assessors of the cities and towns where the *§ 39* property is located and therefore subject to taxation. See *G. L. c. 59, § 39*. See also *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. 198, 199, 820 N.E.2d 208 (2005)*. The assessors of the cities and towns must use the commissioner's certified valuations for tax assessment purposes. See *Assessors of Springfield v.* **[**135]** *New England Tel. & Tel. Co., 330 Mass. 198, 200-201, 112 N.E.2d 260 (1953)*. However, *§ 39* gives the assessors, as well as the taxpayer-owner of the *§ 39* property, the right to appeal from the commissioner's value determinations to the board on or before June 15 of the taxable year [2].

2 Owners of *§ 39* property such as Bell Atlantic Mobile, but not local assessors, have additional appeal rights under *G. L. c. 59, §§ 64* and *65*. These sections permit, respectively, taxpayers aggrieved by the failure of local assessors to abate a tax to appeal to the county commissioners

(*§ 64*) or, as is almost always the case, to the board (*§ 65*). *General Laws c. 59, § 65* (*§ 65*), provides in part: "A person aggrieved . . . with respect to a tax on property in any municipality may, subject to the same conditions provided for **[***4]** an appeal under *[§ 64*], appeal to the appellate tax board by filing a petition with such board within three months after the date of the assessors' decision on an application for abatement as provided in [*G. L. c. 59, § 63*], or within three months after the time when the application for abatement is deemed to be denied as provided in *[§ 64*]." In appeals under *§ 65*, unlike those under *§ 39*, the board cannot determine values higher than those certified by the commissioner.

*General Laws c. 58A, § 6*, confers jurisdiction on the board to hear appeals brought under both *§§ 39* and *65*.

**[*730]** At all relevant times, Bell Atlantic Mobile [3] provided wireless cellular telecommunications services, or what is generally known as "cell phone" service. For FY 2003 through FY 2008, the commissioner determined that Bell Atlantic Mobile was a "telephone company" within the meaning of *§ 39*, and accordingly certified a central valuation of its *§ 39* property for each of these years. In addition, for FY 2003, and for FY 2005 through FY 2007, the commissioner determined that Bell Atlantic Mobile was eligible for the property tax exemption granted to certain foreign utility corporations under *G. L. c. 59, § 5*, Sixteenth **[***5]** (1) (*d*), as incorporating *G. L. c. 63, § 52A (1) (a) (iii)* (corporate utility exemption) [4]. The commissioner ruled that Bell Atlantic Mobile was not eligible for the corporate utility exemption in FY 2004, or in FY 2008 [5]. The difference in the valuations when Bell Atlantic Mobile was granted the corporate utility exemption compared to when it was not is significant. For example, for Bell Atlantic Mobile's personal property situated in Newton, the commissioner's certified values exceeded $ 6,000,000 in the years Bell Atlantic Mobile was denied the corporate utility **[*731]** exemption; comparatively, in the years the corporate utility exemption was applied, the commissioner's valuation was under $ 30,000 [6].

3 Bell Atlantic Mobile of Massachusetts Corporation, Ltd. (Bell Atlantic Mobile), does business in Massachusetts under the name "Verizon Wireless." It is incorporated in Bermuda. See *Bell Atl. Mobile of Mass. Corp. v. Commissioner of Revenue, 451 Mass. 280, 281, 884 N.E.2d 978 (2008)* (*Bell Atl. Mobile I*).

4 *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 *[§ 52A*]... **[***6]** of . . . [c. 63]." 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*, contains a definition of "[u]tility corporation" that includes "a telephone and telegraph company subject to [*G. L. c. 166*]."

5 The commissioner's reasons for determining that the corporate utility exemption was not available to Bell Atlantic Mobile in FY 2004 and FY 2008 are not relevant to this appeal.

6 Bell Atlantic Mobile's personal property located in the cities of Boston, Cambridge, and Springfield was similarly valued at dramatically different amounts depending on whether the commissioner allowed the corporate utility exemption. In Boston, Bell Atlantic Mobile's property was valued at $ 93,125,600 and $ 110,603,500 in FY 2004 and FY 2008, respectively, as compared to $ 274,900, $ 284,800, and $ 349,500 for FY 2005 through 2007; in Cambridge, the taxpayer's property was valued at $ 30,300 in FY 2007, as compared to $ 6,024,400 in FY 2008; and in Springfield, its property was valued at $ 71,600 and $ 66,400 for FY 2006 and FY 2007, respectively, as compared to $ 6,355,700 **[***7]** in FY 2008.

**[**136]** Of relevance to this case is the fact that for FY 2003 and FY 2004, the board of assessors of Newton (Newton assessors) filed appeals with the board under *§ 39* (*§ 39* appeals), and for FY 2005 through FY 2008, the assessors of various cities and towns, including Newton, Boston, Springfield, and Cambridge, filed additional *§ 39* appeals, challenging the commissioner's valuations. Some or all of these appeals argued that Bell Atlantic Mobile was not a "telephone company" for purposes of *§ 39*, and therefore not entitled to central valuation of its personal property by the commissioner; some or all argued in addition that the company was not entitled to the corporate utility exemption, and therefore its machinery (see note 8, *infra*) constituted taxable property [7]. For FY 2004 and FY 2008, Bell Atlantic Mobile filed its own appeals -- under both *§ 39* and *G. L. c. 59, § 65* (*§ 65*); see note 2, *supra* -- from the taxes assessed by the 220 cities and towns where its property was located. These appeals claimed that the taxpayer's property had been overvalued by the local assessors, and sought as relief the abatement of the property taxes it had paid.

7 Regarding the assessors who are parties **[***8]** to this appeal, the claims of undervaluation and wrongful exemption were

raised in FY 2003 by the Newton assessors; in FY 2004 by the Newton assessors; in FY 2005 by the Boston and Newton assessors; in FY 2006 by the Boston, Newton, and Springfield assessors; in FY 2007 by the Boston, Cambridge, Newton, and Springfield assessors; and in FY 2008 by the Boston, Newton, and Springfield assessors.

The board dealt first with the various FY 2004 appeals. As we described in *Bell Atl. Mobile I, 451 Mass. at 281-283*, the board consolidated the Newton assessors' *§ 39* appeal with Bell Atlantic Mobile's *§§ 39* and *65* appeals but then bifurcated the **[*732]** issues for trial. The board held hearings on the issue of Bell Atlantic Mobile's eligibility for (1) central valuation -- in other words, whether Bell Atlantic Mobile was in fact a "telephone company" within the meaning of *§ 39* -- and (2) the corporate utility exemption [8]; it deferred all questions of the correct value of the taxable property. On May 15, 2006, the board issued a decision in which it concluded that Bell Atlantic Mobile was not a telephone company and therefore not entitled to central valuation under *§ 39* (2006 decision). On that same date, **[***9]** the board issued a separate order with respect to Bell Atlantic Mobile's appeals under *§ 65*; it ruled that the company was not entitled to the corporate utility exemption but stayed any further action in relation to the *§ 65* appeals pending appellate review of its 2006 decision under *§ 39*. Bell Atlantic Mobile duly filed an appeal from the 2006 decision. After granting direct appellate review, we affirmed the board's determination. See *Bell Atl. Mobile I, supra at 283*.

8 In FY 2004, the commissioner determined that Bell Atlantic Mobile was not entitled to the corporate utility exemption, and, as a result, the commissioner's FY 2004 certified valuations of the company's personal property included "machinery" (e.g., antennae, analog and digital computer components, amplifiers, switching equipment, generators, and power equipment) that, according to the board, comprised the "vast majority" of the company's personal property. Bell Atlantic Mobile responded by raising the issue of its eligibility for the corporate utility exemption in its FY 2004 appeals under both *§§ 39* and *65*.

**[**137]** Following the issuance of our decision in *Bell Atl. Mobile I*, the Newton assessors and the board of assessors of **[***10]** Boston (Boston assessors) filed motions to consolidate their *§ 39* appeals -- appeals for FY 2003 through FY 2008 in the case of the Newton assessors, and for FY 2005 through FY 2008 in the case of the Boston assessors -- with Bell Atlantic Mobile's *§ 65* appeals. At the hearing on the motions to consolidate, the board advised the parties that as a result of this court's decision in *Bell Atl. Mobile I*, the board intended to dismiss *all* the remaining *§ 39* appeals filed by the various boards of assessors and by Bell Atlantic Mobile for lack of jurisdiction. Thereafter, on June 19, 2008, the board sua sponte issued a decision ordering the dismissal of all *§ 39* appeals [9], and at the request of the **[*733]** commissioner and several boards of assessors, on December 3, 2008, the board issued its findings of fact and report. The board concluded that its 2006 decision and this court's decision in *Bell Atl. Mobile I, supra*, were "dispositive" as to the remaining *§ 39* appeals and, in the case of the Newton assessors, that principles of res judicata, collateral estoppel, and issue preclusion independently prevented them from relitigating the undervaluation claim because the Newton assessors had been a party **[***11]** to *Bell Atl. Mobile I*. The board further observed that the assessors had not pursued alternative avenues to challenge the commissioner's valuations of Bell Atlantic Mobile's property, such as a declaratory judgment action or an action in the nature of mandamus. The Newton assessors, the Boston assessors, and the boards of assessors of Cambridge and Springfield (collectively, assessors) filed appeals from the board's decision dismissing their *§ 39* appeals (2008 decision) [10]. We granted the assessors' joint application for direct appellate review and now reverse the decision of the board.

9 The dismissed appeals included approximately fifty *§ 39* appeals originally filed by various boards of assessors as well as all the *§ 39* appeals filed by Bell Atlantic Mobile.

10 The boards of assessors of other cities and towns with *§ 39* appeals pending did not file appeals from the board's 2008 dismissal decision. Likewise, Bell Atlantic Mobile did not appeal from the board's dismissal of its *§ 39* appeals.

2. *Discussion.* The question presented by this appeal is one of statutory construction. It concerns the scope of the board's authority under *§ 39* to decide appeals that were, at the time of filing, properly **[***12]** before the board pursuant to that statute. The board interpreted *§ 39* to mean that once the board determined Bell Atlantic Mobile was not a telephone company, the board was without jurisdiction to continue to entertain the pending appeals and therefore could not consider the challenges to the commissioner's valuation determinations.

The board is an agency charged with the administration of tax laws and has expertise in tax matters, and therefore we may give weight to the board's interpretation of a tax statute. *Bell Atl. Mobile I, 451 Mass. at 283*, quoting *Commissioner of Revenue v. McGraw-Hill, Inc., 383 Mass. 397, 401, 420 N.E.2d 293*

*(1981)*. See *Matter of the Valuation of MCI WorldCom Network Servs., Inc., 454 Mass. 635, 641, 912 N.E.2d 920 (2009)*. Ultimately, however, a question of statutory interpretation is a question of law for the court to resolve. See *AA Transp. Co. v. Commissioner of Revenue, 454 Mass. 114, 118-119, 907 N.E.2d 1090* **[*734]** *(2009)*; *Bell Atl. Mobile I, supra.* For the reasons that follow, we interpret *§ 39* in a manner that differs from the board.

**[**138]** We begin with the statutory language itself [11]. As previously summarized, the first paragraph of *§ 39* directs the commissioner annually to value all the *§ 39* property of a telephone **[***13]** or telegraph company and certify the valuation to the company as well as to every board of assessors of a municipality where any such property is located.

11 *General Laws c. 59, § 39*, provides in pertinent part:

> "The valuation at which the machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies shall be assessed by the assessors of the respective cities and towns where such property is subject to taxation shall be determined annually by the commissioner of revenue, subject to appeal to the appellate tax board, as hereinafter provided. On or before May fifteenth in each year, the commissioner of revenue shall determine and certify to the owner of such machinery, poles, wires and underground conduits, wires and pipes, and to the board of assessors of every city and town where such machinery, poles, wires and underground conduits, wires and pipes are subject to taxation, the valuation as of January first in such year of such machinery, poles, wires and underground conduits, wires and pipes in said city or town. Every owner and board of assessors to whom any such valuation shall have been so certified may, on or before the fifteenth day of **[***14]** June then next ensuing, appeal to the appellate tax board from such valuation. Every such appeal shall relate to the valuation of the machinery, poles, wires and underground conduits, wires and pipes of only one owner in one city or town, and shall name as appellees the commissioner of revenue and all persons, other than the appellant, to whom such valuation was required to be certified. 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. . . .
>
> "The board of assessors shall assess the machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies as certified and at the value determined by the commissioner of revenue under this section; provided, however, that in the event of a final decision by the appellate tax board or of the supreme judicial court under the preceding paragraph establishing a different valuation, the assessors shall grant an abatement, or assess and commit to the collector with their warrant **[***15]** for collection an additional tax, as the case may be, to conform with the valuation so established by such final decision. . . ."

The first paragraph further provides that the company, as well as each board of assessors, may appeal **[*735]** to the board from the valuation by June 15, and that "[e]very such appeal shall relate to the [commissioner's] valuation" for the particular company. The second paragraph of *§ 39* in turn requires every board of assessors to assess the company's property "as certified and at the value determined by the commissioner...under this section," subject to later adjustment -- by tax abatement or additional tax collection -- based on the final result of any appeal from the commissioner's central valuation that has been filed with the board pursuant to the first paragraph.

See *Assessors of Springfield v. New England Tel. & Tel. Co., 330 Mass. at 201*. The language of *§ 39* was designed to give power to the commissioner to conduct central valuations of certain types of property for the purpose of ensuring valuation "consistency and

competence." *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. at 199*. It is a remedial statute, "not enacted to exempt the companies' property **[***16]** from taxation." *Id. at 201*.

As a remedial measure, "the statute must be construed and applied expansively in order to achieve the Legislature's goals." *Id*. The board itself has previously adopted a broad interpretation of the scope of its jurisdiction under *§ 39*. As it **[**139]** did in the present case, the board in RCN-BecoCom, LLC *vs*. Commissioner of Revenue, Docket Nos. F253495, F257397 (Aug. 19, 2003), aff'd, *443 Mass. 198, 820 N.E.2d 208 (2005)*, asserted jurisdiction under *§ 39* to decide whether the commissioner had correctly determined that a particular company was a "telephone" or "telegraph" company [12]. The board did so even though *§ 39* does not state or imply that the board make a threshold determination concerning the accuracy of the commissioner's classification decision, and despite the fact that an independent statutory provision, *G. L. c. 58, § 2*, provides the board with jurisdiction to hear appeals by "[a]ny person aggrieved by any classification made by the commissioner under any provision of [G. L. c. 59]." We **[*736]** agree that the board may choose to review a classification decision as part of its consideration of a *§ 39* appeal. However, if the board chooses to do so and determines, contrary to the **[***17]** commissioner, that a particular company is not a telephone company, such a determination leaves unaddressed the facts that (1) a central valuation of that company's "machinery, poles, wires and underground conduits, wires and pipes" (i.e., *§ 39* property) has been made and certified by the commissioner; and (2) the assessors are obligated to use the valuation as the basis of their tax assessments.

> 12 The board stated: "There is nothing in [*G. L. c. 58A, § 6*,] which restricts the issues that the Board may consider in an appeal arising under *§ 39*. Moreover, *§ 39* mandates the Commissioner to value certain property of 'all' telephone companies 'subject to appeal to the [board].' This provision does not contain any limitations on the type of issues arising from the Commissioner's administration of *§ 39* that may be appealed to the Board, nor does it contain a grant of jurisdiction concerning any issue to a court or tribunal other than the Board." RCN-BecoCom, LLC *vs*. Commissioner of Revenue, Docket Nos. F253495, F257397 (Aug. 19, 2003), aff'd, *443 Mass. 198, 201, 820 N.E.2d 208 (2005).*

In determining the scope of the board's jurisdiction under *§ 39* to hear appeals, our goal is to carry out the intent of the **[***18]** Legislature. See, e.g., *Acting Supt. of Bournewood Hosp. v. Baker, 431 Mass. 101, 104, 725 N.E.2d 552 (2000)*, quoting *Industrial Fin. Corp. v. State Tax Comm'n, 367 Mass. 360, 364, 326 N.E.2d 1 (1975)*. To that end, we examine the whole statute, seeking an interpretation that is true to the legislative purpose and will make it an effective piece of legislation. See, e.g., *Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749, 840 N.E.2d 518 (2006)*; *Wolfe v. Gormally, 440 Mass. 699, 704, 802 N.E.2d 64 (2004)*. See also *EMC Corp. v. Commissioner of Revenue, 433 Mass. 568, 574, 744 N.E.2d 55 (2001)*, quoting *State Tax Comm'n v. La Touraine Coffee Co., 361 Mass. 773, 778, 282 N.E.2d 643(1972)* (statute "should be construedas' a consistent and harmonious whole, capable of producing a rational result consonant with common sense and sound judgment'"). In considering that *§ 39* was enacted to establish and support the commissioner's authority to perform central valuations of telephone company property; the express language of the statute confers on those affected by the central valuation the right to appeal and seek review of it by the board; and the act of centrally valuing a company's *§ 39* property has direct and continuing consequences for both the company **[***19]** and the boards of assessors, we think the principles of statutory construction just cited point to an interpretation of *§ 39* that authorizes the board fully to consider and decide all pending appeals from the valuation.

**[**140]** Accordingly, we hold that where the commissioner classifies a company as a "telephone or telegraph company" and certifies a central valuation of the company's property under *§ 39*, and timely appeals from that central valuation have been filed by the assessors, the company, or both, the board has jurisdiction **[*737]** to hear and decide all the issues raised in such appeals, even if it concludes that the company did not qualify as a telephone or telegraph company [13]. The board's contrary interpretation, supported by Bell Atlantic Mobile, ignores *§ 39*'s express provisions establishing the rights of the affected assessors and taxpaying company to appeal from the commissioner's central valuation. See *Assessors of Springfield v. New England Tel. & Tel. Co., 330 Mass. at 201* (requirement of central assessment under *§ 39* mandatory; otherwise, there would be "no point in granting to the assessors a right to appeal from the commissioner's valuation to the [board]"). The interpretation **[***20]** also may lead to a result that runs counter to the statute's underlying legislative intent, see *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. at 201*, by effectively freeing from taxation any portion of a company's personal property that the commissioner has erroneously misclassified as exempt [14].

13 We reach this result as a matter of statutory construction. Other courts, in different contexts, have also recognized the need to consider jurisdictional questions with an eye toward achieving a practical and fair result. See, e.g., *Hansen v. Trustees of Hamilton Southeastern Sch. Corp., 551 F.3d 599, 607-609 (7th Cir. 2008)*, quoting *Chicago v. International College of Surgeons, 522 U.S. 156, 173, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997)* (addressing whether Federal District Court should have declined to exercise supplemental or ancillary jurisdiction over State claims after it granted summary judgment to defendant on plaintiffs' Federal Title IX claim; holding that even if District Court could have relinquished State law claims, it did not abuse its discretion by retaining jurisdiction: District Court "should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, **[***21]** fairness, and comity"). See also *RLTD Ry. Corp. v. Surface Transp. Bd., 166 F.3d 808, 814 (6th Cir. 1999)* (stating that although surface transportation board [STB] loses jurisdiction when track is no longer part of interstate rail network and, therefore, STB may not issue trail condition, STB may exercise jurisdiction if it determines that" over-riding interests of interstate commerce require" it).

14 This case illustrates the point. In FY 2003 and FY 2005 through FY 2007, the commissioner determined that Bell Atlantic Mobile was entitled to the corporate utility exemption, which meant that the company's "machinery" was exempt from local property tax. As previously discussed, however, in 2006 the board itself concluded that Bell Atlantic Mobile was not entitled to the corporate utility exemption. Nevertheless, under the board's interpretation of *§ 39*, the board no longer has jurisdiction to entertain the claims by the assessors, made in their previously filed *§ 39* appeals, that all the personal property covered by the corporate utility exemption was subject to tax at the local level for the fiscal years in question. This result would create an unintended tax exemption for Bell Atlantic **[***22]** Mobile that is contrary to the purpose of *§ 39*. *RCN-BecoCom, LLC v. Commissioner of Revenue, 443 Mass. at 201*.

**[*738]** The interpretation of *§ 39* that we adopt here is not precluded by our decision in *Bell Atl. Mobile I*. The board interpreted our decision in that case as agreeing with its view that once it decided Bell Atlantic Mobile was not a telephone company, that determination effectively required the board to dismiss all the pending *§ 39* appeals. However, the footnote in our opinion relied on by the board, see *Bell Atl. Mobile I, 451 Mass. at 285 n.11*, constituted a description of actions taken by the board, not a ruling on their merits. The only issue before us in *Bell Atl. Mobile I* was the correctness of the board's determination that Bell Atlantic **[**141]** Mobile was not a telephone company for purposes of *§ 39*. The question whether the board retained jurisdiction to decide the valuation issues raised in the assessors' (and the taxpayer's) *§ 39* appeals once the board made this determination was not raised, and we did not decide it [15].

15 For this reason, our decision in *Bell Atl. Mobile I* cannot be considered a final judgment on the merits of the issue currently before us. Nor should the board's **[***23]** 2006 decision be so considered. In that decision, the board indicated that it did not address other issues raised in the *§ 39* appeals because *§ 39* did not apply, but nowhere did the board address the scope of its jurisdiction under *§ 39*. Insofar as the board concluded, in its 2008 decision, based on the 2006 decision, that the doctrines of res judicata, issue preclusion, and collateral estoppel required dismissal of the Newton assessors' *§ 39* appeals for the fiscal years other than 2004, we disagree. For any of these doctrines to apply, a final judgment on the merits is necessary. See *Anusavice v. Board of Registration in Dentistry, 451 Mass. 786, 798 n.16, 889 N.E.2d 953 (2008)*; *Kobrin v. Board of Registration in Med., 444 Mass. 837, 843, 832 N.E.2d 628 (2005)*; *Treglia v. MacDonald, 430 Mass. 237, 240-241, 717 N.E.2d 249 (1999)*. We therefore reject Bell Atlantic Mobile's reliance on this alternative basis for the board's dismissal of the Newton assessors' *§ 39* appeals, as well as its attempt to extend the purported preclusion to the other assessors currently before this court.

Further, our resolution of the question now before us does not confer unlimited rights of appeal. Appeals to the board remain subject to the board's rules **[***24]** of practice and procedure, codified at *831 Code Mass. Regs. §§ 1.00* (2007) "A claim of appeal shall be filed with the clerk of the Board in accordance with the Massachusetts Rules of Appellate Procedure . . . ." *831 Code Mass. Regs. § 1.35* (2007). *Rule 4 (a) of the Massachusetts Rules of Appellate Procedure*, as amended, 430 Mass. 1603 (1999), provides that, in a civil case, the notice of appeal must be filed with the clerk "within thirty days of the date of the entry of the judgment appealed from."

**[*739]** In the present case, only the assessors of the cities of Newton, Boston, Springfield, and Cambridge filed claims of appeal from the board's sua sponte

dismissal of their *§ 39* appeals. As these appeals were each filed within thirty days of December 3, 2008, the date the board issued its findings of fact and report, on remand, these assessors are entitled to have the board entertain their *§ 39* appeals that the board dismissed [16]. The **[**142]** approximately forty-six other boards of assessors whose *§ 39* appeals were also dismissed as of December 3, 2008, see note 10, *supra*, may not now file an appeal from the board's decision; the thirty-day filing deadline has long passed. See *Friedman v. Board of Registration in Med., 414 Mass. 663, 665, 609 N.E.2d 1223 (1993),* **[***25]** citing *Harper v. Division of Water Pollution Control, 412 Mass. 464, 465, 589 N.E.2d 1239 (1992).*

16 The Newton assessors' December 30, 2008, notice of appeal includes the dismissal of its FY 2004 *§ 39* appeal as one of the matters being appealed. The board addressed the Newton assessors' *§ 39* appeal relating to FY 2004 in its 2006 decision, and entered judgment in Newton's favor. Bell Atlantic Mobile argues that the Newton assessors are not entitled to have their FY 2004 appeal revived for consideration by the board on remand from this case, because the Newton assessors did not file an appeal from the board's 2006 decision. The argument is not without merit, but in the unusual circumstances of this case, we conclude that it should be rejected. The board's 2006 decision appeared on its face to represent a favorable disposition for the Newton assessors; it was not until its 2008 decision that the board interpreted that favorable disposition in 2006 to have adverse consequences for Newton. For several reasons, including that judgment entered in the Newton assessors' favor on their *§ 39* appeal for FY 2004; that the Newton assessors could not have foreseen the jurisdictional implications that the board in **[***26]** 2008 determined were embedded in its 2006 decision within the thirty-day timeline for filing appeals; that after *Bell Atl. Mobile I* was decided, the Newton assessors did not abandon their FY 2004 *§ 39* appeal but rather sought to keep it alive by moving to consolidate it with Bell Atlantic Mobile's still-pending *§ 65* appeals; and that the Newton assessors' timely filings with regard to its other *§ 39* appeals indicate that Newton took all available actions to seek relief, we think the circumstances surrounding the Newton assessors' FY 2004 *§ 39* appeal are exceptional and operate to excuse their failure to file a timely appeal from the 2006 decision. See *Herrick v. Essex Regional Retirement Bd., 68 Mass. App. Ct. 187, 190, 861 N.E.2d 32 (2007)* (failure to file appeal timely typically absolute bar to plaintiff's ability to obtain judicial review of final agency action, but rare exceptions exist). On remand, the board should consider Newton's *§ 39* petition for FY 2004 as if it had been timely appealed.

Finally, Bell Atlantic Mobile argues that one-half of the assessors' *§ 39* appeals are moot because of agreements reached between the relevant assessors and Bell Atlantic Mobile as to **[*740]** the value of Bell Atlantic **[***27]** Mobile's *§ 39* property for fiscal years 2006, 2007, and 2008. The question before us, however, concerns only the scope of the statutory grant of jurisdiction to the board under *G. L. c. 59, § 39*. Because we find the board has jurisdiction to hear the assessors' *§ 39* appeals, questions concerning mootness are best reserved for the board to resolve.

3. *Conclusion*. The decision of the Appellate Tax Board is reversed. The case is remanded to the board for consideration of the assessors' *§ 39* appeals on the merits and for any further proceedings consistent with this opinion.

*So ordered.*

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**MASSPCSCO**
**v.**
**COMMISSIONER OF REVENUE** Docket Nos. C278479
C284149
C288621

**MASSPCSCO**
**v.**
**BOARD OF ASSESSORS**
**OF THE CITY OF WOBURN** Docket Nos. F283510
F293338

**MASSPCSCO**
**v.**
**BOARD OF ASSESSORS**
**OF THE CITY OF SPRINGFIELD** Docket Nos. F282451
F287119

Promulgated: May 7, 2010

ATB 2010-372

Commissioner Scharaffa heard these appeals. Chairman Hammond and Commissioners Egan, Rose, and Mulhern joined him in the decisions for the appellant in the appellant's appeals against the Commissioner of Revenue ("Commissioner") (Docket Nos. C278479 (2005), C284149 (2006), and C288621 (2007)) and the decisions for the appellees in the appellant's appeals against The Board of Assessors of the City of Springfield ("Springfield Assessors") (Docket Nos. F282451 (FY 2005) and F287119 (FY 2006)) and in the appellant's appeals against The Board of Assessors of the City of Woburn ("Woburn Assessors") (Docket Nos. F283510 (FY 2006) and F293338 (FY 2007)).

The appellant's appeals against the appellee, Commissioner, were filed under the formal procedure pursuant to G.L. c. 58A, §§ 6 and 7 and G.L. c. 58, § 2, from the refusal of the Commissioner to include the appellant on her annual lists under G.L. c. 63, § 30 of domestic and foreign corporations subject to an excise for 2005 through 2007 (the "Corporations Books").

The appellant's appeals against the appellees, Springfield Assessors and Woburn Assessors (collectively, the "Assessors"), were filed under the formal procedure pursuant to G.L. c. 58A, §§ 6 and 7 and G.L. c. 59, §§ 64 and 65, from the refusal of the Assessors to abate taxes on certain personal property in the Cities of Springfield and Woburn, respectively, owned by and assessed to the appellant under G.L. c. 59, §§ 11 and 38, for fiscal years 2005 and 2006 with respect to the Springfield appeals and for fiscal years 2006 and 2007 with respect to the Woburn appeals.

These findings of fact and report are made pursuant to requests by the appellant and the appellees, Commissioner and Assessors, under G.L. c. 58A, § 13 and 831 CMR 1.32.

*John S. Brown*, Esq., *Matthew D. Schnall*, Esq., *Darcy A. Ryding*, Esq., and *Shu-Yi Oei*, Esq. for the appellant.

*Kevin M. Daly*, Esq. and *Daniel Shapiro*, Esq. for the appellee Commissioner.

*Richard P. Bowen*, Esq. and *Jeffrey T. Blake*, Esq. for the appellee Woburn Assessors.

*John M. Lynch*, Esq. and *Stephen W. DeCourcey*, Esq. for the appellee Springfield Assessors.

## FINDINGS OF FACT AND REPORT

### I. Introduction

This matter involves seven appeals brought by MASSPCSCO,[1] a Delaware statutory trust that leases wireless telephone network equipment to one of its affiliates. By order dated April 11, 2006, the Appellate Tax Board ("Board") denied a motion to consolidate certain of the appeals. Later, in a series of orders dated October 25, 2007, April 8, 2008, April 17, 2008, and June 24, 2008, the Board ordered these appeals consolidated for purposes of a hearing on all issues other than valuation. Appeals involving MASSFONCO, an affiliate of MASSPCSCO, were severed in the June 24, 2008 order. On August 13, 2008, MASSPCSCO withdrew three petitions involving the Board of Assessors of the City of Newton that had been consolidated with these appeals. On September 10, 2009, the Board scheduled a pretrial conference to establish a date for the completion of the hearing regarding the remaining valuation issues relating to MASSPCSCO's appeals involving the Board of Assessors of the City of Boston (Docket Nos. F282536 (FY 2005) and F283668 (FY 2006)), which had been consolidated and partly heard with the above-captioned appeals.[2]

The Board conducted a two-day hearing for these appeals, beginning on September 8, 2008. At the hearing, three witnesses testified for MASSPCSCO: Michael Heaton, the Director of Property Tax for Sprint/United Management Company ("SUMC"), the company that, at all relevant times, performed certain management, bookkeeping, and accounting services for various Sprint affiliates including MASSPCSCO; Brian Jurgensmeyer, the Director of Accounting and Operations for SUMC; and Melinda Ordway, a Senior Program Manager and Fiscal Analyst in the Commissioner's Division of Local Services.

On the basis of the testimony and exhibits introduced at the hearing of these appeals, together with the parties' extensive and detailed Statement of Agreed Facts with eighty-one attached exhibits, the Board made the following findings of fact.

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[1] The "PCS" in MASSPCSCO is an acronym for personal communication services.

[2] MASSPCSCO, the Springfield Assessors, and the Woburn Assessors agreed and stipulated that if MASSPCSCO is not entitled to the "stock-in-trade" exemption under G.L. c. 59, § 5, cl. 16(2), "decisions should be entered in those matters in favor of the Assessors." In other words, unlike the appeals involving Boston, there were no potential valuation issues in the appeals involving Springfield and Woburn.

**(A) Issues**

The two principal issues in these appeals are: (1) whether MASSPCSCO was a foreign corporation within the meaning of G.L. c. 63, § 30 ("Section 30") and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007; and (2) whether MASSPCSCO was entitled to the "stock-in-trade" exemption under G.L. c. 59, § 5, cl. 16(2) ("Clause 16(2)"), which would require a full abatement of the tax assessments placed on its personal property by the Assessors. The Board decided that MASSPCSCO was entitled to be so classified as a foreign corporation but was not entitled to the "stock-in-trade" exemption.

**(B) Jurisdiction**

**(1) Commissioner**

On April 25, 2005, the Commissioner issued her 2005 Corporations Book pursuant to G.L. c. 58, § 2.[3] On May 18, 2005, in accordance with G.L. c. 58, § 2, MASSPCSCO timely filed its Petition Under Formal Procedure with the Board claiming to be aggrieved by the Commissioner's failure to include it in her 2005 Corporations Book as a for-profit corporation subject to taxation in Massachusetts.

On May 9, 2006, the Commissioner issued her 2006 Corporations Book. On June 1, 2006, in accordance with G.L. c. 58, § 2, MASSPCSCO timely filed its Petition Under Formal Procedure with the Board claiming to be aggrieved by the Commissioner's failure to include it in her 2006 Corporations Book as a for-profit corporation subject to taxation in Massachusetts.

On April 23, 2007, the Commissioner issued her 2007 Corporations Book. On May 16, 2007, in accordance with G.L. c. 58, § 2, MASSPCSCO timely filed its Petition Under Formal Procedure with the Board claiming to be aggrieved by the Commissioner's failure to include it in her 2007 Corporations Book as a for-profit corporation subject to taxation in Massachusetts.

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[3] G.L. c. 58, § 2 provides in pertinent part:

> The commissioner shall annually, on or before April first of each year, forward to each board of assessors a list of all corporations known to him to be liable on January first of said year to taxation under chapters fifty-nine, sixty A, and sixty-three. . . .
>
> Any person aggrieved by any classification made by the commissioner under any provision of chapters fifty-nine and sixty-three or by any action taken by the commissioner under this section may, on or before April thirtieth of said year or the thirtieth day after such list is sent out by the commissioner, whichever is later, file an application with the appellate tax board on a form approved by it, stating therein the classification claimed.

On the basis of these facts, the Board found and ruled that it had jurisdiction over MASSPCSCO's appeals against the Commissioner.

**(2) Springfield Assessors**

For fiscal year 2005, MASSPCSCO did not file its form of list with the Springfield Assessors on or before March 1, 2004, but instead filed it on September 27, 2004 in response to a September 8, 2004 request from the City's Law Department written on behalf of the Springfield Assessors.[4] The Springfield Assessors valued the property, as of January 1, 2004, at $250,500 and assessed personal property taxes thereon, at the rate of $33.36 per thousand, in the amount of $8,356.68. The tax bill was issued on December 31, 2004 and, on March 29, 2005, a payment of $4,286.06 was made on behalf of MASSPCSCO.[5]

On January 26, 2005, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Springfield Assessors for abatement of the tax. The Springfield Assessors did not act on the abatement application and did not send out notice of their inaction. On July 28, 2005, in accordance with G.L. c. 59, § 65C, MASSPCSCO timely filed a Petition for Late Entry with the Board. By Order dated August 24, 2005, the Board allowed MASSPCSCO's Petition for Late Entry, and, on September 1, 2005, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

For fiscal year 2006, in accordance with G.L. c. 59, § 29, a form of list was timely filed with the Springfield Assessors on behalf of MASSPCSCO on February 23, 2005. The Springfield Assessors valued the property, as of January 1, 2005, at $250,500 and assessed personal property taxes thereon, at the rate of $33.03 per thousand, in the amount of $8,271.51. The tax bill was issued on March 31, 2006. Payments had been made previously on behalf of MASSPCSCO in the amount of $2,089.17 on August 1, 2005 and in the amount of $2,089.17 on November 1, 2005.

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[4] Following "seasonable notice" issued by assessors, G.L. c. 59, § 29 requires non-residents and foreign corporation, among others, to bring into the assessors "a true list of all their personal estate in that town not exempt from taxation." "The seasonable filing of a list . . . is a condition precedent to the right to secure an abatement unless the taxpayer shows a reasonable excuse for delay." ***Dexter v. City of Beverly***, 249 Mass. 167, 169 (1924). The Springfield Assessors did not contest the timeliness of MASSPCSCO's filing, and the Board inferred and found from the actions of the parties and MASSPCSCO's reliance on advice from tax professionals and counsel not to file "a true list" because its personal property was exempt that reasonable or good cause for delay existed. On this basis, the Board determined that the form of list was timely filed on September 27, 2004 in response to the Springfield Assessors' request.

[5] In contrast to real estate tax appeals, "a person aggrieved by the refusal of assessors to abate a tax on personal property" must pay only one-half of the tax to preserve [the] right of appeal." G.L. c. 59, § 64. Moreover, for jurisdictional purposes, there is no provision requiring that the tax due on personal property be paid "without the incurring of any interest charges," as is the case for most real estate tax appeals. G.L. c. 59, § 64.

On April 4, 2006, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Springfield Assessors for abatement of the tax. The Springfield Assessors denied the request for abatement on July 3, 2006, and, on July 27, 2006, in accordance with G.L. c. 59, §§ 64 and 65, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

**(3) Woburn Assessors**

For fiscal year 2006, in accordance with G.L. c. 59, § 29, a form of list was timely filed with the Woburn Assessors on behalf of MASSPCSCO on February 23, 2005. The Woburn Assessors valued the property, as of January 1, 2005, at $15,380,600 and assessed personal property taxes thereon, at the rate of $21.50 per thousand, in the amount of $330,682.90. The tax bill was issued on January 4, 2006 and on May 3, 2006, a payment was made on behalf of MASSPCSCO as follows:[6]

| Tax Paid | Interest Paid | Total Paid |
|---|---|---|
| $165,341.45 | $5,517.40 | $170,858.85 |

On January 30, 2006, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Woburn Assessors for abatement of the tax. Because the Woburn Assessors did not act on MASSPCSCO's request for abatement, it was deemed denied three months later. On May 5, 2006, in accordance with G.L. c. 59, §§ 64 and 65, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

For fiscal year 2007, in accordance with G.L. c. 59, § 29, a form of list was timely filed with the Woburn Assessors on behalf of MASSPCSCO on February 21, 2006. The Woburn Assessors valued the property, as of January 1, 2006, at $9,813,700 and assessed personal property taxes thereon, at the rate of $21.96 per thousand, in the amount of $215,508.85. The tax bill was issued on December 31, 2006 and payments were made on behalf of MASSPCSCO as follows:[7]

| Date | Tax Paid |
|---|---|
| July 21, 2006 | $ 52,748.64 |
| October 17, 2006 | $ 52,748.64 |
| January 16, 2007 | $ 2,257.15 |

On February 1, 2007, in accordance with G.L. c. 59, § 59, MASSPCSCO timely applied to the Woburn Assessors for abatement of the tax. Because the Woburn Assessors again failed to act on MASSPCSCO's request for abatement, it also was deemed denied three months later. On July 30, 2007, in accordance with G.L. c. 59, §§

[6] See footnote 5, *supra*.
[7] See footnote 5, *supra*.

64 and 65, MASSPCSCO seasonably filed its Petition Under Formal Procedure with the Board.

On the basis of these facts, the Board found and ruled that it had jurisdiction over this appeal.

## II. Underlying Facts

### (A) The Companies

Sprint Nextel Corporation, formerly known as Sprint Corporation ("Sprint"), was, at all relevant times, a Kansas corporation that was mainly a holding company with its operations principally conducted by its subsidiaries.

Sprint Spectrum Holding Company, L.P., formerly known as MajorCo, L.P. ("Holdings"), and MinorCo, L.P. ("MinorCo") were, at all relevant times, Delaware limited partnerships. Since November, 1998, all of the partnership interests in Holdings and MinorCo have been owned by direct or indirect subsidiaries of Sprint.

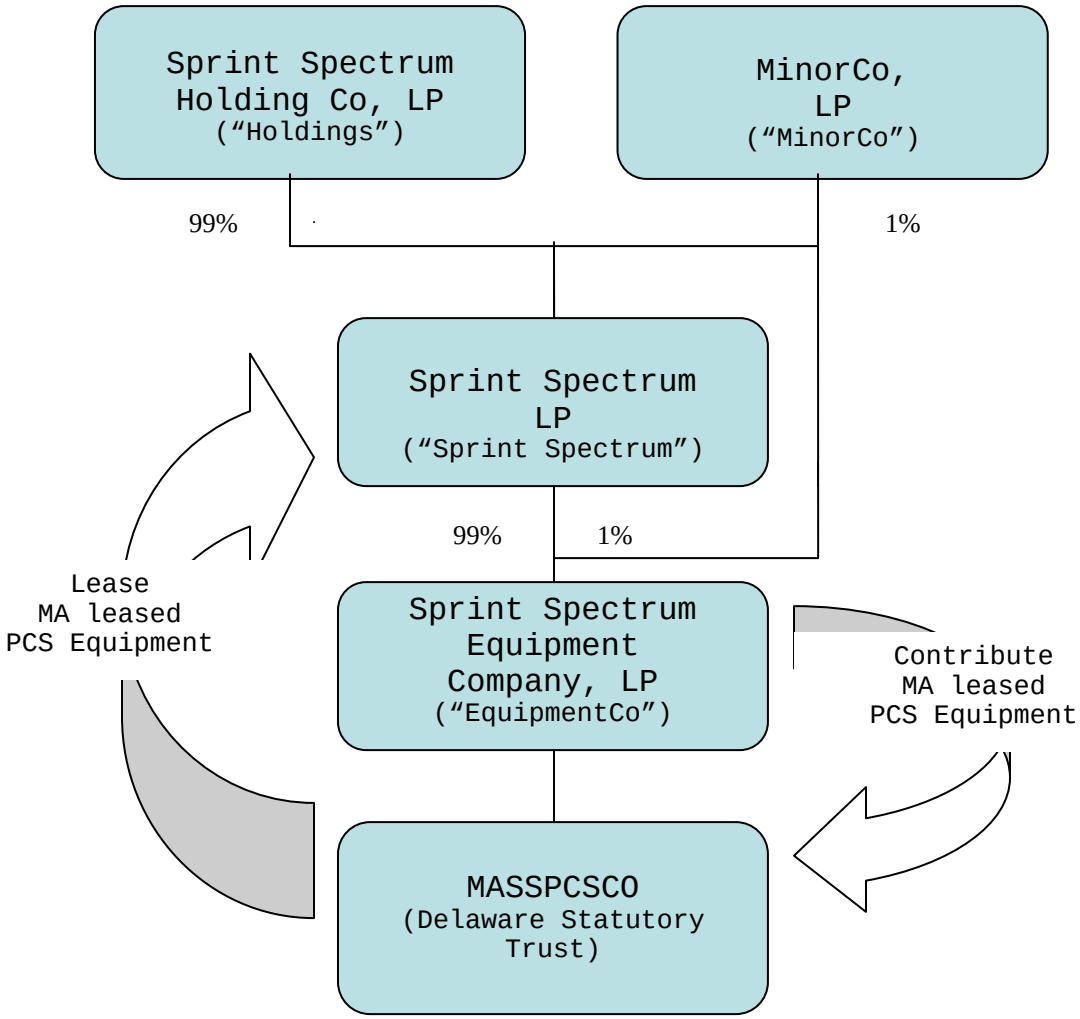
Sprint Spectrum L.P. ("Sprint Spectrum") was, at all relevant times, a Delaware limited partnership. Holdings was the 99% general partner of Sprint Spectrum and MinorCo was the 1% limited partner of Sprint Spectrum.

Sprint Spectrum Equipment Company L.P. ("EquipmentCo") was, at all relevant times, a Delaware limited partnership. Substantially all of the partnership interests in EquipmentCo were owned by Sprint Spectrum.

MASSPCSCO was, at all relevant times, a Delaware statutory trust formed on December 19, 2003. One-hundred percent of the beneficial interest in MASSPCSCO was owned by EquipmentCo.

SUMC was, at all relevant times, a Kansas corporation, and was an indirect wholly-owned subsidiary of Sprint.

The relationship among the foregoing entities is summarized in the following diagram and further discussed below.




**(B) Sprint Spectrum and Its National Wireless Network**

Sprint Spectrum was formed as a Delaware limited partnership on March 28, 1995. Sprint Spectrum was originally named "MajorCo Sub, L.P.", and changed its name to "Sprint Spectrum L.P." on February 29, 1996. At all relevant times, the partnership interests in Sprint Spectrum have been held by Holdings, as the 99% general partner and MinorCo, as the 1% limited partner. Holdings and MinorCo, in turn, were formed as partnerships among subsidiaries of four independent companies: Sprint, Telecommunications, Inc. ("TCI"), Comcast Corporation ("Comcast") and Cox Communications, Inc. ("Cox"). The purpose of the joint venture among Sprint, TCI, Comcast and Cox was to establish Sprint Spectrum as a leading provider of wireless communications products and services in the United States by various means, including acquisition and operation, directly through subsidiaries, of a national wireless communications network (the "Network"). On June 3, 1996, Sprint Spectrum registered with the Secretary of the Commonwealth of Massachusetts ("Secretary") as a foreign limited partnership.

EquipmmentCo was formed as a Delaware limited partnership on May 15, 1996 to own and lease to Sprint Spectrum certain personal property that would be used in the Network. EquipmentCo registered with the Secretary as a foreign limited partnership on

July 19, 1996. In August 1996, Sprint Spectrum, together with an affiliate, Sprint Spectrum Finance Corporation, issued $250,000,000 aggregate principal amount of 11% Senior Notes and $500,000,000 aggregate principal amount of 12½% Senior Discount Notes (collectively, the "Notes") to fund capital expenditures, including build out of the Network, to fund working capital as required, to fund operating losses and for other partnership purposes. At the time of the issuance of the Notes, Sprint Spectrum and its direct and indirect subsidiaries, including EquipmentCo, had not commenced commercial operations and had no revenue from operations.

Sprint Spectrum also obtained financing from equipment vendors (the "Vendor Financing"). The terms of the Vendor Financing required that all "Personal Property assets" (as defined in the vendors' commitment letters), which included equipment, be acquired in or transferred to a separate, wholly-owned, single-purpose partnership subsidiary of Sprint Spectrum. That subsidiary was EquipmentCo.

Since August 1996, Sprint Spectrum has been engaged in the business of providing wireless communications services over the Network in the Commonwealth and in other markets across the United States. Using funds that it borrowed, earned, or received as capital contributions, EquipmentCo purchased property to be used in the Network and leased all of its Network property to Sprint Spectrum. The lease payments due from Sprint Spectrum to EquipmentCo under the leases were determined by applying a lease factor to the costs of the various assets leased.

During the second quarter of 1998, Sprint announced that it had entered into a restructuring agreement with TCI, Comcast and Cox to buy out those companies' interests in Sprint Spectrum (*i.e.*, their partnership interests in Holdings and MinorCo), in exchange for an equity interest in Sprint. The buyout was completed in November, 1998. After the buyout, Sprint loaned approximately $2.9 billion to Sprint Spectrum, and Sprint Spectrum used those funds in part to retire the Vendor Financing.

### (C) Taxation of the Network from 1999 through 2002

From 1999 through 2002, Sprint Spectrum filed returns with the Commissioner pursuant to G.L. c. 59, § 41. In conformity with the Commissioner's instructions, because it owned no underground conduits, poles, wires or pipes, Sprint Spectrum limited the property reported on the Forms 5941 to machinery used in manufacture, namely, electric generators. The aggregate valuation certified by the Commissioner for the personal property reported by Sprint Spectrum was $330,800 for fiscal year 2000, $330,800 for fiscal year 2001, $1,703,000 for fiscal year 2002, and $1,762,900 for fiscal year 2003. On January 13, 2003, in response to an order of the Board in ***RCN-BecoCom, LLC v. Commissioner of Revenue***, Docket Nos. F253495 & F257397 (order dated August 1, 2002) (***RCN-BecoCom*** Order"),[8] the Commissioner announced that filers of Form 5941 organized as partnerships or limited liability companies that filed federal returns as partners or as disregarded entities would, beginning with the fiscal year 2004 returns due on March 1, 2003, be required to report "all machinery, including switching equipment, used for telephone and telegraph purposes" that it owned.

[8] The Board determined, among other things, that RCN-BecoCom, as an LLC, was not entitled to the corporate exemption under G.L. c. 59, § 5, clause 16(1).

After Sprint Spectrum filed a fiscal year 2004 Form 5941, on February 28, 2003, reporting all of the machinery and equipment located in the Commonwealth that it leased from EquipmentCo and used in the Network, the Commissioner certified an aggregate taxable value of $172,899,300, nearly a 100-fold increase over the fiscal year 2003 certified value.

**(D) The Formation and Operation of MASSPCSCO**

As a result of the change in the Commissioner's interpretation of the Massachusetts property tax law resulting from the ***RCN-BecoCom*** Order, Sprint undertook a review of Massachusetts property tax law, and sought advice from outside professionals at Deloitte & Touche LLP ("Deloitte & Touche"). Sprint had previously considered shifting its Massachusetts tangible personal property to certain utility corporations that operate within the Sprint business structure, but Sprint determined that such a restructuring was inadvisable. In a memorandum dated December 10, 2003, Deloitte & Touche advised Sprint to restructure by creating, among other things, MASSPCSCO:

> The crux of the restructuring is to place otherwise taxable Massachusetts assets in an entity that is recognized as a corporation for purposes of the relevant property tax exemptions in Massachusetts, while being disregarded for federal income tax purposes so as to avoid the creation of federal income tax issues.

In the memorandum, Deloitte & Touche also recommended that MASSPCSCO "be structured, if possible, to engage in third party transactions"; and that profits be directed to "defend against any assertion of a sham transaction theory" and to "protect against any change in the state's position that a federally disregarded entity does not have gross income for state tax purposes." Deloitte & Touche further recommended that leases from MASSPCSCO to Sprint Spectrum be at "arms' length prices."

In a follow-up memorandum regarding Sprint's "Property Tax Restructuring Profile," Deloitte & Touche summarized the purposes of the restructuring:

> For business, legal and tax purposes, Sprint will undergo an internal organizational restructuring strategy that enables the Company to qualify for certain personal property tax exemptions for its switching equipment and other personal property in Massachusetts without requiring the assets to be placed in corporate solution for federal income tax purposes. Specifically, the use of a federally disregarded Delaware Business Trust ("DBT") for holding Massachusetts assets permits Sprint to take advantage of differences in state and federal entity classification rules, and obtain certain corporate property tax exemptions without federal income tax consequences, and with acceptable state income and sales tax impacts.

Mr. Heaton's direct testimony also confirmed that MASSPCSCO's creation was "undertaken with a view toward Massachusetts property taxes." On cross-examination, he even went so far as to agree with his interrogator that MASSPCSCO's creation was done solely for tax purposes.

EquipmentCo executed a Trust Agreement forming MASSPCSCO as a Delaware statutory trust and filed a certificate of Trust with the Delaware Secretary of State. All of the beneficial interests in MASSPCSCO were owned, at all relevant times, by EquipmentCo. MASSPCSCO did not file an election to be treated as an association taxable as a corporation for federal tax purposes. MASSPCSCO filed corporate excise tax returns on Forms 355 with the Commissioner which the Commissioner received on the following dates:

| **Tax Year** | **Return Received** |
|---|---|
| 2003 & 2004 | June 6, 2005 |
| 2005 | September 15, 2006 |
| 2006 | July 18, 2007 |

Sprint's tax compliance group had apparently inadvertently neglected to file an automatic six-month extension for tax years 2003 and 2004. The Commissioner neither audited nor declined to accept any of MASSPCSCO's corporate excise tax returns, and therefore did not make any adjustment to the amounts of tax reported on them.

By a document executed on December 22, 2003, EquipmentCo transferred all of its tangible personal property located in Massachusetts, including towers, antennas, switches and related software, and other equipment, to MASSPCSCO as a contribution to capital valued at net book cost and without any other consideration. MASSPCSCO then became the owner of that Network property. No sales tax was paid in connection with that transfer. On December 23, 2003, Sprint Spectrum and EquipmentCo executed a Lease Termination Agreement pursuant to which they terminated, as of December 31, 2003, the lease of that property from EquipmentCo. On December 23, 2003, Sprint Spectrum and MASSPCSCO executed a lease agreement. EquipmentCo retained its property located outside Massachusetts and continued to lease that property to Sprint Spectrum.

Since December 2003, MASSPCSCO has performed activities similar to those previously conducted by EquipmentCo with respect to the Network assets located in Massachusetts. MASSPCSCO has held existing assets that are leased to Sprint Spectrum, has had new assets purchased on its behalf using funds that were borrowed, earned, or received as capital contributions and has leased those assets to Sprint Spectrum, and retired obsolete assets.

At all relevant times, Sprint Spectrum paid rent to MASSPCSCO on a monthly basis for the leased property. Mr. Heaton testified that the lease factors were calculated to produce a rate of return of 9%, presumably on the net book cost of the leased property. This same rate of return was used from 1996 through at least 2006 and was applied to all categories of leased property. There was no evidence showing how this rate of return was calculated or determined or demonstrating its relationship to a market rate of return. Contrary to advice from the accounting firm of Ernst & Young, MASSPCSCO did not implement, during the relevant time period, a lease factor schedule which would have assigned different lease factors to different types and categories of property and likely more accurately reflected market values. At all relevant times, sales taxes were collected and paid on a monthly basis on the lease payments made by Sprint Spectrum. For purposes of paying over sales taxes to the Commissioner, SUMC made the payments by

checks drawn on a bank account in the name of SUMC. Each of the payments was contemporaneously charged to the account of MASSPCSCO.

At all relevant times, MASSPCSCO had no employees. All functions and services necessary or desirable for the management, administration and operation of MASSPCSCO's business, as required or requested by MASSPCSCO, were performed by employees of SUMC, under a services agreement dated December 14, 2004. In return for its services, MASSPCSCO reimbursed SUMC by a fixed payment of $2,000 per month for a total of $24,000 per year on revenues between $23,000,000 and $41,700,000 for calendar years 2004 through 2006 and property, plant, and equipment valued at $211,000,000 to $328,000,000 for those same years. MASSPCSCO did not as of January 1, 2005, January 1, 2006 or January 1, 2007, hold any assets other than property leased to Sprint Spectrum.

During calendar years 2004 through 2006, MASSPCSCO did not lease, or seek or attempt to lease, property to any person or entity other than Sprint Spectrum. During calendar years 2004 through 2006, MASSPCSCO did not consider or conduct any regular business activities other than those incident to the purchase, ownership and leasing of Network equipment to Sprint Spectrum. Any repairs to the equipment leased were the responsibility of the lessee, not MASSPCSCO. MASSPCSCO did not purchase the equipment it leased to Sprint Spectrum; instead Sprint Spectrum purchased the equipment and marked the purchase against MASSPCSCO's account on a common ledger. Sprint Spectrum and MASSPCSCO did not maintain separate bank accounts. The lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries transferring amounts to MASSPCSCO's account in Sprint's books. MASSPCSCO was not compensated for any services it performed for any person or entity. During calendar years 2004 through 2006, MASSPCSCO did not lease or occupy any office space or real estate, except that certain inventory of MASSPCSCO was stored, prior to delivery to Sprint Spectrum sites, in facilities shared with other affiliates of Sprint.

At all relevant times, the administrative trustee of MASSPCSCO was an employee of SUMC and was authorized only to take action as directed by EquipmentCo. EquipmentCo was empowered to remove or appoint any trustee without cause at any time. The nominal trustee, Wilmington Trust Company, was not entitled to exercise any powers under the trust or control over MASSPCSCO; it was appointed for the limited purpose of fulfilling certain requirements under Delaware law.

### (E) The Commissioner's Treatment of MASSPCSCO

Pursuant to G.L. c. 58, § 2, the Commissioner, through the Division of Local Services Municipal Data Management & Technical Assistance Bureau ("Data Management"), prepares an annual list of for-profit corporations known to the Commissioner to be liable for Massachusetts corporate excise, local property, or motor vehicle excise taxes as of January first of each year. The Commissioner "forwards" this annual list to the boards of assessors of the Commonwealth's cities and towns. The publication is officially known as *Massachusetts Domestic and Foreign Corporations Subject to an Excise*, but is commonly, and in this Findings of Fact and Report, referred to as the "Corporations Book."

The information compiled for the Corporations Book derives from two sources, the Commissioner's internal database of taxpayers qualifying as "active" corporations under chapter 63 and the Secretary's new corporations database. The Commissioner's internal database is referred to as MASSTAX and includes all active taxpayers filing as for-profit corporations.[9] The Secretary's database is a compilation of newly registered corporations doing business in Massachusetts that is communicated to the Commissioner for inclusion in the Corporations Book.

Despite being organized in 2003, MASSPCSCO's 2003 and 2004 Forms 355, Corporate Excise Returns, were not filed on its behalf by Sprint with the Commissioner until June 6, 2005. Extensions of time to file those returns were not requested, either. Previously, MASSPCSCO had registered with the Secretary as a trust, and the Secretary had classified MASSPCSCO as a trust. Consequently, MASSPCSCO was not among the entities listed in either the Secretary's new corporations list or the MASSTAX corporations database for 2005. Pursuant to established procedures, the Commissioner compiled her 2005 Corporations Book by supplementing the prior year's list with: information from a list obtained from the Secretary of new corporation filings; a list of entities that had filed corporate excise tax returns; and applications for manufacturing corporation status. MASSPCSCO was not included in any of those data sources. As a result, the 2005 Corporations Book, which was published on April 25, 2005, did not contain MASSPCSCO among its listing of corporations.

After MASSPCSCO's June 6, 2005 filings and tax payments, the Commissioner's MASSTAX database recognized MASSPCSCO as an active foreign corporation in its database. Its listing did not represent, however, a studied determination by the Commissioner as to MASSPCSCO's proper filing status. The Commissioner left MASSPCSCO out of her 2006 and 2007 Corporations Books, on advice of counsel, because of the pending litigation involving this matter's 2005 appeals before the Board and the perceived position of local boards of assessors that MASSPCSCO was not entitled to recognition as a for-profit corporation for purposes of local property tax exemptions. Notwithstanding these omissions, the Commissioner issued two letters to local boards of assessors – one prior to and one subsequent to the publication of the 2005 Corporations Book – stating that MASSPCSCO was a foreign corporation, and explaining that its failure to be listed in the Corporations Book resulted from the administrative procedures used in compiling the Corporations Book.

**(F) Abatement Amounts at Issue**

The parties stipulated that if MASSPCSCO is properly classified as a "foreign corporation" within the meaning of Section 30 and if the personal property that MASSPCSCO leases to its affiliates is "stock in trade" that is exempt under Clause 16(2), then MASSPCSCO is entitled to abatements in the following amounts:

[9] An "active" taxpayer is one that has filed a return or paid a corporate excise within the last five years.

| Assessors | Fiscal Year | Abatement Amounts at Issue |
|---|---|---|
| Springfield | 2005 | $ 8,356.68 |
| Springfield | 2006 | $ 8,271.51 |
| Woburn | 2006 | $ 330,682.90 |
| Woburn | 2007 | $ 215,508.85 |

## III. Board's Ultimate Findings of Fact

### (A) MASSPCSCO Was a Foreign Corporation Within the Meaning of Section 30

Based on all of the evidence and its subsidiary findings above, and as explained more fully in its Opinion below, the Board ultimately found that, at all relevant times, MASSPCSCO was a foreign corporation within the meaning of Section 30 and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007. The Board found that MASSPCSCO's omission from the Commissioner's 2005 Corporations Book resulted solely from the fact that MASSPCSCO was not included in any of the data sources that the Commissioner consulted in preparing the Corporations Book. The omission did not reflect a determination by the Commissioner concerning MASSPCSCO's status as a foreign corporation. The Board found that, at all relevant times, the Commissioner did not, in preparing the annual Corporations Book, make any substantive determinations concerning the status of any entity, except with respect to entities that had applied for classification as manufacturing corporations, which MASSPCSCO did not do.

With respect to MASSPCSCO's omission from the 2006 and 2007 Corporations Books, the Board found that MASSPCSCO's omission resulted solely from advice of counsel because of the pendency of this litigation before the Board regarding MASSPCSCO's prior omission from the 2005 Corporations Book and the perceived position of local boards of assessors that MASSPCSCO was not entitled to recognition as a for-profit corporation for purposes of local property tax exemptions. In omitting MASSPCSCO from the 2006 and 2007 Corporations Books, the Board found that the Commissioner again did not make any substantive determination regarding MASSPCSCO's status as a foreign corporation and, admittedly, deviated from her usual practice and procedures, which, but for the deviation, would have resulted in MASSPCSCO's inclusion. Moreover, in letters to boards of assessors, following MASSPCSCO's omission from her 2005 Corporations Book, the Commissioner referred to MASSPCSCO as a foreign corporation.

The Board found that, at all relevant times, MASSPCSCO satisfied the definition of a foreign corporation contained in Section 30 because it was an association or organization established, organized and chartered under Delaware law; it was organized for the ostensible purpose of owning property and leasing it to an affiliate, a purpose for which corporations could be organized under Chapter 156B and, after July 1, 2004, under Chapter 156D; and it had privileges, powers, rights and immunities not possessed by individuals or partnerships, including perpetual existence, freely transferable shares, centralized management through its administrative trustee and officers, and limited liability on the part of its beneficial owner, even if the owner chose – as permitted under

MASSPCSCO's trust agreement and applicable Delaware law – to participate in the management of MASSPCSCO's business.

Accordingly, the Board found that the MASSPCSCO's omission from the 2005, 2006, and 2007 Corporations Books was not determinative of, or necessarily germane to, MASSPCSCO's status as a foreign corporation under Section 30 and that MASSPCSCO met the definition of a foreign corporation under Section 30. The Board, therefore, decided that MASSPCSCO was a foreign corporation within the meaning of Section 30 for the years at issue and was entitled to be classified as such by the Commissioner.

### (B) MASSPCSCO Was Not Entitled to the "Stock-in-Trade" Exemption under Clause 16(2)

Based on all of the evidence and its subsidiary findings above, and as explained more fully in its Opinion below, the Board ultimately found that, at all relevant times, MASSPCSCO was not entitled to the "stock-in-trade" exemption under Clause 16(2). The Board found that MASSPCSCO's activities were not undertaken for the purpose of profit or gain and MASSPCSCO was not operated for a predominantly business purpose. In addition, the Board found that MASSPCSCO's original transaction with EquipmentCo, transferring Massachusetts property from EquipmentCo to MASSPCSCO, as well as MASSPCSCO's continuing lessor-lessee relationship with Sprint Spectrum lacked economic substance.

The Board further found that MASSPCSCO was created for the predominant and essentially sole purpose of avoiding taxation in the form of personal property taxes for its personal property located in Massachusetts. MASSPCSCO's assertions that its organization served to enhance Sprint's cash flow and its future ability to borrow were without merit. With respect to enhancing cash flow, the Board determined that enhanced cash flow was unlikely, or even fictional, in a scenario where payments were mere ledger adjustments between affiliates. With respect to enhanced borrowing power, the Board determined that it too was unlikely, or even fictional, because during the relevant time period, there was no evidence of any vendor or lender requirements placed on MASSPCSCO, or for that matter on EquipmentCo,[10] or even on Sprint Spectrum, requiring the existence of a separate entity, like MASSPCSCO, to finance the purchase of needed property and equipment. Furthermore, the Board found that MASSPCSCO was not engaged in the ordinary course of the leasing business or engaged in any substantive business at all. Accordingly, the Board found that MASSPCSCO was not entitled to the "stock-in-trade" exemption under Clause 16(2).

## OPINION

The two principal issues in these appeals are: (1) whether MASSPCSCO was a foreign corporation within the meaning of G.L. c. 63, § 30 ("Section 30") and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007; and (2) whether MASSPCSCO was entitled to the "stock-in-trade" exemption under G.L. c. 59, § 5, cl.

[10] EquipmentCo's Vendor Financing and the vendors' concomitant financing requirement of a separate, wholly-owned, single-purpose subsidiary of Sprint Spectrum to hold all Personal Property assets, which was EquipmentCo's purported business purpose, were retired in 1999.

16(2) ("Clause 16(2)"), which would require a full abatement of the tax assessments placed on its personal property by the Assessors. The Board decided that MASSPCSCO was entitled to be so classified as a foreign corporation but was not entitled to this exemption.

## I. MASSPCSCO Was a Foreign Corporation within the Meaning of Section 30

Clause 16(2) provides that "[a] foreign corporation . . . as defined in section thirty of chapter sixty-three" is exempt under clause 16(2) on all property other than "real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business." G.L. c. 59, § 5, cl. 16(2). Numerous cases link the corporate tax terminology used in Clause 16 with the same meaning that has attached to the corresponding terms in applying the taxes imposed by Chapter 63. *See, e.g.*, ***Bell Atlantic Mobile Corp. v. Commissioner of Revenue***, 451 Mass. 280, 285-86 (2008) ("***Bell Atlantic Mobile Corp.***") (describing analysis of utility exemption as turning on construction of G.L. c. 63, § 52A); ***RCN-BecoCom, LLC v. Commissioner of Revenue***, 443 Mass. 198, 206 (2005) ("***RCN-BecoCom***")(recognizing that entity must be subject to taxation under Chapter 63 in order to qualify for exemption); ***Assessors of Holyoke v. State Tax Commission,*** 355 Mass. 223, 225-26 (1969)(resolving question of classification for purposes of clause 16(3) by reference to Chapter 63 definition of "manufacturing corporation"); ***In re MCI Consolidated Central Valuation Appeals***, Mass. ATB Findings of Facts and Reports 2008-255, 358-59 ("***MCI***")(applying utility exemption to "foreign corporations subject to annual corporate utility franchise tax under G.L. c. 63, § 52A"), *aff'd in pertinent part*, 454 Mass. 635 (2009).

During the years at issue, paragraph 2 of Section 30 defined a foreign corporation, subject to certain exclusions not relevant here, as a:

> [C]orporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter 156, chapter 156A, chapter 156B, chapter 156D or section 19F to 19W, inclusive, of chapter 175, or chapter 180 which has privileges, powers, rights or immunities not possessed by individuals or partnerships.

G.L. c. 63, § 30(2), as in effect prior to St. 2008, c. 173, § 38. As described in greater detail below, the Board found and ruled that, at all relevant times, MASSPCSCO satisfied this definition. The Board found that MASSPCSCO was an association or organization established, organized and chartered under Delaware law; it was organized for the ostensible purpose of owning property and leasing it to an affiliate, a purpose for which corporations could be organized under Chapter 156B and, after July 1, 2004, under Chapter 156D; and it had privileges, powers, rights and immunities not possessed by individuals or partnerships, including perpetual existence, freely transferable shares, centralized management through its administrative trustee and officers, and limited liability on the part of its beneficial owner, even if the owner chose – as permitted under MASSPCSCO's trust agreement and applicable Delaware law – to participate in the management of MASSPCSCO's business.

Furthermore, and for essentially those same reasons, the Commissioner concluded in Letter Ruling 91-2 that Delaware business trusts formed under 12 Del. C. § 3801, *et seq.*, were properly treated as foreign corporations within the meaning of Section 30. The trusts in Letter Ruling 91-2 were organized to operate mutual funds. The Commissioner concluded that they were associations formed under Delaware law that were "so far clothed with the functions and attributes of a corporation as to come within the just application of principles relating to corporations." (Citations omitted.)

MASSPCSCO was formed partly in reliance on Letter Ruling 91-2, and for each year at issue, MASSPCSCO filed a corporate excise tax return as a foreign corporation. Despite the late filing of the 2004 return, for which the Board found Sprint's tax compliance group inadvertently neglected to file an automatic six-month extension, as they had for EquipmentCo's Massachusetts return, MASSPCSCO fully complied with all of its obligations as a foreign corporation for these purposes. As of the close of the hearing, the Board found that the Commissioner had made no adjustments to MASSPCSCO's corporate excise tax filings and her records indicated that MASSPCSCO was an eligible filer for the corporate excise.

Finally, and as discussed in greater detail below, the Board found that while MASSPCSCO's operations were limited to leasing property to a related party, that limitation did not alter MASSPCSCO's status as a foreign corporation under Section 30. For Section 30 purposes, the Board found that MASSPCSCO's status should be determined by its governing trust instrument and the terms of the statute, without reference to the business activities that it undertook during the relevant time period.

For all of these reasons, which are discussed in greater particularity below, the Board found and ruled that MASSPCSCO was a foreign corporation within the meaning of Section 30.

**(A) MASSPCSCO Was an Association or Organization Established, Organized or Chartered under Laws Other Than Those of Massachusetts and Was Not a Foreign LLC**

Both Section 30 and the Commissioner's corporate excise tax regulations recognize that the term "foreign corporation" includes certain unincorporated associations. The statute refers disjunctively to a "*corporation, association or organization* established, organized or chartered" under the laws of another jurisdiction. (Emphasis added.) The regulations refer to "a form of organization recognized in Massachusetts as that of a foreign corporation under [Section 30], *whether or not the entity is described as a corporation* by the state under whose laws the entity is organized." 830 CMR 63.39.1(2) (emphasis added).

A Delaware statutory trust is by definition an "unincorporated association" that is created by a trust instrument "under which property is or will be held, managed, administered, controlled, invested, reinvested and/or operated . . . by a trustee or trustees or as otherwise provided in the governing instrument for the benefit of such person or persons as are or may become beneficial owners or as otherwise provided in the governing instrument." 12 Del. C. § 3801(g). In contrast to a Massachusetts business trust, which is a contractual entity recognized as a matter of common law, *see* ***Minkin v. Commissioner of Revenue***, 425 Mass. 174, 178 (1997), the status of a Delaware statutory

trust as a separate legal entity is governed by statute. *See, e.g.*, 12 Del. C. § 3801(g). The statutory trust has no existence as a separate entity until an instrument is filed with the Delaware Secretary of State. 12 Del. C. § 3810(a)(2). As the Commissioner concluded in Letter Ruling 91-2, the Board ruled here that when a statutory trust makes the required filing with the Delaware Secretary of State, it becomes "an association or organization established, organized or chartered under the laws of Delaware."

On December 19, 2003, EquipmentCo executed a trust agreement for MASSPCSCO conforming to the terms of 12 Del. C. § 3801(g). That same day, MASSPCSCO filed a certificate of trust with the Delaware Secretary of State in compliance with 12 Del. C. § 3801(a)(1). Upon filing of the certificate, MASSPCSCO became an unincorporated association organized under Delaware law. 12 Del. C. § 3801(a)(2). MASSPCSCO was not a "limited liability company" under Delaware law because that term is limited to entities formed under the Delaware Limited Liability Company Act, 6 Del. C. § 18-101, *et seq.* MASSPCSCO was formed instead under the Delaware Statutory Trust Act, and the Board, therefore, ruled that, at all relevant times, it was a statutory trust under Delaware law, not an LLC.

The Board further ruled that the characterization of MASSPCSCO under Delaware law is conclusive for purposes of its status as a non-LLC under Section 30 because the provisions of Section 30 adopt the definition from the Massachusetts LLC statute, which in turn relies on the name given to an entity under the laws of the state in which the entity was organized. *See* Section 30(2)(referring to "a foreign limited liability company as defined in section 2 of chapter 156C"); G.L. c. 156C, § 2 (defining a foreign limited liability company as "a limited liability company formed under the laws of any state other than the commonwealth or the laws of any foreign country or other foreign jurisdiction *and denominated as such under laws of such state or foreign country or other foreign jurisdiction*")(emphasis added). Because MASSPCSCO was not an LLC under Delaware law, the Board ruled that it was not an LLC for purposes of Section 30.

**(B) MASSPCSCO Was Established for the Ostensible Purposes for Which a Corporation May Be Organized under Massachusetts Law**

Section 30 limits foreign corporations to those entities organized "for purposes which domestic corporations may be organized" under the general corporate provisions of Massachusetts law, principally, Chapter 156B and, for periods after July 1, 2004, Chapter 156D. That limitation distinguishes corporations subject to the general corporate excise from those subject to special excise or tax regimes, such as financial institutions (G.L. c. 63, § 2) and utilities (G.L. c. 63, § 52A), which are likewise subject to different corporate laws and regulations. The general Massachusetts corporate statutes, Chapter 156B, as in effect prior to July 1, 2004, and Chapter 156D, as in effect beginning July 1, 2004, apply to:

> All domestic corporations having capital stock whether established before or after [the effective date of the statute], either by general or special law, for the purpose of carrying on business for profit *except* corporations organized for the purpose of carrying on the business of a bank, savings bank, co-operative bank, trust company, credit union, surety or indemnity company, or safe deposit company, or for the purpose of carrying on within the commonwealth the business of an insurance company, railroad,

> electric railroad, street railway or trolley motor company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, any other corporation which on October 1, 1965 have or may thereafter have the right to take land within the commonwealth by eminent domain or to exercise franchises in public ways granted by the commonwealth or by any county, city or town, and corporations subject to chapter 157 [agricultural and other cooperatives] and corporations subject to chapter 157A [employee cooperatives]. G.L. c. 156D, § 17.01(1); G.L. c. 156B, § 3 (emphasis added).

Although those statutes contain a long list of types of businesses excluded from statutory coverage, the Board ruled that, at all relevant times, none of the exclusions applied to MASSPCSCO, a professed lessor of wireless communications equipment. The only exclusion that possibly could have applied by its terms was the exclusion for telephone companies. In ***Bell Atlantic Mobile Corp.***, however, both the Board and the Supreme Judicial Court determined that a company engaged in the wireless telephone business is not a "telephone company" within the meaning of G.L. c. 59, § 39, G.L. c. 63, § 52A, and G.L. c. 166. ***Bell Atlantic Mobile Corp.***, Mass. ATB Findings of Fact and Reports at 2008-184; 451 Mass. at 281, 288. The term "telephone company" should be given the same construction under Chapters 156B and 156D that it has under Chapter 166, because those statutes – together with the statutory regimes regulating other types of utilities and financial institutions – are designed to partition the universe of corporations for regulatory purposes. *Cf.* ***Chandler v. County Commissioners***, 437 Mass. 430, 436 (2002) ("[a] term appearing in different portions of a statute is to be given one consistent meaning"); ***Arnold v. Commissioner of Corporations & Taxation***, 327 Mass. 694, 700 (1951)("It is a general rule of statutory construction that ordinarily a term appearing in different portions of a statute is to be given the same meaning."). Accordingly, even if MASSPCSCO could otherwise be considered a telephone company because of the nature of the equipment that it leased, the Board ruled that that conclusion was foreclosed by ***Bell Atlantic Mobile Corp***.

In determining whether MASSPCSCO was established for purposes for which a domestic corporation might be organized under Chapters 156B and 156D, the Board also found and ruled that, at all relevant times, MASSPCSCO was a for-profit company. MASSPCSCO's trust agreement provides that it is a for-profit company. Moreover, every Delaware statutory trust is a for-profit company unless the trust instrument specifically provides otherwise, because the statute gives the beneficial owners the right (unless overridden by the trust instrument) to "share in all profits and losses of the statutory trust." 12 Del C. § 3805(a).

The fact that MASSPCSCO's business was limited during the years at issue to the leasing of property to an affiliate would not have prevented it from being organized under Chapter 156B or Chapter 156D. In ***Brown, Rudnick, Freed & Gesmer v. Assessors of Boston***, 389 Mass. 298 (1983) ("***Brown Rudnick***"), the Supreme Judicial Court recognized that a domestic corporation could be organized, under Chapter 156B, for the purpose of leasing property to an affiliate. ***Id.*** at 302. The Board found and ruled that, under the circumstances here, it is entirely logical and consonant to apply that proposition to a foreign entity, like MASSPCSCO.

### (C) MASSPCSCO Has Corporate Privileges, Powers, Rights and Immunities

The primary issue in determining whether an unincorporated association is a foreign corporation under Section 30 is the question of whether the association "has privileges, powers, rights or immunities not possessed by individuals or partnerships." The Commissioner has interpreted that phrase as requiring an analysis similar to the federal entity classification regulations in effect prior to 1997 (the "*Kintner* regulations," Treas. Reg. § 301.7701-2, as in effect prior to January 1, 1997). *See* LR 01-7 (Sept. 4, 2001); LR 99-13 (June 24, 1999); LR 97-2 (May 23, 1997); LR 95-8 (July 12, 1995); LR 91-2; *see also* TIR 97-8 (June 16, 1997)(noting that the replacement of the *Kintner* regulations by the federal "check-the-box" regulations did not alter the Massachusetts rules for classifying unincorporated business entities other than LLCs). The factors considered in the federal regulations and in the Massachusetts rulings as pointing toward corporate status include: **(1)** perpetual life (Treas. Reg. § 301.7701-2(a)(1), (d); LR 01-7; LR 97-2; LR 95-8); **(2)** transferable equity interests (Treas. Reg. § 301.7701-2(a)(1), (e); LR 01-7; LR 97-2; LR 95-8); **(3)** centralized management (Treas. Reg. § 301.7701-2(a)(1), (c); LR 99-13; LR 95-8); **(4)** limited liability for debts of the entity on the part of the equity owners who participate in management (Treas. Reg. § 301.7701-2(a)(1), (d); LR 99-13; LR 91-2); **(5)** the ability to merge or consolidate with corporations and other entities (LR 91-2); and **(6)** the imposition of conditions on the ability to maintain a derivative action (LR 91-2).

The Board found and ruled that Delaware statutory trusts in general, and MASSPCSCO in particular, have all of those privileges, powers, rights and immunities, and more. As the Commissioner observed in Letter Ruling 91-2,[11] unless the trust provides otherwise: a Delaware statutory trust has perpetual life, and will not terminate or dissolve upon the death, incapacity, dissolution, termination or bankruptcy of a beneficial owner, 12 Del C. § 3808(a)-(b); the beneficial interests in the trust are freely transferable, 12 Del. C. § 3805(d); the trust is managed by the trustees and officers, 12 Del. C. § 3806(a), (i); the beneficial owners are entitled to limited liability whether or not they participate in management, 12 Del. C. §§ 3803(a)-(b), 3806(a), 3808(e); the trust has the power to merge or consolidate with business entities organized under Delaware law or the law of any other jurisdiction, 12 Del. C. § 3815; the trust can sue or be sued in its own name and under the same title principles applicable to corporations, 12 Del. C. § 3804(a); and derivative actions are governed by provisions substantially identical to those governing corporations, 12 Del. C. § 3816. MASSPCSCO's trust agreement does not eliminate any of those privileges, powers, rights and immunities. Rather, the Board found that the trust agreement specifically confirms the applicability of several of those statutory provisions. The agreement also specifically permits MASSPCSCO's beneficial owner, EquipmentCo, to participate directly in the management of the trust. Under Massachusetts common law, vesting the owner with that degree of control would cause EquipmentCo to have unlimited liability for MASSPCSCO's debts, *see, e.g.*, ***Frost v. Thompson***, 219 Mass. 360 (1914)(holding that an association in which the shareholders

[11] The citations below refer to the current provisions of the Delaware Statutory Trust Act, which are materially the same as the provisions reviewed in Letter Ruling 91-2.

control the trustees is properly regarded as a partnership in which the shareholders are personally liable to third-party creditors), but under Del C. § 3806(a), EquipmentCo is shielded from such liability.

Accordingly, the Board ruled that, under the *Kintner* regulations and the Commissioner's rulings, an entity is classified as a corporation if it possesses a majority of the previously delineated corporate characteristics. The Board therefore found and ruled here that because MASSPCSCO possessed all of these relevant characteristics, it too should be regarded as a corporation under Section 30.

**(D) Summary**

On this basis, the Board found and ruled that, at all relevant times, MASSPCSCO was a foreign corporation within the meaning of Section 30 and was entitled to be classified as such by the Commissioner because it was an "association . . . established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter 156, chapter 156A, chapter 156B, chapter 156D or section 19F to 19W, inclusive, of chapter 175, or chapter 180 which has privileges, powers, rights or immunities not possessed by individuals or partnerships." G.L. c. 63, § 30.

**II. MASSPCSCO Is Not Entitled to the "Stock-In-Trade" Exemption under Clause 16(2)**

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. General Laws c. 59, § 18, commences with the preamble, "All 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 . . . ." All tangible personal property is taxable under G.L. c. 59, § 18, clause first. ***RCN-BecoCom***, Mass. ATB Findings of Fact and Reports at 2003-410, *aff'd*, 443 Mass. 198 (2005). General Laws c. 59, § 18, clause first states: "First, All tangible personal property, including that of persons not inhabitants of the commonwealth, except ships and vessels, shall, unless exempted by section five, be taxed to the owner in the town where it is situated on January first."

MASSPCSCO alleged that, at all relevant times, it was the owner of personal property in Woburn and Springfield, but claimed that it was entitled to an exemption from local property taxes, pursuant to Clause 16(2), because it leased its personal property to an affiliated entity. Thus, MASSPCSCO claimed that its property was "stock in trade" within the meaning of that clause. The following emphasized language of Clause 16(2) exempts from local property tax:

> In the case of (a) domestic business corporation or (b) a foreign corporation, both as defined in section thirty of chapter sixty-three, all property owned by such corporation other than the following: - real estate, poles, underground conduits, wires and pipes, and machinery used in the conduct of the business, which term, as used in this clause, shall not be deemed to include *stock in trade or any personal property directly used in*

> *connection with dry cleaning or laundering processes or in the refrigeration of goods or in the air-conditioning of premises or in any purchasing, selling, accounting or administrative function.* (Emphasis added.)

"An exemption is a matter of special favor or grace and to be recognized only where the property falls clearly and unmistakenly within the express words of a legislative command." ***Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue***, 384 Mass. 794, 796 (1981) (*citing* ***Children's Hospital Medical Center v. Assessors of Boston***, 353 Mass. 35, 43 (1967)).

This principal has explicitly been made applicable to claims for exemptions under the stock-in-trade provision of Clause 16(2). "'[T]he 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.'" ***Brown Rudnick***, 389 Mass. at 304(*quoting* ***Boston Symphony Orchestra, Inc. v. Assessors of Boston***, 294 Mass. 248, 257 (1936)). A claim of exemption must fail if the operative facts merely cast doubt on the claim of exemption. ***Boston Symphony Orchestra, Inc.***, 294 Mass. at 257. "[T]he proof must be such as leaves the question free from doubt." ***Trustees of Boston University v. Assessors of Brookline***, 11 Mass. App. Ct. 325, 331 (1981)(citations omitted). Accordingly, the Board ruled that to prevail, MASSPCSCO must prove clearly and unequivocally that, at all relevant times, it came within the terms of the stock-in-trade exemption under Clause 16(2).

### (A) MASSPCSCO Failed to Qualify for the Stock-In-Trade Exemption under the Test Established in *Brown Rudnick*

The leading case dealing with the applicability of the stock-in-trade exemption to non-arm's-length leasing situations is ***Brown Rudnick***. In ***Brown Rudnick***, the Supreme Judicial Court considered the issue of whether a domestic business corporation organized under G.L. c. 156B, which was wholly owned by a related partnership, for the stated purpose of engaging in the business of leasing personal property, and whose only business activity was leasing personal property to the related partnership, was not a "domestic business corporation" for purposes of the stock-in-trade exemption under Clause 16(2). In holding that the Board correctly ruled that the corporation was not entitled to the exemption, the Court found that the fact that an entity was organized as a "domestic business corporation" within the meaning of Clause 16(2) was not the end of the inquiry. To end the analysis there, the Court found, would "elevate form over substance." ***Brown Rudnick***, 389 Mass. at 303. Drawing an analogy to the many cases dealing with charitable exemptions under G.L. c. 59, § 5, cl. 3, the Court stated:

> We think that a similar inquiry is appropriate here to determine whether a corporation claiming exemption under G.L. c. 59, Section 5, Sixteenth (2), is operated for dominantly business purposes. We think, also, that the definition of business used by the board, "an activity which occupies the time, attention and labor of men for purposes of livelihood, profit or gain" is apt. ***Whipple v. Commissioner of Corps. & Taxation***, 263 Mass. 476, 485-486 (1928).

In other words, the Supreme Judicial Court placed the burden of proof on the taxpayer in ***Brown Rudnick*** – just as it is on MASSPCSCO here – to show "clearly and unequivocally" that, at all relevant times, it was "in fact engaged in business." ***Brown Rudnick***, 389 Mass. at 303, 304 (quoting ***Boston Symphony Orchestra***, 294 Mass. at 257.

The Court ruled that the Board had correctly recognized and applied the reasoning of ***Higgins v. Smith***, 307 U.S. 473 (1940), that "transactions, which do not vary control or change the flow of economic benefits, are to be dismissed from consideration." ***Id.*** at 476. The Court also quoted with approval the language of Judge Learned Hand in ***National Investors Corp. v. Hoey***, 144 F.2d 466 (2d Cir. 1944):

> "[T]o be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation: in other words, that the term 'corporation' will be interpreted to mean a corporation which does some 'business' in the ordinary meaning; and that escaping taxation is not 'business' in the ordinary meaning."

***Id.*** at 468.

After examining the formation and activities of MASSPCSCO, the Board found and ruled that MASSPCSCO could not meet this ***Brown Rudnick*** standard.

### (1) MASSPCSCO Was Formed for the Predominant Purpose of Avoiding Massachusetts Personal Property Taxes

MASSPCSCO was formed by Sprint in response to the Board's and the Supreme Judicial Court's decisions in ***RCN-BecoCom***, which held, among other things, that limited liability companies classified as telephone companies were not exempt from taxation of their personal property under Clause 16, because Clause 16's exemption provisions applied only to corporations, not to limited liability companies. Beginning with fiscal year 2004, the Commissioner informed telephone and telegraph filers that partnerships and LLCs filing as partnerships or disregarded entities would be valued by the Commissioner on all poles, wires, underground conduits, wires and pipes situated in the Commonwealth, and all machinery, including switching equipment, used for telephone or telegraph purposes. For LLCs, like Sprint Spectrum, which had previously reported to the Commissioner only generators, this ruling greatly expanded the property deemed reportable to the Commissioner under G.L. c. 59, § 41, for central valuation purposes. In Sprint Spectrum's case, the Commissioner's certified central valuation increased from $1,762,900 for fiscal year 2003 to $172,899,300 for fiscal year 2004.

Faced with a one-hundred fold increase in its property taxes in Massachusetts, Sprint consulted Deloitte & Touche for advice on how to mitigate it. Deloitte & Touche issued a memorandum dated December 10, 2003 purporting to describe "a restructuring strategy that can enable Sprint to qualify for certain personal property tax exemptions for its switching and other personal property in Massachusetts. The proposed structure creates eligibility for the exemptions without requiring assets to be placed in corporate solution for federal income tax purposes." Sprint had previously considered shifting its Massachusetts tangible personal property to certain utility corporations that operate

within the Sprint business structure, but Sprint determined that such a restructuring was inadvisable. Deloitte & Touche concluded, based partly on the Commissioner's LR 91-2, that a "Delaware Business trust," now known as a Delaware statutory trust, would be recognized as a "corporation" for Massachusetts property tax purposes, but could be disregarded for federal income tax purposes. Deloitte & Touche further concluded that the Delaware business trust would not be taxed on its income for Massachusetts purposes, and that all of the trust's income would be treated as that of the parent Sprint's limited partnerships. Deloitte & Touche explained that "[t]his flow-through of income occurs because the Massachusetts definitions of gross income and net income applicable to business corporations tie to the Code" and that "[i]n other situations involving federally disregarded entities that are treated as separate corporate entities for Massachusetts purposes, the [Commissioner] has ruled that, because of [sic] the entities are disregarded for federal income tax purposes and therefore have no federal taxable income, the entity has no taxable income for Massachusetts income tax purposes." (Footnote and citations omitted).

Subsequent to the Deloitte & Touche memorandum and follow-up memorandum, Sprint formed MASSPCSCO for the admitted purpose of avoiding local property taxes in Massachusetts. However, the Board found that some of the "legitimizing" strategies suggested in the Deloitte & Touche memoranda were not followed by Sprint. For example, MASSPCSCO did not engage in any leasing activities with third parties despite Deloitte & Touche's recommendation to do so. The Board found that, at all relevant times, MASSPCSCO did not lease, or attempt to lease, any property to any person other than Sprint Spectrum. The Board also found that MASSPCSCO did not conduct any regular business activities other than those incident to the purchase, ownership and leasing of Network equipment to Sprint Spectrum.

Deloitte & Touche also recommended that the leases from MASSPCSCO to Sprint Spectrum be at "arms' length prices." The Board found that MASSPCSCO did not produce credible evidence in support of this proposition. Rather, it appeared that the net book values at which the Network equipment was transferred from EquipmentCo to MASSPCSCO, and not market values, likely formed the basis for the rent charged Sprint Spectrum by MASSPCSCO. In addition, MASSPCSCO did not introduce any credible evidence demonstrating that the lease factors that were used to calculate rent were premised on fair market rates. Moreover, it appeared that Sprint Spectrum and MASSPCSCO did not implement the lease factors schedule suggested by their professional advisors. Consequently, there was insufficient evidence in the record to allow the Board to determine if the purported lease payments payable by Sprint Spectrum to MASSPCSCO were consistent with the relevant marketplace.

Recognizing the identity of management and control between MASSPCSCO and Sprint Spectrum and Sprint's ability to direct profit among its subsidiaries, Deloitte & Touche stated that while MASSPCSCO should recognize a profit "to defend against any assertion of a sham transaction theory, nevertheless we recommend that this profit be kept low to protect against any change in the state's position that a federally disregarded entity does not have gross income for state tax purposes." The Board found that this recommendation not only supported the supposition that MASSPCSCO was formed for tax avoidance purposes, but also helped to demonstrate that MASSPCSCO did not operate independently from Sprint or Sprint Spectrum and the notion of "profit," as it pertained to MASSPCSCO, was illusory.

### (2) MASSPCSCO Did Not Operate as a Business Independent of Sprint Spectrum

At all relevant times, Sprint Spectrum, a subsidiary of Sprint, operated a wireless communications system. Holdings was the 99% general partner and MinorCo was the 1% limited partner of Sprint Spectrum. All of the partnership interests in Holdings and MinorCo were held by direct and indirect subsidiaries of Sprint giving Sprint complete ownership and control over Sprint Spectrum.

This identity of ownership and control was carried forward to MASSPCSCO. All of the beneficial interests in MASSPCSCO were held, at all relevant times, by EquipmentCo. The sole administrative trustee of MASSPCSCO was an employee of SUMC, another wholly-owned Sprint subsidiary. Under the terms of the trust creating MASSPCSCO, the administrative trustee is authorized to take all actions necessary or incidental, in his reasonable discretion, to the conduct of the business of MASSPCSCO, but only as directed by EquipmentCo. Virtually all of the partnership interests in EquipmentCo were owned by Sprint Spectrum. Thus, Sprint Spectrum, the lessee under the lease with MASSPCSCO, completely controlled, through EquipmentCo, MASSPCSCO, the nominal lessor under the lease. EquipmentCo also had the control to appoint or remove MASSPCSCO's administrative trustee at any time. The "Delaware trustee" of MASSPCSCO, Wilmington Trust Company, was, at all relevant times, a trustee for the sole and limited purpose of fulfilling the requirements of Delaware law and was not entitled to exercise any powers under the trust. Because the formation of MASSPCSCO was not a transaction which varied control or changed the flow of economic benefits between the two entities, the Board found and ruled that it was justified in examining the true nature of the relationship between them and whether the activities of MASSPCSCO were in the nature of a business. *See* ***Brown Rudnick***, 389 Mass. at 304-305 (*citing* ***Higgins v. Smith***, 308 U.S. at 476).

### (3) MASSPCSCO Did Not Engage in Business within the *Brown Rudnick* Test

The Board found that, at all relevant times, MASSPCSCO did not conduct any regular business activities other than those incident to the purchase, ownership and leasing of equipment to Sprint Spectrum. Sprint Spectrum, through its ownership of EquipmentCo, MASSPCSCO's sole beneficiary, owned and controlled MASSPCSCO.

The Board found that, at all relevant times, neither Sprint Spectrum nor MASSPCSCO maintained separate bank accounts, and any lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries transferring amounts to MASSPCSCO's account on Sprint's books. Sprint, the publically traded parent holding company of Sprint Spectrum, and all other Sprint subsidiaries, issued consolidated financial statements, which included the operations of all of its subsidiaries. Formal financial statements were not prepared in the ordinary course of MASSPCSCO's business, although informal ones were prepared for purposes of this litigation. Therefore, at the Sprint level, the Board determined that these ledger entries had little economic substance.

The Board further found that, at all relevant times, MASSPCSCO had no employees. All functions and services necessary or desirable for the management, administration and operation of MASSPCSCO's business were performed by employees of SUMC, another Sprint subsidiary, under a services agreement dated December 14, 2004, almost one year after the formation of MASSPCSCO. In return for its services, MASSPCSCO reimbursed SUMC $2,000 per month for a total of $24,000 per year on revenues between $23,000,000 and $41,700,000 for calendar years 2004 through 2006 and property, plant, and equipment valued at $211,000,000 to $328,000,000 for those same years. There was no credible evidence to establish, and the Board doubted, that this charge approximated fair cash value.

The Board also found that, at all relevant times, MASSPCSCO did not hold any assets other than property leased to Sprint Spectrum, nor did it lease property to anyone other than Sprint Spectrum. It did not even attempt to lease property to any other person or entity. MASSPCSCO was not compensated for any services it performed for any person or entity. MASSPCSCO did not lease or occupy any office space or real estate, except that certain inventory of MASSPCSCO was stored prior to delivery to Sprint Spectrum sites, in facilities shared with other affiliates of Sprint. MASSPCSCO had no dealings with third parties other than those incident to its ownership, maintenance and dealings with respect to its property including the lease of that property to Sprint Spectrum.

Given the identity of interests between MASSPCSCO and Sprint Spectrum, and the fact that MASSPCSCO did not engage in any transactions other than those incident to the non-arm's-length leases with its ultimate owner, Sprint Spectrum, the Board found and ruled that, at all relevant times, MASSPCSCO did not engage in any real business other than escaping taxation. Accordingly, the Board found and ruled that it failed to show, even by a preponderance of the evidence, that it was "operated for dominantly business purposes." ***Brown Rudnick***, 389 Mass. at 303.

### (4) The *Brown Rudnick* Test Applies to MASSPCSCO Even Though It Was a Foreign Corporation and Not a Massachusetts Business Corporation

MASSPCSCO contended that the holding in ***Brown Rudnick*** does not apply to foreign corporations as that term is used in Clause 16(2). Nothing in the Court's reasoning supports this distinction. The Clause 16(2) stock-in-trade exemption applies to (a) "domestic business corporations" and (b) "foreign corporations," both defined in Section 30. ***Brown Rudnick*** dealt with a case in which the entity that was organized to lease property to an affiliate was organized as a domestic corporation. In the present appeals, the entity that was organized to lease property to an affiliate was a Delaware statutory trust. The Board has found that MASSPCSCO, the Delaware statutory trust here, was, at all relevant times, a foreign corporation under Section 30. MASSPCSCO posited that the ***Brown Rudnick*** test should be confined to business corporations under Section 30 and not applied to Section 30 foreign corporations.

The definition of foreign corporation in Section 30 refers to corporations, associations and organizations established, organized or chartered under laws other than those of the Commonwealth, for which domestic corporations may be organized under, *inter alia*, G.L. c. 156B and, after July 1, 2004, under G.L. c. 156D. MASSPCSCO

admitted that it was organized for the purpose of owning property and of leasing it to an affiliate, a purpose for which the Board has found and ruled a corporation could be organized under Chapters 156B and Chapter 156D. Chapters 156B and 156D apply to domestic corporations organized for the purpose of carrying on business for profit. Thus, the "for profit" standard of Chapters 156B and 156D have been carried into the definition of foreign corporations. The Board found and ruled that, under the circumstances, it strained credulity to suggest, as MASSPCSCO has, that the Legislature intended to treat a foreign corporation more leniently than a domestic business corporation for purposes of the stock-in-trade exemption.

Moreover, the Supreme Judicial Court's analysis in ***Brown Rudnick*** did not focus merely on the word "business" in the phrase "business corporation." Like MASSPCSCO, the corporation in ***Brown Rudnick*** claimed to have been organized for profit. As the Supreme Judicial Court ruled in ***Brown Rudnick***, the stated purpose of the organization does not end the inquiry. "It still must be shown that the corporation was, in fact, engaged in business." ***Brown Rudnick***, 389 Mass. at 304. In other words, form does not control over substance.

#### (5) EquipmentCo's Purported Business Purposes Cannot Be Imputed to MASSPCSCO

Prior to 2004, Sprint formed EquipmentCo to own and lease back to its affiliates the categories of personal property that are the subject of these appeals. Those property categories included towers, antennas, switches and related software. EquipmentCo was originally created at the request of Sprint's vendors which, for financing purposes, required that all assets provided to Sprint be held by a separate entity. EquipmentCo's primary purpose was to satisfy those vendors' demands.[12] However, as Sprint grew and became an established business with significant assets, and once it retired that initial Vendor Financing, the vendor restriction requiring assets to be held in a separate company was no longer necessary.

By the time that MASSPCSCO was created, there were no longer any vendor restrictions in place. Consequently, the purported business reason for creating a separate entity to hold assets had expired. Accordingly, the Board found and ruled that EquipmentCo's original "business purpose" could not be imputed to MASSPCSCO, and it did not even maintain any vitality for EquipmentCo. As the Board previously found, there were no other credible reasons, other than property tax avoidance, for MASSPCSCO's creation. Therefore, the Board further found and ruled that, at all relevant times, MASSPCSCO did not "perform[] any function other than to shelter [Sprint] from personal property liability." ***Brown Rudnick***, 389 Mass. at 306.

### (B) MASSPCSCO Has Failed to Show That It Was Formed for a Substantial Business Purpose or Actually Engaged in Substantial Business Activity and Therefore Was Not a Sham

[12] It was not necessary for the adjudication of these appeals for the Board to determine whether the financing requirements of EquipmentCo's vendors constituted a business reason or purpose for the *creation* of EquipmentCo. For purposes of these appeals, the Board simply assumed that it was.

The sham transaction doctrine focuses on whether a transaction, including a business reorganization that results in tax benefits, has practical economic effects beyond tax avoidance. "[F]or a business reorganization that results in tax advantages to be respected for tax purposes, the taxpayer must demonstrate that the reorganization is 'real' or 'genuine,' and not just form over substance. Stated otherwise, the entity resulting from the reorganization must be one which is 'formed for a substantial business purpose or actually engage[s] in substantial business activity." ***The Sherwin-Williams Company v. Commissioner of Revenue***, 438 Mass. 71, 84 (2002)("***Sherwin-Williams Co.***")(quoting ***Northern Ind. Pub. Serv. Co. v. Commissioner of Internal Revenue***, 115 F.3rd 506, 511 (7th Cir. 1997)); *see also* ***Bass v. Commissioner of Internal Revenue***, 50 TC 595, 600 (1968).

***Sherwin-Williams Co.*** involved a reorganization in which wholly owned subsidiaries entered into genuine obligations with unrelated third parties in furtherance of the subsidiaries' claimed corporate purposes, and the subsidiaries, among other things, maintained their own bank accounts, hired employees, set their own investment policies, invested assets for their own accounts, and hired and paid professionals. ***Sherwin-Williams Co.***, 438 Mass. at 85-87. The Supreme Judicial Court found that the subsidiaries were "viable business entit[ies] engaged in substantive business activity rather than in a 'bald and mischievous fiction,'" and, therefore, were entitled to be respected for tax purposes. ***Sherwin-Williams Co.***, 438 Mass. at 89 (quoting ***Moline Props. v. Commissioner of Internal Revenue***, 319 U.S. 436, 439 (1943)).

In the instant matter, the Board found that MASSPCSCO not only ignored advice from Deloitte & Touche to enter into leasing agreements with third parties, but otherwise failed to operate independently and evidence a legitimate and viable business purpose. Unlike EquipmentCo, MASSPCSCO was not created to facilitate and comply with vendor financing requirements, which had been retired in 1999. Rather, the Board found that the dominant, and essentially sole, reason for its organization was for tax avoidance purposes.

The Board found that, at all relevant times, MASSPCSCO had no employees. All functions and services necessary or desirable for the management, administration and operation of MASSPCSCO's business, were performed by employees of SUMC, under an apparently non-arm's length service agreement dated almost a year after MASSPCSCO was organized. MASSPCSCO was required to reimburse SUMC for those services by a fixed payment of only $2,000 per month. Sprint Spectrum and MASSPCSCO did not maintain separate bank accounts. The lease payments made by Sprint Spectrum to MASSPCSCO were implemented by ledger entries transferring amounts to MASSPCSCO's account in Sprint's books. MASSPCSCO was not compensated for any services that it performed for any person or entity. MASSPCSCO did not even purchase the equipment it leased to Sprint Spectrum; instead Sprint purchased the equipment and marked the purchase against MASSPCSCO's account on a common ledger that was maintained by Sprint. No evidence was introduced to substantiate that any interest was charged or paid on this "loan," or that there was a fixed repayment schedule. Moreover, the Board found that it was unclear from the evidence if MASSPCSCO was ever required to repay the debt. *See* ***The TJX Companies, Inc. v. Commissioner of Revenue***, 2009 Mass. App. Unpub. LEXIS 168, *12-13 (April 3, 2009)("***TJX Companies***")(upholding the Board's disallowance of interest payments on

loans which the Board determined were not *bona fide* because, among other reasons, they simply constituted a circular flow of funds without appropriate documentation, interest rates, or repayment schedules).

MASSPCSCO did not hold any assets other than property leased to Sprint Spectrum. MASSPCSCO did not lease property to any person other than Sprint Spectrum. MASSPCSCO did not conduct any regular business activities other than those incident to the purchase, ownership and leasing of Network equipment to Sprint Spectrum. There was no evidence presented at the hearing of these appeals showing that the transactions between Sprint and MASSPCSCO were at market rates or that the leases were arm's-length transactions. At the time the assets were originally transferred from EquipmentCo to MASSPCSCO, "for simplification purposes, the fixed assets [were] transferred at net book value rather than fair market value through investment and subsidiary accounts." In addition, the leases between EquipmentCo and MASSPCSCO were signed by Sprint's Assistant Vice President for State and Local Taxation, as both the lessee and the lessor. The Board further found that there was no credible evidence that the rents or lease factors were at market rates. MASSPCSCO did not even implement the lease factor schedules prepared by Ernst & Young.

Lastly in this regard, the Board found that Sprint assured itself of complete control over MASSPCSCO. At all relevant times, the administrative trustee was an employee of SUMC and was authorized only to act as directed by EquipmentCo, a subsidiary of Sprint. EquipmentCo was empowered to remove the administrative trustee at any time for any reason. The nominal trustee, Wilmington Trust Company, was appointed merely for the sole and limited purpose of fulfilling requirements under Delaware law and was not entitled to exercise any powers under the trust.

In sum, at all relevant times, MASSPCSCO had no employees; did not maintain separate bank accounts; did not independently invest any of its profits; did not do business with any other parties other than what was incidental to its leasing of equipment to its parent; did not attempt to lease any property to third parties; did not maintain any office space or real estate; was unable to exercise any independent control; did not purchase any of its equipment; and was not shown to be dealing with affiliates in an arm's-length manner or to be responsible for any debt incurred as a result of any purchases of equipment or property on its behalf.

Accordingly, the Board found and ruled that the reorganization of Sprint and, more particularly, EquipmentCo, by creating MASSPCSCO as the repository for property and equipment located in Massachusetts, and the lease agreements between Sprint Spectrum and MASSPCSCO did not "vary control or change the flow of economic benefits between . . . entities." ***Brown Rudnick***, 389 Mass. at 305. The Board further found and ruled that MASSPCSCO did not perform any corporate function other than to attempt to shelter Sprint from personal property tax liability in Massachusetts. ***Id.*** at 306. MASSPCSCO evidenced virtually none of the examples of economic substance or substantive business activity embraced by the Supreme Judicial Court in ***Sherwin-Williams Co***., 438 Mass. at 85-88. Based on the subsidiary findings developed from a review and analysis of the entire record, the Board found and ruled here that MASSPCSCO's purported business dealings with Sprint Spectrum and its affiliates were without economic substance and that MASSPCSCO was not a viable business entity engaging in substantial business activity. The Board further found and ruled that MASSPCSCO's acquisition of its equipment and property and its leasing transactions

had no "practical economic benefit beyond the creation of tax benefits." ***Id.*** at 85. The Board therefore ruled that the transfer of property and equipment to MASSPCSCO and MASSPCSCO's subsequent leasing of it to Sprint Spectrum were shams.

### (C) The Assessors Properly Assessed MASSPCSCO as the Owner of the Subject Property

MASSPCSCO claimed that if the Board disregarded the transfer of the subject personal property to MASSPCSCO for purposes of eligibility for the Clause 16(2) exemption, then the Board should completely disregard MASSPCSCO for all purposes, including assessment purposes. MASSPCSCO proposed that if the Board were to find that MASSPCSCO was not the owner of the subject personal property for purposes of Clause 16(2), then the Assessors should have assessed the personal property taxes to either EquipmentCo, as the transferor of the subject personal property to MASSPCSCO, or Sprint Spectrum, as the default owner of the subject personal property. The Board noted that, under G.L. c. 59, § 18, Second, the Assessors presumably could have assessed all or some of the subject personal property to Sprint Spectrum, instead of MASSPCSCO, as the "person having possession of the same on January first."

"While the courts recognize that tax avoidance or reduction is a legitimate goal of business entities, the courts have, nonetheless, invoked a variety of doctrines . . . to disregard the form of a transaction where the facts show that the form of the transaction is artificial and is entered into for the sole purpose of tax avoidance and there is no independent purpose for the transaction." ***Falcone v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 1996-727, 734-35. The sham transaction doctrine is one such judicially created doctrine for preventing the misuse of the tax code. ***Horn v. Commissioner of Internal Revenue***, 968 F.2d 1229, 1236 (D.C. Cir. 1992).

Massachusetts recognizes the sham transaction doctrine and, accordingly, has given the taxing authorities the ability to disregard, for taxing purposes, transactions that have no economic substance or business purpose other than tax avoidance. ***Sherwin-Williams Co.***, 438 Mass. at 79. Furthermore, this doctrine prevents taxpayers from claiming the tax benefits of transactions that, although within the language of the tax code, are not the type of transaction the law intended to favor with the benefit. ***Syms Corp. v. Commissioner of Revenue***, 436 Mass. 505, 510 (2002). MASSPCSCO offered no direct authority for the proposition that a taxing authority is authorized under this doctrine to divest an entity of ownership of property simply because it has been determined that it does not qualify for a statutory exemption.

In its application for abatement and pleadings to this Board, MASSPCSCO admitted that it was the owner of the Network property located in Springfield and Woburn. Pursuant to G.L. c. 59, § 18, the Assessors, relying on filings made by MASSPCSCO or its affiliates, fulfilled their statutory duty and assessed the subject property to MASSPCSCO. The Board found and ruled that MASSPCSCO may not now claim that it was not the owner of the subject property because the Board found and ruled that it was not qualified or eligible for the stock-in-trade exemption under Clause 16(2). The Board's findings here are focused on MASSPCSCO's qualifications or eligibility for the exemption under Clause 16(2). The Board did not find or rule that another entity was, at all relevant times, the owner of the subject property for other purposes, such as personal property tax assessments under Section 18. Rather, the Board found and ruled

the MASSPCSCO was the owner for personal property assessment purposes. Unlike the situation in ***TJX Companies***, where "the fruits of a sham transaction [were] appropriately [and necessarily] disregarded and reapportioned to the parent," 2009 Mass. App. Unpub. LEXIS 168 at *14, the Board ruled here that there was no need for "reattribution" of gain or income "to the parent" to properly redress the ill-begotten fruits from the subject sham transaction because disallowance of the exemption was enough, and all that was required, to remedy the tax mischief created by the scheme.

Accordingly, the Board found and ruled that its findings and rulings here that MASSPCSCO did not qualify for the Clause 16(2) exemption did not vitiate or negate MASSPCSCO's ownership of the property for purposes of property tax assessment and Section 18.

**(D) Summary**

The Board found and ruled that MASSPCSCO failed to qualify for the stock-in-trade exemption under Clause 16(2) because it did not pass the test established in ***Brown Rudnick***. The Board also found and ruled that MASSPCSCO was formed for the predominant and essentially sole purpose of avoiding Massachusetts personal property taxes; MASSPCSCO did not operate as a business independent from Sprint Spectrum; MASSPCSCO did not engage in business as defined in ***Brown Rudnick***; the ***Brown Rudnick*** test applied to MASSPCSCO even though, at all relevant times, it was a foreign corporation and not a domestic business corporation; and EquipmentCo's original business purpose could not be imputed to MASSPCSCO. The Board also found and ruled that MASSPCSCO failed to show that the subject reorganization and transactions had economic substance or a legitimate business purpose. Finally, the Board found and ruled that MASSPCSCO was properly assessed by the Assessors for the personal property taxes at issue.

## III. Conclusion

On this basis, the Board decided that: (1) MASSPCSCO was a foreign corporation within the meaning of Section 30 and entitled to be classified as such by the Commissioner for 2005, 2006, and 2007; but (2) MASSPCSCO was not entitled to the "stock-in-trade" exemption under Clause 16(2).

**APPELLATE TAX BOARD**

**By: _____**

**Thomas W. Hammond, Jr., Chairman**

**A true copy**
**Attest: _____**
**Clerk of the Board**