

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

RCN BECOM LLC

v.

**COMMISSIONER OF REVENUE AND
BOARDS OF ASSESSORS OF
VARIOUS CITIES AND TOWNS**

Docket No. C312499 et al.¹

**BOARDS OF ASSESSORS OF THE
CITIES/TOWNS OF BOSTON,
BROOKLINE, BURLINGTON,
LEXINGTON, AND NEWTON**

v.

**COMMISSIONER OF REVENUE AND
RCN BECOM LLC**

Docket No. C312268 et al.²

Promulgated:
January 30, 2020

These sixty-four appeals³ were filed with the Appellate Tax Board (the "Board") under the formal procedure pursuant to G.L. c. 58A, §§ 6 and 7 and G.L. c. 59, § 39, challenging the central valuation for fiscal years 2012, 2013, and 2014 (the "fiscal years at issue")⁴ determined and certified by the

¹ See Appendix A for a complete list of parties and docket numbers. Any reference to an "Appendix" refers to the Appendix attached to and incorporated in these findings of fact and report.

² See Appendix A for a complete list of parties and docket numbers.

³ These appeals were consolidated for purposes of the hearing. The Boards of Assessors of the Cities of Boston and Newton and the Towns of Brookline and Lexington actively participated in the hearing. The Boards of Assessors of the remaining cities and towns agreed to forego participation in the hearing – including foregoing the introduction of any evidence – and agreed to be bound by the final legal rulings resulting from the hearing and any appeal.

⁴ These findings of fact and report, and the Opinion, utilize the masculine pronoun in reference to the Commissioner, irrespective of who held the position on the date of the action.

Commissioner of Revenue ("Commissioner") pursuant to G.L. c. 59, § 39, for the "machinery, poles, wires and underground conduits, wires and pipes" owned by RCN BecoCom LLC ("RCN") and located in various cities and towns ("Municipalities") in Massachusetts.

In these appeals, RCN argued that the Commissioner's certified values for its G.L. c. 59, § 39 property ("§ 39 Property") in the Municipalities for the fiscal years at issue were substantially too high ("RCN appellant appeals"),⁵ while the Boards of Assessors of five of the Municipalities asserted that for all or certain of the fiscal years at issue these values were substantially too low ("RCN/Commissioner appellee appeals").⁶ For his part, the Commissioner maintained that his valuation methodology and the certified central values derived from his methodology were correct and proper. In addition to the valuation issue, issues were raised relating to the Forms 5941⁷ filed by RCN for the fiscal years at issue, the Commissioner asserting that they constituted insufficient filings, and RCN asserting that the Commissioner failed to process the forms as filed taking into account the situation of RCN on the relevant valuation dates.

Commissioner Scharaffa heard these appeals. Chairman Hammond and Commissioners Rose and Good joined him in the decisions for

⁵ The RCN appellant appeals are listed in Table 1 of Appendix A.

⁶ The RCN/Commissioner appellee appeals are listed in Table 2 of Appendix A.

⁷ Form 5941 is a Massachusetts telephone or telegraph company return of personal property subject to valuation by the Commissioner.

the Commissioner and the Municipalities in the RCN appellant appeals and for RCN and the Commissioner in the RCN/Commissioner appellee appeals.

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

William A. Hazel, Esq., James F. Ring, Esq., and Diana C. Cuff, Esq. for RCN.

Anthony M. Ambriano, Esq. for the Boards of Assessors of the Cities of Boston and Newton and the Towns of Brookline and Lexington.

James F. Sullivan, Esq. for the Board of Assessors of the Town of Burlington.

Daniel A. Shapiro, Esq. and Michael P. Clifford, Esq. for the Commissioner.

FINDINGS OF FACT AND REPORT

INTRODUCTION

These appeals were presented to the Board through a Statement of Agreed Facts with exhibits; the testimony of fact and expert witnesses; the introduction of additional exhibits at the hearing, including an expert valuation report and appraisal; and post-hearing briefs and post-hearing reply briefs. RCN presented four witnesses at the hearing of these appeals: Michael Thomas Sicoli, the Chief Financial Officer of RCN Corporation; Michael P. O'Day, Vice President of Tax for RCN cable companies; Stefan

Wojcickyj of Ernst & Young; and Kevin S. Reilly, ASA, of American Appraisal Associates, Inc. ("American Appraisal"). The Municipalities presented no witnesses. The Commissioner called two witnesses, Brenda L. Cameron, Deputy Chief of the Commissioner's Bureau of Local Assessment during the fiscal years at issue, and George E. Sansoucy, P.E., who was allowed to testify over the objection of RCN. Mr. Sansoucy testified on the valuation system that he developed, recommended, and helped to implement for the Commissioner, which the Commissioner applied during the fiscal years at issue. Mr. Sansoucy also provided the Board with his opinion regarding the values derived for RCN's § 39 Property.

The Municipalities in the RCN/Commissioner appellee appeals rested on the presumed validity of the Commissioner's certified values and therefore presented no testimony to establish that the fair cash values of RCN's § 39 Property were substantially higher than the values certified by the Commissioner for each of the fiscal years at issue.

Based on the evidence entered into the record, the Board made the following findings of fact.

BACKGROUND

RCN, a Delaware limited liability company, was formed on March 9, 2010; it registered to do business in Massachusetts on March 11, 2010. The sole owner of RCN was initially RCN Telecom

Services of Massachusetts, Inc. ("Massachusetts Telecom"), the indirect parent of which was RCN Corporation ("Public Parent"), a public company that prior to 2010 conducted two separate lines of business (a "Cable Business" and a "Metro Business") through various directly and indirectly owned subsidiary entities. The Cable Business provided cable television, high-speed internet, and voice services to residential customers and small and medium business customers. The Metro Business delivered fiber-based, high-capacity data transport services to large commercial customers. The Cable Business was conducted in six different business locations -- Lehigh Valley (Pennsylvania), Philadelphia, Chicago, New York, Boston, and the District of Columbia.

On March 5, 2010, Public Parent entered into an Agreement and Plan of Merger, with the intent: (i) first to sell its Cable Business for cash to a newly formed entity, Yankee Cable Acquisition, LLC, directly owned by newly formed Yankee Cable Parent, LLC and indirectly owned by another newly formed entity, leaving Public Parent with only the Metro Business; and (ii) then to merge with Yankee Metro Merger Sub, Inc., a newly formed entity directly owned by newly formed Yankee Metro Parent, Inc. and indirectly owned by another newly formed entity, as a result of which the shareholders of Public Parent would receive cash of \$15 a share for their stock. Yankee Cable Parent, LLC and Yankee Metro Parent, Inc. are each hereinafter referred to as a "Direct Parent."

The transactions contemplated by the Agreement and Plan of Merger (the "2010 Acquisition Transaction") occurred on August 26, 2010 (the "Closing"). In connection with Public Parent's sale of its Cable Business for cash, RCN-BecoCom, Inc., the Massachusetts corporation through which Public Parent conducted its Cable Business in the Boston market: (i) distributed its Metro Business assets to its parent, Massachusetts Telecom; (ii) sold to RCN, for cash consideration of \$31,581,200,⁸ all of its tangible assets relating to the delivery primarily to residential and small and medium business customers of video, cable modem internet, and voice services under two brand names; and thereafter (iii) merged with RCN which, as consideration for the merger, made a cash payment⁹ to Massachusetts Telecom. After these transactions (the "Massachusetts Telecom Transactions"), RCN remained as the surviving entity.

As originally contemplated, RCN-BecoCom, Inc. was to have merged with RCN for no consideration after having transferred its Metro Business assets to Massachusetts Telecom. The change in approach was described in an amendment dated August 25, 2010 to the Agreement and Plan of Merger. Mr. O'Day, the Vice President

⁸ The Agreement and Plan of Merger, as amended, described the cash price to be "\$31,581,200, as may be equitably adjusted, as mutually agreed upon by [Public Parent] and RCN-BecoCom, LLC."

⁹ The Agreement and Plan of Merger, as amended, described the cash payment to be "\$13,534,800, as may be equitably adjusted, as mutually agreed upon by [Public Parent] and RCN-BecoCom, LLC."

of Tax for RCN cable companies, testified that the change had been contemplated in May or June of 2010. At the Closing, and before the Massachusetts Telecom Transactions, the member interest in RCN was transferred to Yankee Cable Acquisition, LLC as part of the 2010 Acquisition Transaction.

THE PARTIES

RCN, the Delaware limited liability company created in connection with the 2010 Acquisition Transaction, is disputing the value of its § 39 Property for the fiscal years at issue. For purposes of these appeals, the Commissioner, the Municipalities, and RCN did not challenge RCN's qualification as a telephone company within the meaning of G.L. c. 59, § 39 during the fiscal years at issue.

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, Division of Local Services, responsible for reviewing and making recommendations to the Commissioner regarding his obligations under G.L. c. 59, § 39.

Boston and Newton are municipal corporations, and Brookline and Lexington are towns, situated within the Commonwealth. The Boards of Assessors of these municipal corporations and towns are charged, among other things, with assessing § 39 property within

their respective Municipalities, once the Commissioner has centrally valued that property and certified those values to them. The Boards of Assessors of the various other Municipalities in these appeals are likewise situated within the Commonwealth and charged, among other things, with assessing § 39 property within their respective Municipalities once the Commissioner has centrally valued that property and certified those values to them.

REPORTING REQUIREMENTS AND JURISDICTION

I. Required Reporting of Tangible Personal Property

By statute, unincorporated telephone companies are required to report all of their poles, wires, and underground conduits, wires and pipes, and machinery used for telephone and telegraph purposes, located in any city or town in the Commonwealth ("§ 39 property"). G.L. c. 59, §§ 39, 41. The report must be in the form and detail prescribed by the Commissioner, contain all information needed by the Commissioner to value § 39 property, and "relate, so far as is possible, to the situation of the company and its property on January first of the year when made." For the fiscal years at issue, the Commissioner issued a prescribed tax form under G.L. c. 59, § 41 to elicit this information for use in central valuations. The form was denoted State Tax Form 5941, "FISCAL YEAR [year] - Telephone or Telegraph Company: Return of

personal property subject to valuation by the Commissioner of Revenue."

II. RCN's Reporting of Tangible Personal Property

RCN filed two signed Forms 5941 for fiscal year 2012 with the Commissioner's BLA on February 28, 2011 - a "First" and an "Alternate" Form 5941. Both forms were signed and dated by the Treasurer of RCN, and both were timely filed at the same time.

RCN filed as a new filer, explaining in an accompanying letter that on August 26, 2010 it had purchased tangible personal property located in Massachusetts from RCN-BecoCom, Inc. for "the arm's-length, original cost of \$31,581,200," in a transaction that it stated had been "carried out in conjunction with the arms-length acquisition" by a newly formed entity of the properties relating to the Cable Business owned directly or indirectly by Public Parent.

RCN stated that financial accounting and federal income tax rules required an allocation of the aggregate purchase price paid for Public Parent's Cable Business among the acquired assets, and that an original cost of \$48,872,671 had been attributed to the tangible assets of the Cable Business owned by RCN. RCN indicated that the original cost of its \$ 39 Property was either \$39,374,305 (out of a total cost of \$48,872,671), the amount shown on its "First" Form 5941 for fiscal year 2012, or \$25,443,418 (out of a total cost of \$31,581,200), the amount shown on its "Alternate"

Form 5941 for fiscal year 2012. RCN commented that the information it was submitting would allow the BLA to arrive at a fair valuation of RCN's tangible personal property as of January 1, 2011 "by an application of the valuation processes employed by your office."

On March 3, 2011, Marilyn H. Browne of the BLA responded by e-mail to RCN's counsel, stating that RCN should submit "original cost numbers for central valuation purposes as instructed on page 2 of Form 5941." In a follow-up letter dated March 23, 2011, Ms. Browne advised RCN that "the return received on February 28, 2011, is deficient and has been deemed an insufficient filing." She indicated that use of a purchase price allocation to calculate values and a 2010 installation year did not satisfy the filing requirements.

In its timely submitted March 31, 2011 response to Ms. Browne's letter, RCN provided the BLA with: copies of documents relating to the 2010 Acquisition Transaction; Appendix II information for fiscal year 2012 which it stated was completed to the best of its ability; and, according to RCN's submission, copies of "[d]ocuments that appear to be Forms 5941 that may have been filed with [the BLA] by prior owners of our company's property . . . [which] appear to relate to Fiscal Years 2007 through 2011." In a separate letter, RCN objected through its counsel to the BLA's refusal to process the data provided by RCN relating "*so far as possible, to the situation of the company*

and its property on January first of the year when made' [and BLA's imposing upon RCN] a set of supposed cost figures and dates that relate to some other company at some other time." RCN's Counsel stated that, if the BLA had "any doubts [about the arm's-length nature of the 2010 Acquisition Transaction] or suspicions [that Public Parent had sold its property at far below its fair cash value,] the appropriate course would be to process the Tax Return as filed and to then conduct an audit."

Ms. Browne advised RCN on April 7, 2011 that the fiscal year 2012 Form 5941 remained insufficient. She requested data concerning non-generating machinery acquisitions and retirements in Massachusetts after fiscal year 2006, and observed that the acquisition documents the BLA had received from RCN indicated that RCN had access to documentation of its predecessor relating to the subject personal property. Ms. Browne advised that the BLA would "be using the best available data to calculate the valuation [of RCN's § 39 Property] based on our best information and belief absent a submission of a compliant Form 5941 for FY2012" by April 14, 2011.

On April 14, 2011, RCN submitted "[a] document generated by using the standard FY2012 Form 5941 issued by [the BLA, with the] 'all property schedule' . . . completed by inserting data that is shown on what appear to be Forms 5941 filed with your office by prior owners of our company's property." The form included certain

property marked "New Asset," noted to have been installed in 2010 and not shown on RCN's "First" or "Alternate" Forms 5941 for fiscal year 2012, as well as equipment installed prior to 2010 not reported on the previous owner's prior year Form 5941. Mr. O'Day testified that the form may have mistakenly included some Metro Business assets.

The form that RCN submitted to the BLA on April 14, 2011 was not signed and sworn to by RCN's treasurer. An accompanying letter from RCN's counsel set forth RCN's position that RCN had already met its tax filing obligations and that the Department of Revenue could not "properly compel a taxpayer, under threat of a penalty, to utter and swear, under pains and penalties of perjury, to the accuracy of information set forth in some other company's records about the situation of that company and its property at some other time." RCN's counsel stated that it was unaware of any instance in which the BLA's "valuation of the taxable property of a Section 39 telephone and telegraph company began with the cost numbers of a prior owner of the property being valued."

For each of the following two fiscal years - fiscal years 2013 and 2014, RCN timely filed three Forms 5941: (i) a "First" Form 5941 using the original cost to RCN of its centrally valued property shown on its books, (ii) an "Alternate" Form 5941 showing the amount that it had paid to RCN-BecoCom, Inc. for property in connection with the 2010 Acquisition Transaction and the cost to

RCN of newly acquired property, and (iii) a third unsigned Form 5941 using information from its predecessor's returns and listing newly acquired property. The BLA did not at the time notify RCN of the insufficiency of these fiscal year 2013 and 2014 Form 5941 filings.

III. Certifications of Value and Appeals

Based on his best information and belief, the Commissioner timely issued certified central valuations to RCN and the Boards of Assessors of the Municipalities for each of the fiscal years at issue, showing total values for RCN's \$ 39 Property of \$154,828,900, \$162,785,400, and \$182,184,500, respectively. The certified values were based upon the unsigned Form 5941 property listings, and the fiscal year 2011 Form 5941 filed by RCN's predecessor.

RCN timely paid the tax assessments to the Municipalities, and seasonably filed petitions with the Board appealing the Commissioner's certified central valuations for the fiscal years at issue. The Boards of Assessors of three Municipalities timely filed petitions with the Board appealing the Commissioner's certified central valuations of RCN's \$ 39 Property for the fiscal years at issue, and the Boards of Assessors of two Municipalities timely filed petitions with the Board appealing the Commissioner's certified central valuations of RCN's \$ 39 Property for fiscal year 2013.

IV. The Commissioner's Position on Jurisdiction

The Commissioner asserted that RCN was barred from prosecuting appeals under G.L. c. 59, § 39 because of its failure to comply with the return filing requirements in G.L. c. 59, § 41. The Commissioner maintained that RCN had not satisfied the three critical elements of G.L. c. 59, § 41: (i) that the return be in the form and detail prescribed by the Commissioner based on what the Commissioner determined to be necessary to make valuations; (ii) that the return not have any statement known to be "false in a material particular;" and (iii) that the return be signed and sworn to by the company's treasurer. The Commissioner argued in his post-hearing brief that, considering RCN's filing decisions as a whole, RCN "abused its central valuation filing obligations and attempted to force the Commissioner to abandon the meaningful application of the Commissioner's valuation methodology [, causing the Commissioner] to make 'best information and belief' valuations under [G.L. c. 59,] Section 42."

The Commissioner argued that the instructions to Form 5941 for the fiscal years at issue were clear. RCN was directed to provide the original cost of its § 39 Property - i.e. "[t]he total cost of the acquisition and commissioning of the property at the time of installation as part of the system." Instead, RCN filed signed Forms 5941 based on the 2010 Acquisition Transaction and on accounting concepts "not germane to *ad valorem* property tax

assessment and central valuation of . . . telephone companies under § 39." Taking into account that RCN was the successor to a Massachusetts entity that had previously filed Forms 5941 with the Commissioner, and to whose information RCN had access, the Commissioner argued the underreporting of original installation costs could not be attributed to reasons beyond RCN's control. The Commissioner cited to various other deficiencies in the signed forms as well, including: (i) the omission or misidentification of actual "new growth" property, defined in the instructions to Form 5941 as "new to a community" during the current year, and (ii) the omission of material categories of personal property not subject to tax when held by the prior corporate owner but taxable when owned by RCN.

The Commissioner asserted that there was nothing inadvertent or unintentional about RCN's: (i) reporting of costs based on a purchase price allocation and book accounting; and (ii) indicating "the time of installation as part of the system" to be 2010 in the case of the assets it acquired in the 2010 Acquisition Transaction. Only after repeated demands in 2011 did RCN provide to the Commissioner the information required by the instructions, by submitting an unsigned Form 5941. According to the Commissioner, the signed forms were known to be false and had not been filed in good faith.

The Commissioner further maintained that the third unsigned Forms 5941 submitted by RCN for the fiscal years at issue did not satisfy the statutory signature requirements and hence were not valid returns. In his post-hearing brief, the Commissioner stated that the unsigned fiscal year 2012 Form 5941 providing "original cost" information intended to respond to the BLA's requests was not a return, or a supplement to or revision of RCN's initial fiscal year 2012 filings. Citing a 1979 Supreme Judicial Court decision,¹⁰ the Commissioner stated that even if a signature were required "under the pains and penalties of perjury," such a requirement did not require personal knowledge of the signer. In any event, the Commissioner maintained that Form 5941 merely required the treasurer to indicate that the "return and all accompanying lists and statements . . . [were] true, correct and complete to the best of [his] knowledge and belief." The Commissioner argued that RCN had an obligation to sign and swear that the property list "was based on the best available information," and maintained that RCN's efforts to disguise its ability to use best efforts to compile and sign a return reporting original costs was undercut by the legal relationship between RCN and its predecessor.

¹⁰ *McKenney v. Commission on Judicial Conduct*, 377 Mass. 790, 796 (1979).

V. The Board's Findings and Rulings on Jurisdiction

As discussed further in the Opinion, the Board determined that RCN's signed Forms 5941 for the fiscal years at issue, as supplemented by information giving its predecessor's original costs and years of installation, provided the Commissioner in a timely manner with the information needed by him to make the valuations required under G.L. c. 59, § 39.

The Board found that RCN's failure to provide its predecessor's original costs on signed Forms 5941 did not evidence the submission of information known by RCN to be false in a material particular, nor did its treasurer's failure to sign and swear to original cost information provided with unsigned Forms 5941 deprive the signed Forms 5941 of their validity. Two returns for each fiscal year at issue were signed and sworn to by RCN's treasurer, and the omissions and misidentifications asserted by the Commissioner did not evidence an intentional presentation of false information. The Board found no evidence that the signed returns had not been filed in good faith. Indeed, RCN advised the BLA of its reporting position. The Commissioner had the right after review of the signed returns to require them to be supplemented, which he did; the statute did not allow the Commissioner simply to reject them.

Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide these appeals, petitions having

been timely filed with the Board by RCN and by the Boards of Assessors of the five appealing Municipalities.

VALUATION

I. Standard of Review

In appeals under G.L. c. 59, § 39, an appellant has the burden of proving that the Commissioner's valuation of machinery, poles, wires and underground conduits, wires and pipes resulted in certified values that were substantially higher or substantially lower than their fair cash values. The Board may substitute its own value only if the appellant proves that the value certified by the Commissioner is "substantially higher or substantially lower" than the § 39 property's fair cash value. "Substantially higher or substantially lower," as used in G.L. c. 59, § 39, means a considerable or large value, and not a mere trifle or nominal amount.

Accordingly, the issue presented in these appeals was whether RCN had established that the fair cash value of its § 39 Property in each of the Municipalities was "substantially lower" than the value certified by the Commissioner for each of the fiscal years at issue, the appealing Municipalities having rested on the presumed validity of the Commissioner's certified values.

II. The Commissioner's Valuation Methodology

A. Central Valuation Methodology

The Commissioner stated in his post-hearing brief that his valuation methodology was described in this Board's findings of fact and reports in: (i) *In Re MCI Consolidated Central Valuation Appeals: Boston and Newton*, Mass. ATB Findings of Fact and Reports 2008-255, 311 et seq. ("**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) ("**MCI WorldCom Network Services**"), and (ii) *In Re Verizon New England, Inc. Consolidated Central Valuation Appeals: Boston and Newton*, Mass. ATB Findings of Fact and Reports 2009-851, 930 et seq. ("**Verizon New England**"). Evidence was introduced to indicate that the general structure of the Commissioner's annual valuations, applying a methodology dating back to a 2003 report prepared by George E. Sansoucy, P.E., LLC ("**Mr. Sansoucy**"), had not changed since these decisions, although there were some variations in the application of the method.

After this Board's decision 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), the BLA selected Mr. Sansoucy to evaluate the Commissioner's then existing valuation procedures and design a mass appraisal methodology capable of being updated by the Commissioner annually to determine

values for the personal property of telephone and telegraph companies. Mr. Sansoucy prepared a May 2003 report for the Department of Revenue's Division of Local Services entitled "The Valuation of Telephone & Telegraph Personal Property," which was introduced into evidence. Based on the recommendations in this report, the Commissioner implemented a new central valuation methodology beginning with fiscal year 2004 and, with respect to fiscal years after 2003, Mr. Sansoucy continued to advise the Commissioner on its central valuation procedures.

The Board qualified Mr. Sansoucy as an expert in telecommunications property valuation and appraisal techniques. RCN, which had objected to Mr. Sansoucy's testimony as a witness, argued in its post-hearing briefs that the Board should not credit or rely upon the work product of Mr. Sansoucy, including the Commissioner's released values, because all that work was performed by or participated in by Mr. Sansoucy in violation of the provisions of G.L. c. 268A, § 6.¹¹ RCN asserted that the Commissioner's certified values, as well as a decision of this Board crediting Mr. Sansoucy's work product, were subject to being "avoided, rescinded, or cancelled" pursuant to the provisions of G.L. c. 268A, § 9 because of Mr. Sansoucy's ongoing pursuit of employment by certain of the Municipalities. No evidence was

¹¹ G.L. c. 268A addresses the conduct of public officials and employees; G.L. c. 268A, § 6 is entitled: "Financial interest of state employee, relative or associates; disclosure."

introduced to indicate that a violation of the Commonwealth's conflict-of-interest law had been established through an adjudicatory proceeding before the State Ethics Commission or a prosecution brought by the Attorney General or the District Attorney. Further, advice given by the State Ethics Commission concluded that Mr. Sansoucy could appear as a witness for the Commissioner in these appeals if he filed certain disclosures, which he did.¹² The Board therefore found no reason to bar Mr. Sansoucy's testimony or discredit the Commissioner's valuation methodology simply because Mr. Sansoucy's recommendations formed the basis of that methodology.

In his testimony, Mr. Sansoucy addressed specific features and benefits of the Commissioner's central valuation system. He stated that the "overarching goal" of the system was "to perform . . . central valuation in a fair, equitable and uniform manner between the different classes and different properties" to be

¹² In a letter dated October 8, 2015, sent in follow-up to its earlier letter dated August 19, 2015, both signed by the Deputy Chief/SFI, Legal Division of the State Ethics Commission, the Commission indicated that Mr. Sansoucy's testimony regarding his work relating to the central valuation of telecommunications company property would not violate the state conflict of interest law (G.L. c. 268A, § 6) if, at the time of his testimony, he was in compliance with the law's applicable disclosure provisions. Mr. Sansoucy filed a Disclosure of Appearance of Conflict of Interest form dated September 2, 2015 with the State Ethics Commission, a copy of which he provided to the Department of Revenue by letter dated October 7, 2015. Subsequently, he sent a letter to the Department of Revenue dated October 16, 2015 amending this disclosure form to indicate that at the time of his October 7 letter he had no active contracts with Boston or Brookline. In an Affidavit dated October 18, 2015, Mr. Sansoucy provided to the Board copies of September documentation confirming this fact and stating that he had been appointed a special municipal employee by Newton. Mr. Sansoucy's testimony in these appeals commenced on October 22, 2015.

valued. Mr. Sansoucy testified that the system was based on the mass appraisal standards described in the Uniform Standards of Professional Appraisal Practice published by The Appraisal Foundation.¹³ Mr. Sansoucy further testified that mass appraisal: (i) started with the inventory of property in each community; (ii) strived to value in the same way similar types of telephone company property in the various communities; (iii) provided transparency, verifiability, and the ability statistically to test determined values; (iv) addressed all three methods of valuation – cost, sales, and income; (v) required market sales analysis for classes of property; and (vi) was intended to eliminate to the maximum extent possible the effects of a business enterprise value. He opined that mass appraisal provides a fair market value for property that is "uniform, equal, transparent, [and] verifiable."

Both Mr. Sansoucy and Ms. Cameron, Deputy Chief of BLA during the fiscal years at issue, testified that the Commissioner's central valuation methodology arrived at the fair cash value of RCN's \$ 39 Property in each community.

B. Application of the Methodology

The Commissioner's valuation methodology was based on the original cost and year of installation of \$ 39 property in each community. Ms. Cameron testified that the Commissioner's central

¹³ Standard 6 in the 2014-2015 edition of the Uniform Standards of Professional Appraisal Practice, published by the Appraisal Standards Board of The Appraisal Foundation, was introduced into evidence.

valuation of telephone and telegraph companies "[started] all companies with a common place, the original cost new at the time of installation." Accordingly, the Forms 5941 required to be filed by telephone companies by March 1 before the start of each of the fiscal years at issue required a description of each item of their § 39 property, the city or town in which the property was located, the year of installation, and the property's original cost. The instructions to the forms explained that "original cost" meant "[t]he total cost of the acquisition and commissioning of the property at the time of installation as part of the system [including] the amount of money paid for the property in an arms length transaction." Mr. Sansoucy testified that "original cost" consisted of direct costs such as construction costs, indirect costs such as permitting and engineering costs, interest during construction, and capitalized office expenses. The instructions to the forms further explained that cost did "not include allocated account entries as a result of acquisition by merger, take-over, bankruptcy or other asset impaired accounting treatment."

Using Mr. Sansoucy's reproduction cost new system, the Commissioner trended the original cost of property when installed, and then adjusted the property for physical deterioration, functional obsolescence, and economic depreciation. The Commissioner employed a trending index to arrive at the cost to reproduce the property as of the valuation date. He used the

service life of the property to develop a "straight-line" depreciation percentage, determined by dividing the expected service life into even yearly amounts, which he applied until a "floor" had been reached below which depreciation was not taken into account. A "composite multiplier" was then created, that mathematically combined the cost new factor and depreciation percentage for each category and vintage year of property. The Commissioner multiplied the applicable composite multiplier by the reported original cost of each item of \$ 39 property to arrive its initial value. The composite multipliers were updated annually. The trending indices, service lives, and depreciation floors were recommended by Mr. Sansoucy.

For the trending of telephone company personal property such as wires, conduits, and electronic machinery, the Commissioner relied on the C.A. Turner Plant Index (the "TPI Index"), subsequently renamed the AUS Telephone Plant Index; for the trending of generator equipment, he relied on the Handy-Whitman Index of Public Utility Construction Costs. Mr. Sansoucy testified that telephone property costs trended for specific property categories. Trending indices are composed of digits representing the relative numeric positions of current cost, and are provided for historical years to the present. The Commissioner arrived at the factor to be applied to a property's original cost

in order to arrive at its "cost new," by dividing the digit for the current year by the vintage year digit.

For property other than generators, service lives were based on the mid-point of the depreciation life ranges for twenty three categories of telephone property adopted by the Federal Communications Commission (the "FCC") in FCC Docket No. 98-137 (December 17, 1999)¹⁴ for purposes of accounting and depreciation. For generators, the Commissioner used an expected service life of twelve years, based on a market-based depreciation study confirmed by Mr. Sansoucy.

The percentages of reported original cost below which depreciation was not taken (the depreciation floors) were 30% for telephone company property other than generators ("30% to the good"), and 60% for generators ("60% to the good"). The 60% floor for generators was based on a market-based evaluation prepared by Mr. Sansoucy, demonstrating that a viable sales market existed for used generators. The 30% depreciation floor for other telephone company property was based on the property's continuing vitality, incumbency, income production, and maintenance, as well as its salvage value. Included in incumbency was the considerable

¹⁴ In Re 1998 Biennial Review, 15 FCC Rcd 242 (FCC 1999), is the official citation for this document. Mr. Sansoucy testified that the last major review of this Docket by the FCC was in 2004.

original investment in associated direct and indirect costs, as well as the notion of exclusivity.

Beginning in fiscal year 2009, a new category — construction work in progress ("CWIP") — was added, to which a depreciation factor was not applied.

Starting with fiscal year 2005, the Commissioner's methodology included an evaluation of whether external factors affecting the telecommunications industry justified any additional economic obsolescence deductions. To assist him in determining economic obsolescence, the Commissioner, based on Mr. Sansoucy's recommendation, asked all telephone and telegraph companies to provide certain ARMIS (Automated Reporting Management Information System) data previously collected by the FCC from incumbent local exchange carriers ("ILEC"), such as revenue levels and number of access lines. A new Appendix II to Form 5941 was developed, and was required starting with fiscal year 2012.

For the fiscal years at issue, the initially determined values for § 39 property, other than generators and CWIP, were adjusted by an additional economic obsolescence factor. The additional obsolescence deduction, first applied for fiscal year 2005, was in response to claims, particularly from wireless companies, that proposed BLA values were overstated due to technological advances. Mr. Sansoucy testified that, beginning with fiscal year 2012, he recommended a higher economic obsolescence factor for ILECs than

for competitive local exchange carriers ("CLECs"), such as RCN. The Commissioner adopted Mr. Sansoucy's recommendations, which Mr. Sansoucy testified were based on: (i) data relating to market sales of telecommunications companies; (ii) information provided publicly by these companies to their shareholders, the Securities and Exchange Commission (the "SEC"), and the FCC; and (iii) telecommunications industry information from The Value Line Investment Survey and annual report, current report, and change of beneficial ownership forms (Forms 10-K, 8-K and 4) filed with the SEC, in addition to his review of Form 5941 data supplied by telecommunications companies. Mr. Sansoucy testified that he extracted "specific key metrics" from Form 5941 submissions and market sales to develop a summary of the relationship between sales price and various factors for the selling entities, including: (i) original cost; and (ii) earnings before interest, taxes, depreciation, and amortization ("EBITDA").

The Commissioner applied an additional economic obsolescence factor of 25% to CLECs, including RCN, for fiscal year 2012, the same as in the prior year. Mr. Sansoucy testified that he had recommended no change and had told the Commissioner that the activities of CLECs appeared to be improving and diverging from the ILECs. Based on Mr. Sansoucy's recommendations, the Commissioner reduced the additional economic obsolescence factor for CLECs to 20% for fiscal year 2013, and reduced the factor

further to 10% for fiscal year 2014. Mr. Sansoucy testified that his analysis of sales in the telecommunications industry and Form 5941 submissions "supported . . . reversing economic depreciation for the central valuation on the CLEC and the long-distance companies." In his testimony, Mr. Sansoucy indicated that RCN's reported financial data had not been taken into account in determining the additional economic obsolescence factors because the data was considered unreliable.

The Commissioner's values for RCN's § 39 Property for the fiscal years at issue (sums of the taxable values in each of cities and towns in which RCN owned § 39 Property) are shown below:

<u>COMMISSIONER'S VALUES FOR RCN'S § 39 PROPERTY</u>	
<u>Fiscal Year</u>	<u>Value</u>
2012	\$154,828,900
2013	\$162,785,400
2014	\$182,184,500

Appendix B shows the aggregate value of RCN's § 39 Property in each of the various Municipalities for the fiscal years at issue as determined by the Commissioner.

C. RCN's Assertion of Invalidity

RCN argued that the Commissioner "focused on applying an administratively-convenient single method to the valuation of all centrally reported property, rather than on meeting his statutory obligation to determine the fair cash value of such property based

on the 'situation of the company and its property'. . . ." It was RCN's position that: (i) the original cost of a taxpayer's § 39 property for purposes of valuation is the original cost to the taxpayer, not the original cost when the property became part of the Commonwealth's telecommunications system; and (ii) when a taxpayer acquires an operating telecommunications business in an arm's-length transaction, the original cost of its § 39 property for *ad valorem* property tax purposes is the purchase price allocable to that property.

RCN further maintained that mass appraisals did not produce a fair market value for all property subjected to them, and that the Commissioner's method was founded on Mr. Sansoucy's erroneous belief that G.L. c. 59, § 39 required the Commissioner to perform a "ground up valuation of the property within each community," in disregard of the statute that required the Commissioner first to value § 39 property as a whole and then to allocate that value to the cities and towns where it was located.¹⁵

In any event, according to RCN, the numerous deficiencies in the Commissioner's valuation methodology rendered it incapable of determining the fair cash value of RCN's § 39 Property. RCN pointed out that its network was overbuilt, underutilized, and

¹⁵ See note 12 *supra* regarding RCN's argument that the Board should not credit or rely upon any of Mr. Sansoucy's work product because it was based on work performed or participated in by Mr. Sansoucy in violation of the provisions of G.L. c. 268A.

costly to operate, and hence should not be valued using the same method as other presumably fully utilized networks. Specific technical flaws in the Commissioner's valuation noted by RCN included its failure to take notice of the competition in the market, its inappropriate determination of economic obsolescence, and its use of a reproduction cost model without a replacement cost adjustment where the property would not be reproduced as is. Mr. Reilly, RCN's appraiser, criticized what he believed to be the improper use of depreciation floors and FCC service lives, and the failure to recognize negative salvage value.¹⁶

D. The Board's Findings on Valuation

The Board found that the Commissioner's "trended reproduction cost new less depreciation" methodology for centrally valuing the § 39 property of telephone companies during the fiscal years at issue was a proper approach and furthered the important Legislative purpose behind G.L. c. 59, § 39 of providing a standardized statewide valuation system for telephone companies. Mr. Sansoucy readily testified that the central valuation methodology took into account the three traditional methods of valuation, and reflected

¹⁶ This Board has expressly rejected the use of net salvage value deductions. See *Verizon New England* at 2009-917-918.

an ongoing analysis of current market sales of telecommunications companies and company financial information.

The starting points for Mr. Sansoucy's "trended reproduction cost new less depreciation" system were the reported original cost of \$ 39 property in each community, and its vintage year. Accordingly, the Commissioner sought to obtain from RCN the original cost of its \$ 39 Property at the time it was first installed as part of the Commonwealth's telecommunications system. RCN having provided cost information that the Commissioner found to be unresponsive to the required Forms 5941, the Commissioner applied his valuation methodology using the information available to him regarding the original cost and vintage year of RCN's \$ 39 Property.

Taking the original cost of RCN's \$ 39 Property and its vintage year, the Commissioner trended and depreciated that original cost using a "composite multiplier," which combined a trending factor with a depreciation factor to, in one calculation, arrive at the cost to reproduce each category of property currently as of the valuation date and determine its depreciated value, taking into account appropriate depreciation floors.

The Commissioner trended using the TPI Index for telephone company personal property generally, and the Handy-Whitman Index of Public Utility Construction Costs for generators. The Board found that the TPI Index for personal property generally and the

Handy-Whitman Index for generators complemented both the § 39 property reporting format required by the Commissioner, and the service lives and depreciation tables used. These readily available indices provided ample categorization and groupings, and functioned well within a standardized central valuation system.

For the depreciation component, the Commissioner used: straight-line depreciation; a service life of twelve years for generators; and the FCC service life for each FCC category of telephone company property determined in accordance with FCC Docket No. 98-137 (December 17, 1999). Because of the similarity of equipment and similar pace of technological change among telecommunications providers, as well as the convergence of services offered by these providers, the Board found that it was appropriate to apply the FCC service lives to all telecommunications companies subject to central valuation. The Board also agreed with the use of a twelve-year life for generators, given their use to provide only emergency power and the high degree of maintenance required to insure reliability. Further, the Board agreed with the Commissioner's use of straight-line depreciation and found that, 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 was 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.

The Commissioner, following Mr. Sansoucy's recommendation, used a depreciation floor of 60% for generators and 30% for other telephone property. The Board found that a 30% floor was appropriate for telephone property generally because it reflected the property's continuing vitality as part of a revenue producing system, its income production, its exclusivity, and its maintenance, as well as the considerable original investment in associated direct and indirect costs, particularly regarding the outside plant. The Board also concurred with the 60% floor for generators which Mr. Sansoucy selected, and the Commissioner adopted.

After performing his initial calculation, the Commissioner subtracted additional economic obsolescence from the values arrived at for property other than generators and CWIP. Beginning with fiscal year 2012, based on Mr. Sansoucy's recommendation, the Commissioner applied a lower economic obsolescence factor for CLECs, such as RCN, than for ILECs. As recommended by Mr. Sansoucy, the Commissioner applied an additional economic obsolescence factor to CLECs of 25% for fiscal year 2012, 20% for fiscal year 2013, and 10% for fiscal year 2014. Mr. Sansoucy's recommendations were based on his review of Form 5941 submissions; sales in the telecommunications industry; and public information

filed with the SEC, provided to public company shareholders, and shown in Value Line publications. To assist him in determining economic obsolescence, the Commissioner, starting with fiscal year 2012, asked all telephone and telegraph companies to provide information no longer required by the FCC from ILECs in their annual filings, such as revenue levels and number of lines.

Recognizing the inherent difficulty in quantifying economic obsolescence, the Board found that the Commissioner's use of a 25% deduction for fiscal year 2012 to account for additional economic obsolescence was reasonable given Mr. Sansoucy's credible assessment of the improving conditions for CLECs compared with ILECs. The Board further found to be appropriate: (i) the Commissioner's use of a lower 20% economic obsolescence factor for fiscal year 2013; and (ii) his use of a 10% factor for fiscal year 2014, both of which factors were based on Mr. Sansoucy's recommendations.

Based on all the evidence, the Board found that the Commissioner's central valuation methodology used to value RCN's \$ 39 Property for the fiscal years at issue was not incorrect or improper. The Commissioner's methodology was objective, transparent, and consistent. The specific flaws alleged by RCN did not derogate from the validity of the Commissioner's methodology.

II. RCN's Valuation Methodology

A. The 2010 Acquisition Transaction

RCN maintained that the fair cash value of its \$ 39 Property had been established by the 2010 Acquisition Transaction, and that the fair cash value so determined was "substantially lower" than the value certified by the Commissioner for each of the fiscal years at issue. In the 2010 Acquisition Transaction, Public Parent (RCN Corporation) sold its Cable Business for cash to newly created Yankee Cable Acquisition, LLC. Among the assets sold was the member interest in RCN. In connection with the sale, RCN separately acquired the tangible and intangible assets of Public Parent's Boston cable market business owned by RCN-BecoCom, Inc., another entity indirectly owned by Public Parent. RCN paid \$31,581,200 in cash for the tangible assets, and it acquired the intangible assets in a cash merger with RCN-BecoCom, Inc.

As part of the 2010 Acquisition Transaction: (i) Public Parent, after selling its Cable Business, engaged in a cash merger with a newly formed corporation, leaving the surviving corporation with the assets of Public Parent's Metro Business; and (ii) the shareholders of Public Parent received \$15 per share for their stock. The 2010 Acquisition Transaction closed on August 26, 2010, over five months after the date of the Agreement and Plan of Merger. All documents and information furnished in connection with the Agreement and Plan of Merger were subject to a

Confidentiality Agreement dated March 11, 2009 entered into between Public Parent and ABRY Partners, LLC (the private equity investment firm that sponsored the transaction).¹⁷ For a period of forty days after the execution of the Agreement and Plan of Merger, Public Parent had the right under a "go-shop" provision to solicit alternative acquisition proposals from third parties. The Proxy Statement dated April 21, 2010 filed with the SEC and provided to Public Parent's shareholders in connection with the transaction ("Proxy Statement") reported that, although approximately 105 parties had been contacted, no person had made a counter proposal as of the date of the Proxy Statement.

Mr. Sicoli, who served as the Chief Financial Officer of Public Parent prior to the Closing, testified that the total transaction consideration was approximately \$1.25 billion.¹⁸ Of this amount, \$497 million was attributable to the Metro Business. The \$753 million purchase price agreed upon for the Cable Business was, under the terms of the Agreement and Plan of Merger, subject to equitable adjustment as mutually agreed upon by the buyer of the Cable Business and the parent of the corporation formed to

¹⁷ It can be inferred from the Proxy Statement noted herein that this Confidentiality Agreement related to ABRY Partners, LLC's possible acquisition of Public Parent's Pennsylvania cable operations. According to the Proxy Statement, later that year, on November 19, 2009, "ABRY Partners" provided Public Parent with a written preliminary indication of interest in acquiring Public Parent's outstanding capital stock at \$15 a share. The address shown in the Proxy Statement for each acquiring entity was c/o ABRY Partners LLC.

¹⁸ Mr. Sicoli testified that the total transaction consideration, including buyer's fees and expenses, was approximately \$1.3 billion, and that the consideration to Public Parent's stakeholders was approximately \$1.25 billion.

acquire the Metro Business. Mr. O'Day, the Vice President of Tax for RCN cable companies, testified that the purchase price specified for the Cable Business had been negotiated by Public Parent and the buyer of the Cable Business, and was adjusted upward to \$757 million to account for certain costs. Pursuant to the terms of the Agreement and Plan of Merger, a significant portion of the transaction consideration was applied to satisfy liabilities. A total of approximately \$500,000 was distributed to the shareholders of Public Parent who, according to the Proxy Statement, received a per share premium for their stock of approximately 43% over Public Parent's average closing stock price for the thirty trading days immediately prior to public announcement of the execution of the Agreement and Plan of Merger.

An RCN Cable Rating Agency Presentation dated April 2010, prepared in connection with the solicitation of debt financing for the 2010 Acquisition Transaction, stated that the "acquisition strategy" of ABRY Partners, LLC (the sponsor of the transaction) was "to capitalize and operate RCN Cable and RCN Metro discretely."¹⁹ Two Confidential Information Memoranda prepared in April and May of 2010 provided to prospective lenders stated that

¹⁹ However, the Agreement and Plan of Merger required the buyer of the Cable Business and the Direct Parent of the corporation that acquired the Metro Business to enter into a long-term service agreement pursuant to which each was to provide certain support services and shared assets to the other in support of their respective businesses. Separate service agreements were entered into at the Closing.

ABRY Partners, LLC had "assigned a total enterprise valuation of \$771.4 million" to the Cable Business and "a total enterprise valuation of \$496 million" to the Metro Business, and that its intent was to "separate RCN Cable and RCN Metro at closing." A "Purchase Price Calculation" subsequently prepared in connection with the Closing of the transaction showed an "RCN Value Allocation" of approximately \$754 million to the Cable Business and \$496 million to the Metro Business, amounts that were used to determine the proportionate share of the transaction expenses allocable to each business.

The buyer of the Cable Business and the corporation that acquired the Metro Business were indirectly owned by two newly formed private equity partnerships²⁰ affiliated with the sponsor of the transaction. Although the indirect owner of the two entities that acquired the Cable Business and the Metro Business were different private equity partnerships, there was overlap in their ownership, the largest percentage being that owned by ABRY Partners VI, L.P. ("ABRY VI"), which was affiliated with the sponsor of the transaction. Other identical ownership interests in the two entities, including ABRY VI's 42.5495%, brought the common ownership interests to over 50%.²¹ In fact, as a condition

²⁰ The ultimate parents were limited liability companies - Yankee Cable Partners, LLC and Yankee Metro Partners, LLC - referred to herein as "partnerships."

²¹ The Consolidated Financial Statements for Yankee Cable Partners, LLC at December 31, 2011 and 2010, and for the years ended December 31, 2012 and 2011, described ABRY VI as majority owner of both Yankee Cable Partners, LLC (the

of the debt financing for the acquisition transaction, ABRY VI was required: (i) to own, either directly or indirectly, a percentage interest in each Direct Parent's equity greater than that of any other co-investor; and (ii) to own and control, together with its affiliates and co-investors, either directly or indirectly, at least 51% of each class of each Direct Parent's outstanding equity.

Although the lenders to the buyer of the Cable Business and the corporation that acquired the Metro Business were not identical and there was no cross-collateralization, significant financing was provided by some of the same lenders for the acquisition of both the Cable Business and the Metro Business. ABRY Partners, LLC, the sponsor of the acquisition transaction, provided 7.57% of the total debt financing for the Cable Business purchase (7.57% of \$585.2 million) and 12.5% of the total debt financing for the Metro Business acquisition (12.5% of \$240 million). Approximately 32% of the total debt raised for the Cable Business purchase came from eleven lenders who also extended credit to the corporation that acquired the Metro Business. Approximately 45% of the total debt raised for the Metro Business acquisition came from these same eleven lenders. Debt comprised approximately 70% of the initial capital that funded the acquisition of the Cable Business.

ultimate parent of the Cable Business buyer) and the ultimate parent of the corporation that acquired the Metro Business.

Evidence introduced by RCN described the steps leading up to the 2010 Acquisition Transaction and the allocation of the \$757 million purchase price paid for the Cable Business among the six acquired business locations, and their tangible and intangible assets in each location, including an allocation of \$57 million in value to the Boston cable market operated by RCN. The other five acquired cable markets were located in Lehigh Valley (in Pennsylvania), Philadelphia, Chicago, New York, and the District of Columbia.

RCN pointed to the way in which the 2010 Acquisition Transaction was structured as an indication that the \$757 million purchase price for the Cable Business was not an arbitrarily chosen number; rather it was the result of intense scrutiny by: (i) Public Parent's Board of Directors; (ii) Public Parent's financial advisor (Deutsche Bank); (iii) the equity partners in the partnerships that through subsidiary entities acquired the Cable Business and the Metro Business; (iv) the separate lending groups that provided financing for the purchase of the businesses; and (v) the Boston-based private investment company (ABRY Partners, LLC) that arranged for equity and debt financing. RCN noted that all parties had a fiduciary duty requiring them to transact the sale and merger transactions on arm's-length and fairly negotiated terms.

Specific testimony was introduced to support the \$757 million price paid for the Cable Business. Mr. Sicoli testified that he thought the value of the Cable Business was roughly \$750 million and that the value of the Metro Business was roughly \$500 million. He also stated he was confident that, prior to the 2010 Acquisition Transaction, the Metro Business could have been sold separately for \$500 million. Mr. O'Day testified that Deutsche Bank had estimated an enterprise value for the Cable Business of between \$620 million and \$775 million, and an enterprise value for the Metro Business of between \$448.5 million and \$586.5 million.²²

Testimony was also introduced to support the breakdown of the \$757 million price paid among the Cable Business's six markets. The Proxy Statement indicated that Public Parent had received third party offers of \$390 million for the Pennsylvania markets and approximately \$230 million for the Chicago market, both of which were withdrawn. Letters of Intent dated September 29, 2009 (later modified on November 4) and January 8, 2010, respectively, were provided by each prospective buyer. The Proxy Statement further indicated that the third party's initial offer of \$420 million for

²² Deutsche Bank's fairness opinion dated March 5, 2010, addressed to a Special Committee of Public Parent's Board of Directors, stated only that the merger consideration of \$15 per share payable to the shareholders of Public Parent was fair from a financial point of view to the shareholders. The Proxy Statement provided to shareholders: (i) stated that Deutsche Bank performed a "sum of the parts" analysis of both the Cable Business and the Metro Business; and (ii) included estimated enterprise value to 2010 EBITDA reference ranges for both businesses.

the Pennsylvania markets was reduced to \$390 million after due diligence.

RCN pointed to the fact that the Ernst & Young Report, *infra*, valued the Pennsylvania and Chicago markets at \$585 million (\$345 million and \$240 million, respectively), leaving \$172 million of the total price that Public Parent received for its entire Cable Business to be allocated among New York, Boston, and the District of Columbia locations. Mr. Sicoli testified that, assuming \$172 million to be the amount allocable among the New York, Boston, and District of Columbia locations, the Commissioner's value of \$154 million for the Boston market's centrally valued assets was "way too high." Mr. O'Day testified that, using the Commissioner's fiscal year 2012 value for the Boston market's centrally valued assets, would have left "extremely low numbers" to be allocated among the New York and District of Columbia locations and Boston's non-centrally valued assets. In Mr. Sicoli's view, the New York market was worth between 50% and 100% more than the Boston market, and the District of Columbia market was worth less than the Boston market.

Regarding the portion of the \$757 million purchase price attributable to the Boston cable market, RCN introduced a valuation analysis ("Report") dated March 30, 2011 prepared by Ernst & Young

showing the fair values²³ of each of the six acquired cable markets as of August 26, 2010. Over the objections of the Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington, Mr. Wojcickij, who prepared the business valuation and intangible assets portions of this Report, was qualified as an expert witness relative to the purchase price allocations. The Report indicated that, based on the \$757 million purchase price for the Cable Business, the fair value of the Boston cable market was \$57 million; the fair values of the Pennsylvania and Chicago cable markets were \$345 million and \$240 million, respectively; and the total fair value of the remaining two markets was \$115 million. The Report determined the enterprise value of each cable market using the discounted cash flow method on a debt-free basis, based on: (i) forecasted revenues, expenses, and capital expenditures over an eight-year period provided by management; (ii) a 40% rate for taxes; and (iii) in the case of the Boston cable market, a 15% discount rate. A terminal value beyond the discrete forecast period incorporated a projected 0.0% growth rate beyond 2021, and a growth rate declining from 6.0% to 0.0% during the four years starting with 2018. The income approach to business

²³ The report defines "fair value" as "the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date."

valuation was selected over the market and cost approaches with the agreement of management.

Ernst & Young's valuation analysis and recommendations were based on information and financial data provided by management and other relevant sources.²⁴ The Report was prepared pursuant to a Statement of Work dated November 5, 2010 for the purpose of assisting management of "RCN Corporation" in its allocation for financial statement reporting purposes of the total purchase price of the corporation among certain identified tangible and intangible assets "that were acquired by ABRY Partners LLC (ABRY) as a result of" the 2010 Acquisition Transaction. Mr. Sicoli testified that the relative values for the six cable markets shown in the Ernst & Young Report were consistent with his view of the actual values of those markets.

Finally, relative to its reliance on the value established by the 2010 Acquisition Transaction, RCN pointed to the \$31,581,200 in cash that it paid to RCN-BecoCom, Inc. for its tangible assets, and the booked costs of the assets that it acquired on the Closing of the transaction. Evidence introduced indicated that the opening book entries used for financial and federal and state income tax purposes were \$53,790,441 for fixed assets (including RCN's \$ 39 Property), \$6,229,571 for intangibles, and \$11,203,727 for current

²⁴ Ernst & Young did not independently investigate or otherwise verify the data provided.

assets excluding cash (a total of approximately \$71 million), based on the Ernst & Young Report and further adjustments made by RCN's Internal Controller and Chief Financial Officer.²⁵ The Ernst & Young Report showed recommended fair values of \$56,259,000 for fixed assets and \$6,862,000 for all intangibles - for a total tangible and intangible asset value of \$63,121,000.²⁶

The chart below summarizes fiscal year 2012 values offered by RCN for its property based on the 2010 Acquisition Transaction:

²⁵ The "Recommended Fair Values" shown at the outset of the Ernst & Young Report for the Boston cable market were \$3,475,000 in the aggregate for listed intangibles (trade name, advertiser sales contracts, and internally developed software) and \$57 million for the reporting unit.

²⁶ In addition to valuing the Boston cable market as a reporting unit, the Ernst & Young Report valued five identified asset categories - fixed assets and intangibles consisting of trade name, advertiser sales contracts, internally developed software, and assembled workforce in place. The fixed assets included buildings and improvements; leasehold improvements; network equipment and fiber; computer hardware and software; office furniture, fixtures, and equipment; and vehicles. Evidence regarding the valuation of the fixed assets was admitted over the objections of the Commissioner and the appealing Municipalities. The fixed asset value in the Ernst & Young Report was not relied upon by RCN in making its presentation to the Board and was not relied upon by the Board in deciding these appeals.

<u>RCN's FY 2012 ASSET VALUES</u>			
	<u>All of RCN's Assets</u>	<u>RCN's Tangible Assets</u>	<u>RCN's \$ 39 Property</u> ²⁷
Reported to BLA on "First" Form 5941 for Assets Subject to Personal Property Tax	--	\$48,872,671	\$39,374,305
Reported to BLA on "Alternate" Form 5941 for Assets Subject to Personal Property Tax	--	\$31,581,200	\$25,443,418
Public Parent Chief Financial Officer's Estimate of Value of the Boston Market	\$57,000,000	--	--
Portion of \$757 Million Price allocated by Ernst & Young to the Boston Market	\$57,000,000	--	--
Amount Booked by RCN for Financial and Federal and State Income Tax Purposes	\$71,223,739 (including current assets of \$11,203,727)	\$53,790,441	--
Reported to BLA on Unsigned Form 5941 with Original Costs based on Previous Owner's Form 5941	--	--	\$286,883,129

A summary of the values of RCN's \$ 39 Property reported on its Forms 5941 for fiscal years 2013 and 2014 is shown in the chart below:

²⁷ The value of RCN's \$ 39 Property reported on its "First" Form 5941 included, according to RCN's post-hearing brief, \$625,000 of CWIP costs incurred after August 26, 2010 and before January 1, 2011. The "First" and unsigned Forms 5941 reported CWIP of \$628,131; the "Alternate" Form 5941 reported CWIP of \$405,894.

RCN's FY 2013 & 2014 VALUES FOR ITS \$ 39 PROPERTY FROM FORMS 5941		
	January 1, 2012 for <u>Fiscal Year 2013</u>	January 1, 2013 for <u>Fiscal Year 2014</u>
Form "First" Form 5941	\$43,524,478	\$54,064,490
Form "Alternate" Form 5941	\$29,815,828	\$40,355,840
Form 5941 with Data from Previous Owner	\$291,033,302	\$301,573,314

Appendix C shows the value of RCN's \$ 39 Property in each of the Municipalities reported on its "First" Forms 5941 for the fiscal years at issue. Mr. O'Day's testimony suggested that the values for RCN's \$ 39 Property in each of the Municipalities shown on its "First" Forms 5941 were taken from its books and records set up by RCN's Internal Controller and Chief Financial Officer.

B. Mr. Sicoli's Opinion of Value

In further support of its position, RCN offered an opinion of value of Mr. Sicoli, who was the Chief Financial Officer of Public Parent from 2005 until the 2010 Acquisition Transaction and who had previously worked at Nextel Communications where he participated in "dozens" of mergers and acquisitions. Mr. Sicoli testified that a value of \$57 million was reasonable for the Boston cable market. RCN asserted that Mr. Sicoli's thorough understanding and knowledge of Public Parent's Boston cable market and its value, and his extensive expertise in buying and selling

telecommunications property, qualified him to give this opinion of value.

C. American Appraisal Report

RCN also introduced an appraisal report dated August 15, 2014 (the "American Appraisal Report") prepared by Mr. Reilly to support its position. At the hearing of these appeals, over the objection of the Commissioner, Mr. Reilly was qualified as an expert in *ad valorem* property taxation, including the valuation of utility and telecommunications property. The American Appraisal Report was admitted into evidence over the objections of the Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington. Mr. Reilly testified that the report's "premise of value" was fair cash value, synonymous with fair market value - "a willing buyer, willing seller concept, neither under compulsion to buy or sell and . . . the sale being an arm's length transaction." RCN argued that the American Appraisal Report was the only fair cash value appraisal submitted to the Board, and that as a *prima facie* matter it should be determinative of value.

The American Appraisal Report addressed the three traditional approaches to valuation - the sales comparison, income, and cost approaches. Only RCN's tangible property was valued, including assets required to provide services such as voice, data connectivity, cable, television, and internet services. The report states that the appraised property consisted of general

network plant equipment, computer equipment, office furniture and equipment, and special purpose vehicles. Data for the designated assets was analyzed using information collected from public sources and information provided by RCN management.

Mr. Reilly rejected the cost approach to valuation, noting that fundamental to it was establishing a replacement cost new. Due to changes in telecom technology, he stated that a newly constructed telecom system would look drastically different from RCN's existing network, calling into question the comparability between what existed and what would replace it. He therefore concluded that the cost approach was not "a meaningful indicator of value for the tangible assets associated with the RCN LLC network."

In his first income approach, the discounted cash flow method, Mr. Reilly projected debt-free net cash flows from operations, consisting of net income (after federal and state income taxes estimated at a corporate composite rate of 40.2%,²⁸ but before property taxes) plus depreciation less a budget for future capital expenditures ("CAPEX"), over a period of ten years. Forecasted revenue was based on historical operating results for 2010 provided by RCN management, increased by 1.0% growth per year based on the

²⁸ Mr. Reilly testified that a tax rate of 40.4% should have been applied to arrive at net income for 2011.

prior year's revenue. Operating expenses were based on the 2009 income statement for RCN's telecommunications network, adjusted into the long-term future at 1.0% annually. The base CAPEX budget was provided by RCN management and adjusted into the long-term future at the same 1.0% anticipated rate. Depreciation was calculated based on the seven-year Modified Accelerated Cost Recovery System ("MACRS") schedule for machinery and equipment, and thirty-nine-year straight-line depreciation for buildings and land improvements.

The cash flow projections for each of the first nine years during the projection period were discounted to present value at a weighted average cost of capital (discount rate). To arrive at a business enterprise value, Mr. Reilly added, to the sum of these present values for nine years, the present value of the projected year-ten income level capitalized into the future using a capitalization rate equal to the discount rate less a cash flow growth projection of 1.0%. The discount rate was calculated by: (i) weighting the cost of debt (tax effected at 40.2%) and the cost of equity in accordance with an industry-based capital structure indicated by Mr. Reilly's analysis of six selected guideline companies; and (ii) adding to the concluded amount an after-tax effective property tax rate (1.7%). Debt was weighted 35% and equity 65%. Mr. Reilly developed a cost of equity by applying both a capital asset pricing model and a built-up method.

The business enterprise value so derived was inclusive of three components - working capital, tangible assets, and intangible assets. Mr. Reilly ascribed 0.0% of the business enterprise value to working capital and 5.0% to intangible assets (primarily trained and assembled workforce and management team, engineering drawings, and operating manual and procedures). After deducting the intangible asset value from the business enterprise value, Mr. Reilly arrived at a tangible asset value of \$44.2 million at January 1, 2011; \$79.3 million at January 1, 2012; and \$66.3 million at January 1, 2013.

In his second income approach, using single-period income capitalization (direct capitalization), Mr. Reilly first estimated annual income expected from operations and expected expenses. Financials for the prior year were used as the basis for determining an appropriate amount of operating income and expenses for each valuation year. Federal and state income taxes calculated at a composite rate of 40.2% and projected future capital expenditures were deducted from net operating income; depreciation was added back; and the resulting "invested capital cash flow" from operations was capitalized at the discount rate developed under Mr. Reilly's first income approach, less 1.0% growth.

From the business enterprise value arrived at using his direct capitalization method, Mr. Reilly deducted 5.0% for intangible assets. Certain assumptions common to his two income approaches

to valuation were the amount of projected future capital expenditures and the after-tax effective property tax rate. The direct capitalization approach produced a tangible asset value of: \$38.2 million at January 1, 2011; \$61.8 million at January 1, 2012; and \$53.8 million at January 1, 2013.

Commenting on Mr. Reilly's income methodologies, the Commissioner stated in his post-hearing brief that they suffered from being business enterprise valuations heavily tied to the operation of a former publicly traded company (i) without taking into account new management with a different financial approach to the purchased cable markets, and (ii) using assumptions and inputs that could not be justified based on the facts regarding RCN's business for the fiscal years at issue. Moreover, the discrepancy and dissimilar results showed the effect of subjective and speculative assumptions, as well as various conceptual errors. In their post-hearing brief, the Boards of Assessors of Boston, Newton, Brookline, and Lexington argued that the "top-down" income capitalization approaches contained conceptual errors, were based on highly subjective and speculative projections and assumptions, and resulted in values that were not reliable, creditable, or probative.

Both the Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington Assessors also criticized specific aspects of Mr. Reilly's income methodologies. Faults

testified to by Mr. Sansoucy included: (i) the use of historical revenue as the basis for suppressing expected future revenue for purposes of determining discounted cash flow; (ii) a failure to recognize the positive impact of capital improvements on revenue; (iii) the debt-to-equity ratio used in the determination of the discount rate; and (iv) the 5.0% reduction in value for intangibles. In their post-hearing brief, the Boards of Assessors of Boston, Newton, Brookline, and Lexington criticized Mr. Reilly's: (i) selection of six guideline companies that were not comparable to RCN; (ii) failure under his deficit cash flow analysis to consider financial forecasts obtained from RCN; (iii) inclusion of income taxes as an expense using an approximate 40% composite corporate income tax rate for a limited liability company; and (iv) failure to determine whether related-party service agreements between the Cable Business and the Metro Business were at market terms as of the valuation dates.

Mr. Reilly found his final method, the sales comparison approach, to be deserving of the most weight. He did not develop a sales comparison indication of value based on separate outside sales. Mr. Reilly testified that he had looked at sales within the telecommunications industry, but had concluded that adjustments could not be made to make them comparable to the subject property. Rather he based his analysis on "the fact that the entire fair value of [Public Parent] transacted at

approximately \$1.3 billion, of which \$53,790,441 . . . [had] been allocated to the RCN . . . fixed assets.”²⁹ Mr. Reilly testified that based on, among other factors, his discussions with management, the competitive bid process, and the “go-shop” provision described in the Proxy Statement, he had concluded that the sale was an arm’s-length transaction.

Starting with this given “sale price” for fixed assets, an amount provided by RCN, Mr. Reilly trended it to 2011 dollars based on AUS Telephone Plant Index Trends (1.07) to arrive at a tangible asset value of \$57,555,772 (rounded to \$57.6 million) as of January 1, 2011. The American Appraisal Report stated as follows: “No . . . significant adjustments must be made to the sale, as the sale is of the subject fixed assets based on an arm’s-length fair value transaction and is considered the most meaningful indication of value.” Mr. Reilly testified that he “analyzed [his] own market evidence, developed income indicators of value using both a discounted cash flow analysis and a direct capitalization method and it supported the price [that] RCN paid for the assets and it supported the price that they had put on their books for the purchase.”

Trending the sale price to 2012 dollars based on AUS Telephone Plant Index Trends (1.08), Mr. Reilly arrived at a tangible asset

²⁹ The American Appraisal Report referred to ABRY Partners, LLC (the sponsor of the acquisition transaction) as the entity that acquired Public Parent in a two-part transaction.

value of \$58,093,676 (rounded to \$58.1 million) as of January 1, 2012. Finally, trending the sale price to 2013 dollars based on AUS Telephone Plant Index Trends (1.09), he arrived at a tangible asset value of \$58,631,581 (rounded to \$58.6 million) as of January 1, 2013. With respect to the values for all three years, the American Appraisal Report noted an appraiser's obligation to consider and analyze any sales of the appraised property that occurred in the three years prior to the appraisal date.

Both the Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington criticized Mr. Reilly's sales comparison approach in their briefs. They maintained that the AUS cost indices used by Mr. Reilly were misapplied to bookkeeping entries, rather than to historical original cost, and they observed that the relied-upon AUS Telephone Plant categories included types of property not at issue in these appeals. Regarding the tangible assets reflected in Mr. Reilly's sales comparison approach, both the Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington argued that the American Appraisal Report gave no value to new property additions, although on cross examination, Mr. Reilly explained the omission by indicating that the additions did not equate to value.³⁰ More generally, the Boards of Assessors of Boston, Newton, Brookline, and Lexington asserted

³⁰ Forms 5941 filed by RCN for fiscal years 2013 and 2014 showed new central valuation property of approximately \$3.5 million (without CWIP) and \$11.8 million (with CWIP), respectively.

that Mr. Reilly's failure to provide an inventory of the property he valued at the relevant valuation dates, relying instead on allocated August 26, 2010 bookkeeping entries, undercut his opinion of value.

Having determined the value of RCN's tangible assets under each method of valuation he used, Mr. Reilly provided his conclusion as to their fair market value at each of the three valuation dates, placing most weight on the sale of the subject assets. Mr. Reilly then determined the portion of that value allocable to each of RCN's four categories of tangible property: (i) property reported on Forms 5941; (ii) property reported locally to assessors; (iii) real property assessed locally; and (iv) vehicles. He did so based on the proportionate "costs" for assets in these four categories that RCN reported to the Commissioner and local cities and towns for property tax purposes. Mr. Reilly undertook no independent review of RCN's reported numbers, which were provided to him by RCN management. Finally, taking the proportionate values so allocated to RCN's Form 5941 property, Mr. Reilly further allocated them among the various Municipalities based on each city's or town's percentage of the total values reported on the "First" Forms 5941 filed by RCN for the fiscal years at issue, which were furnished to him in an excel file. He testified that, unlike the Commissioner's approach, this

was "a unit valuation concept where you value the unit, and then you allocate value down to the respective jurisdictions."

The Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington criticized these final allocations of value in their post-hearing briefs. They maintained that the values shown for the four categories of tangible property were a mixture of costs reported by RCN and assessed values, and that the addition of property to any one of the four categorizes artificially deflated the remaining categories. Moreover, according to both the Commissioner and the Boards of Assessors of Boston, Newton, Brookline, and Lexington, Mr. Reilly's approach treated communities in which new property had been installed for any fiscal year in an inequitable manner, citing as an example Framingham. For fiscal year 2014, RCN reported \$741,556 in new property installed in Framingham in 2011 (first reportable in fiscal year 2013), whereas Mr. Reilly showed total additional value in Framingham from fiscal year 2012 to fiscal year 2013 of \$140,576. More generally, Mr. Sansoucy stated that in his opinion the American Appraisal Report was not "a ground up valuation of the property within each community like the DOR [was] required to do."

The chart below shows: (i) Mr. Reilly's values for RCN's tangible property for the fiscal years at issue using his three approaches to valuation; (ii) his final determinations of value

for the fiscal years at issue; and (iii) based on them, the total value of RCN's \$ 39 Property for the fiscal years at issue:

VALUES FROM AMERICAN APPRAISAL REPORT			
<u>Value of RCN's Tangible Property (including \$ 39 Property)</u>			
<u>Approach</u>	<u>January 1, 2011 for Fiscal Year 2012</u>	<u>January 1, 2012 for Fiscal Year 2013</u>	<u>January 1, 2013 for Fiscal Year 2014</u>
Based on Sales Comparison	\$57,600,000	\$58,100,000	\$58,600,000
Based on Income - Discounted Cash Flow	\$44,200,000	\$79,300,000	\$66,300,000
Based on Income - Direct Capitalization	\$38,200,000	\$61,800,000	\$53,800,000
"Fair Market Value" Based on Synthesis of Three Approaches	\$58,000,000	\$60,000,000	\$60,000,000
<u>Value of RCN's \$ 39 Property</u>			
Portion of Value of all Tangible Property based on Synthesis of Three Approaches	\$46,730,600	\$44,490,000	\$45,384,000

Appendix D shows the value of RCN's \$ 39 Property allocated by Mr. Reilly to each of the Municipalities for the fiscal years at issue.

D. Comparative Values

The chart below compares the aggregate \$ 39 Property values reported on RCN's "First" Forms 5941 for the fiscal years at issue with Mr. Reilly's values for these fiscal years:

<u>Value of RCN's \$ 39 Property</u>			
	<u>January 1, 2011 for Fiscal Year 2012</u>	<u>January 1, 2012 for Fiscal Year 2013</u>	<u>January 1, 2013 for Fiscal Year 2014</u>
From RCN's "First" Forms 5941	\$39,374,305	\$43,524,478	\$54,064,490
From American Appraisal Report	\$46,730,600	\$44,490,000	\$45,384,000

Appendices E, F, and G show the value of RCN's \$ 39 Property by Municipality for each of the fiscal years at issue taken from: (i) RCN's "First" Form 5941; (ii) the American Appraisal Report; and (iii) the Commissioner's valuation.

E. The Board's Findings

For the reasons detailed in the following Opinion, the Board found RCN's valuation methodology (i) to be dependent upon an allocation of the total consideration received by Public Parent for its Cable and Metro Businesses, and (ii) not to be probative of value. It is the long-standing position of this Board that portfolio sales and accounting allocations do not provide reliable bases for demonstrating the fair cash value of property.

The Board further found that Mr. Sicoli's opinion of value was unsupported by a recognized valuation methodology and did not provide probative evidence of value.

Finally, as discussed further in the Opinion, the Board found that the American Appraisal Report prepared by Mr. Reilly was not probative of value. First, Mr. Reilly relied upon income valuation methods that the Board has found to be unreliable for purposes of valuing utility property, and aspects of the income valuations were flawed. Second, Mr. Reilly rejected the cost valuation approach, notwithstanding that the "reproduction cost new less depreciation" method has been determined by this Board to be a valid approach to the valuation of telephone company property.³¹ Third, Mr. Reilly rejected a sales comparison approach based on separate outside sales, and relied instead on the portion of the consideration paid in the 2010 Acquisition Transaction that had been allocated to RCN's acquired fixed assets for financial and federal and state income tax purposes, an approach this Board found not to be probative of the value. In addition, Mr. Reilly offered no independent support for his attribution of a portion of the values he determined for RCN's tangible assets first to RCN's total

³¹ In both *Verizon New England* and *MCI*, the telephone company's valuation expert developed reproduction cost new figures for the \$ 39 property he valued using his "replacement cost new less depreciation" methodology. See *Verizon New England* at 2009-872-84; *MCI* 2008-296-305.

§ 39 Property and then to its § 39 Property located in each of the Municipalities.

In short, the Board found and ruled that RCN had not established that the fair cash value of its § 39 Property in each of the Municipalities was "substantially lower" than the value certified by the Commissioner for each of the fiscal years at issue.

CONCLUSION

The Board found and ruled that it had jurisdiction to hear and decide these appeals, and found that the applicable standard of review required the Board to determine whether RCN had established that the fair cash value of its § 39 Property in each of the Municipalities was "substantially lower" than the value certified by the Commissioner for each of the fiscal years at issue (there being no need to determine whether the appealing Municipalities had proven that the fair cash value of RCN's § 39 Property located within them was "substantially higher" than the value certified by the Commissioner, the appealing Municipalities having rested on the presumed validity of the certified values). Applying this standard of review, the Board found and ruled that RCN had not established that the fair cash value of its § 39 Property in each of the Municipalities was "substantially lower"

than the value certified by the Commissioner for each of the fiscal years at issue.

The Board therefore issued decisions (1) for the Commissioner and the Municipalities in the RCN appellant appeals for the fiscal years at issue, and (2) for RCN and the Commissioner in the RCN/Commissioner appellee appeals for the fiscal years at issue.

OPINION

REPORTING REQUIREMENTS AND JURISDICTION

I. Required Reporting of Tangible Personal Property

The Commissioner performs an annual valuation of telephone and telegraph company personal property subject to central valuation pursuant to G.L. c. 59, § 39. The Commissioner must complete this valuation and certify values to the owners of the § 39 property and to the Boards of Assessors of the cities and towns where the § 39 property is located by May 15 of each year.³² As part of the central valuation process, unincorporated telephone companies are required to file a return reporting all of their poles, wires, and underground conduits, wires, and pipes, and machinery used for telephone and telegraph purposes, located in any city or town in the Commonwealth. G.L. c. 59, §§ 39 and 41. For the fiscal years at issue, the Commissioner issued a prescribed

³² Prior to its amendment by St.1981, c. 111, § 2, G.L. c. 59, § 39 required the Commissioner to issue his certified central values by March 15.

tax form under G.L. c. 59, § 41 for use in central valuations, denoted State Tax Form 5941.

II. RCN's Reporting of Tangible Personal Property

As a threshold matter, the Commissioner argued that the Board did not have jurisdiction over these appeals because RCN failed to comply with the return filing requirements in G.L. c. 59, § 41 which 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 signed and sworn to by its treasurer. 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. If any company, or any treasurer thereof, in a return made under this section makes any statement which is known to be false in a material particular, such false statement shall bar it from any appeal under section thirty-nine.

The Commissioner asserted that the critical elements of G.L. c. 59, § 41 had not been met and that therefore RCN was barred from prosecuting appeals under G.L. c. 59, § 39. The Commissioner argued that the signed Forms 5941 filed by RCN did not provide the total cost of the acquisition and commissioning of RCN's

§ 39 Property at the time of its installation as part of the telecommunications system; rather, in disregard of the instructions, the forms reported the cost allocated to the property as a consequence of an acquisition transaction that closed on August 26, 2010. The Commissioner further maintained that properties were omitted or misidentified which, together with the failure to provide original costs and dates of installation on the signed Forms 5941, caused the filings to be materially false. Finally, in the view of the Commissioner, a version of Forms 5941 filed for each of the fiscal years at issue including data based on the Form 5941 filed by RCN's predecessor for fiscal year 2011 did not bear the signature of the treasurer of RCN, and hence was invalid as a G.L. c. 59, § 41 return. In these appeals, the Commissioner declined to characterize the unsigned forms as returns, or as a supplement to or revision of a prior valid return.

The Board found and ruled that the signed Forms 5941 filed by RCN for each of the fiscal years at issue, as supplemented by the unsigned forms filed for those years, were valid returns, and that the omissions and misidentifications noted by the Commissioner did not evidence an intentional presentation of false information by RCN. The Board found no evidence that those forms were not filed in good faith. See *Trustees of Thayer Academy v. Assessors of Braintree*, 232 Mass. 402, 407 (1919) (finding "appellant's failure of exact compliance with the provisions of the statute was not

willful"); see also *Assessors of Quincy v. Boston Consolidated Gas Company*, 309 Mass. 60, 69-70 (1941) (the inaccuracies in a list of taxable property filed by the company with the assessors "did not render invalid the list which was submitted in good faith by the taxpayer").

The signed versions of Forms 5941 filed by RCN for each of the fiscal years at issue reflected its clearly explained position that the forms called for the original cost to RCN of its \$ 39 Property on the date it acquired the property in an arm's-length transaction. RCN reported two amounts to the Commissioner on these signed forms. The first was based on an allocation prepared for Public Parent by Ernst & Young of the total cash price that a newly formed entity paid for the Cable Business (including RCN) owned by Public Parent. The assets among which that price was allocated included the tangible assets servicing the Boston cable market, which after the acquisition were owned by RCN. The second ("alternate") value reported for RCN's \$ 39 Property was based on the cash amount that RCN paid to its predecessor, RCN-BecoCom, Inc., to acquire the tangible assets of the Boston cable market owned by RCN-BecoCom, Inc. as part of the Closing of the acquisition transaction.

After having received follow-up requests from the Commissioner's BLA in March and April of 2011 for data reflecting the original cost and installation dates of its \$ 39 Property in

the hands of its predecessor, RCN provided the information on a separate unsigned fiscal year 2012 Form 5941, based on information previously filed by its predecessor. RCN continued to provide this information in the same manner for the next two fiscal years at issue. The Board found that RCN's failure specifically to affirm that this information was "true, correct and complete to the best of [the treasurer's] knowledge and belief" could not be interpreted to mean, as suggested by the Commissioner, that RCN did not "take [its] filing obligation seriously and make every good faith effort to provide the Commissioner with the information required in [each] return."

Taken together, all of RCN's Form 5941 filings for the fiscal years at issue, including the supplemental information, contained the information needed by the Commissioner to enable him to make the valuations required by G.L. c. 59, § 39. Pursuant to G.L. c. 59, § 41, the Commissioner had the right after review of the signed returns to require them to be supplemented, which he did; the statute did not allow him simply to reject them. See **MCI** at 2008-341 ("[I]n conjunction with his power to audit, the Commissioner cannot reject or send back returns filed by telephone companies under [G.L.] c. 59, § 41. The Commissioner must accept all returns filed under the telephone company central valuation provisions, and, if after inspection, review, or audit, he determines that they are inadequate in any way, he can order that

they be amended, supplemented, or otherwise augmented."). The addition of G.L. c. 59, 42A, effective July 27, 2010, expressly giving the Commissioner audit powers, did not derogate from the Commissioner's right to do so.

Any deficiencies in the Forms 5941 filed by RCN for the fiscal years at issue were not fatal to the Board's jurisdiction over these appeals. See *Great Barrington v. County Commissioners*, 112 Mass. 218, 223 (1873) ("[T]he right to an abatement is not defeated by mere inaccuracy in the list [of personal property] filed").

VALUATION

I. Statutory Background

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

assessors then assess the applicable tax based on the Commissioner's certified central valuation. G.L. c. 59, §§ 39-42.

The poles, wires, and underground conduits of telephone companies were not subject to local taxation prior to 1902. See Report of the Tax Commissioner for the year ending November 30, 1914, Pub. Doc. No. 16, pages 27-30. Instead, telephone companies were taxed by the Commonwealth on the value of their corporate franchises. The Commonwealth distributed the tax paid by the telephone companies to the various municipalities on the basis of the residence of the companies' shareholders. Consequently, municipalities did not receive benefits based on the location of the telephone companies' personal property. This anomaly caused many municipalities with a considerable amount of telephone property, but few resident shareholders, to complain. Those complaints were answered by the passage of Chapter 342 of the Acts of 1902.

The 1902 legislation provided that the poles, wires, and underground conduits of telephone companies should be taxed by the municipalities where the property was located. It was not long, however, before the infirmities inherent in this approach surfaced. In essence, state-wide telephone company property was subjected to almost as many different valuation standards, methodologies, and avenues of redress as there were municipalities determining values. Recognizing the need to incorporate

consistency and uniformity into the property's valuation, as well as some level of convenience for telephone companies seeking redress from assessments, the Legislature enacted G.L. c. 59, §§ 39-42 in 1915.³³ See *Commissioner of Corporations and Taxation v. Assessors of Springfield*, 330 Mass. 433, 436 (1953); *Assessors of Springfield v. New England Telephone & Telegraph Company*, 330 Mass. 198, 202 (1953).

The 1915 legislation provided for the central valuation of telephone companies' "poles and wires and underground conduits, wires and pipes." The statute was later amended to add machinery.³⁴ Currently, the Commissioner determines the value of the taxable "machinery, poles, wires and underground conduits, wires and pipes of all telephone . . . companies" on a municipality-by-municipality basis and certifies those values to the appropriate boards of assessors. Non-corporate telephone entities, such as RCN, are subject to tax on the value of all of their machinery, whether or not used in manufacture. *RCN Beco-Com, LLC*, 443 Mass. at 209.

II. Standard of Review

Every owner of § 39 property and the boards of assessors to whom the Commissioner certifies § 39 property values have the right to appeal those valuations to this Board. "In every such appeal,

³³ St. 1915, c. 137.

³⁴ St. 1918, c. 138.

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" (G.L. c. 59, § 39).

In discussing the Board's adjudicatory role for reviewing the Commissioner's valuation of state-owned land under a different statutory provision (G.L. c. 58, §§ 13-14), the Supreme Judicial Court observed, in dicta, that:

ordinarily an "appeal" to the Appellate Tax Board results in a trial of all the issues raised by the petition and the answer. . . . In some cases, however, the Legislature has provided that the board should perform a more traditional appellate function, rather than make a de novo determination of value. In such cases, the board's inquiry is limited, at least initially, to determining whether the valuation of the Commissioner was proper. For example, G.L. c. 59, Section 39, . . . which deals with the valuation of the poles, wires, pipes, and the machinery belonging to telephone and telegraph companies, provides that in an appeal from the Commissioner's determination of value for that property, "the appellant shall have the burden of proving that the value of the [property] is substantially higher or substantially lower," than the Commissioner's determination. Only if the taxpayer has met that burden does the board undertake an independent valuation of the property.

Board of Assessors of Sandwich v. Commissioner of Revenue, 393

Mass. 580, 586 (1984). See also ***MCI*** at 2008-274-75. On appeal of this Board's decision in ***MCI***, the Supreme Judicial Court expressly held that:

[t]he appellant has the burden of proving that the value of the 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 board is not empowered to substitute its own valuation of the § 39 property.

MCI WorldCom Network Services, 454 Mass. at 644, 646; see **Verizon New England** at 2009-972-973.

Accordingly, in these appeals RCN was required to establish that the fair cash value of its § 39 Property in each of the Municipalities was "substantially lower" than the values certified by the Commissioner for each of the fiscal years at issue, the appealing Municipalities having rested on the presumed validity of the Commissioner's certified values.

Because the relevant statutory sections provide: (i) no definition of what is "substantially higher or substantially lower"; and (ii) no direction for measuring or interpreting these terms, the Board looks to the "common and approved usage" of the term "substantially." See G.L. c. 4, § 6, ¶ Third (stating that "[w]ords and phrases shall be construed according to the common and approved usage of the language"); **Town of Boylston v. Commissioner of Revenue**, 434 Mass. 398, 405 (2001) ("[A] term should be given its plain and ordinary meaning, unless a contrary legislative intent is demonstrated [and we] usually determine the 'plain and ordinary meaning' of a term by its dictionary definition."). According to THE AMERICAN HERITAGE DICTIONARY (4th ed.

2006, at 1727 and 392), "substantial" means "considerable in importance, value, degree, amount, or extent," while "considerable" in turn means "large in amount, extent, or degree." Similarly, according to MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2007, at 1245 and 266), "substantial" means "considerable in quantity," while "considerable" in turn means "large in extent or degree." BLACK'S LAW DICTIONARY (10th ed. 2014, at 1656), defines "substantial" as being "of real worth and importance" and "considerable in amount or value." Finally, BOUVIER'S LAW DICTIONARY (Rawle's Third Revision, Vol. II, 1914, at 3173) does not contain a definition for "substantially" or "substantial," but does define "substantial damages" as being "damages . . . worth having, as opposed to nominal damages." See **Verizon New England** at 2009-973; **MCI** at 2008-277.

Taking into consideration all the relevant facts and circumstances and the foregoing definitions, the Board determined that in order to establish that the fair cash value of \$ 39 property is "substantially higher or substantially lower" than the value certified by the Commissioner within the meaning of G.L. c. 59, § 39, it must be demonstrated that the difference is a considerable or large value, and not a mere trifle or nominal amount. **Verizon New England** at 2009-973; **MCI** at 2008-277-78.

III. General Valuation Principles

The statute requires assessors 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)). Under G.L. c. 59, § 39, a person challenging the Commissioner's valuation of telephone company special-purpose property has the burden of proof even if the property poses unusual

problems of valuation. **Verizon New England** at 2009-972; **MCI** at 2008-374-375; 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).

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). Although the two preferred methods are the income capitalization and sales comparison methods, they "may be unavailing 'where the special character of the property makes it substantially impossible to arrive at value on the basis of capitalized net earnings or on the basis of comparable sales.'" **MCI WorldCom Network Services**, 454 Mass. at 638.

The sales-comparison approach has been found to be virtually impossible to implement when there are effectively no reliable or comparable sales of the utility property being valued. See **Montaup Electric Co.**, 390 Mass. at 850. While actual sales of "a particular property" are strong evidence of fair market value (**First National Stores, Inc. v. Assessors of Somerville**, 358 Mass. 554, 560 (1971)), sales of telecommunications property "almost always involve entire business entities or such portions of them that the actual value of the \$ 39 property . . . is extremely

difficult to discern." *Verizon New England* at 2009-975. See also the *Mayflower Liberty Tree, L.L.C., Northshore Mall Limited Partnership*, and *PAC Realty Trust* decisions discussed *infra*.

Income-capitalization methods, including the discounted-cash-flow method, have also been found to be unreliable methods for valuing utility property. See *Verizon New England* at 2009-974; *MCI* at 2008-375; see also *Boston Edison Co. v. Assessors of Everett*, Mass. ATB Findings of Fact and Reports 1996-759, 845; *Boston Edison Co. v. Assessors of Boston*, 402 Mass. 1, 17 (1987). These approaches have been rejected for valuing utility property because they generally use "income streams which are unrealistic interpretations and predictions of the existing and future regulatory environment." *Assessors of Everett*, Mass. ATB Findings of Fact and Reports at 1996-845; cf. *Iantosca v. Assessors of Weymouth*, Mass. ATB Findings of Fact and Reports 2008-929, 952 ("The discounted-cash-flow-analysis has never been relied upon by the Board as a primary valuation methodology.").

The cost approach, based on depreciated reproduction cost ("DRC"), has been recognized as the more appropriate method for valuing special purpose property like § 39 property. See *MCI* at 2008-376; *Boston Edison Co. v. Assessors of Watertown*, 387 Mass. 298, 301, 304 (1982). A property's DRC is the current cost of reproducing it, less depreciation from deterioration and

functional and economic obsolescence. See **MCI WorldCom Network Services**, 454 Mass. at 638-39.

IV. The Commissioner's Valid Methodology

The Commissioner arrived at the value of RCN's § 39 Property for the fiscal years at issue using a modified reproduction cost new method, a method which this Board has found to be "objective, transparent, and consistent." See **MCI WorldCom Network Services**, 454 Mass. at 644.

The Board found that the Commissioner's "trended reproduction cost new less depreciation" methodology used to value RCN's § 39 Property was a proper approach and furthered the important Legislative purpose behind G.L. c. 59, § 39 of providing a standardized statewide valuation system for telephone companies that promotes uniformity, equality, and fairness in the valuation of § 39 property in the various municipalities in which the property was located. See **Verizon New England** at 2009-930; **MCI** at 2008-311-12. The Commissioner's valuation methodology was based on objective information that was capable of being, and was, categorized by property type, and used readily available, verifiable, and complementary indices. **Id.** The methodology was capable of being, and was, updated by the Commissioner annually, thereby assuring that the values of § 39 property for the fiscal year at issue were based on timely data. **Id.** Under the Commissioner's methodology, accounting concepts were not germane

because the concept of central valuation requires that all companies report an original cost that has a common basis. See **MCI** at 2008-313.

The specific flaws alleged by RCN did not derogate from the validity of the Commissioner's methodology.

V. RCN'S Failure to Establish a Substantially Lower Value

The Board further found and ruled that RCN had not established that the fair cash value of its \$ 39 Property in each of the Municipalities was "substantially lower" than the value certified by the Commissioner for each of the fiscal years at issue. RCN sought to establish a substantially lower value for its \$ 39 Property on the basis of the 2010 Acquisition Transaction, an opinion of value, and the American Appraisal Report.

A. The 2010 Acquisition Transaction

RCN argued that it acquired its \$ 39 Property in 2010 as part of an arm's-length transaction (the 2010 Acquisition Transaction), and that hence the original cost of its \$ 39 Property for *ad valorem* property tax purposes was the purchase price, an amount substantially lower than the value certified by the Commissioner.

In the 2010 Acquisition Transaction, which was described in an Agreement and Plan of Merger dated March 5, 2010 and which closed over five months later, publicly traded RCN Corporation (Public Parent) sold its Cable Business, including RCN, to a newly formed entity for cash consideration of \$757 million and then,

pursuant to a cash merger, transferred its remaining Metro Business to a corporation formed to acquire the assets of that business. The total cash consideration that Public Parent received in these steps (approximately \$1.25 billion) was used first to satisfy liabilities, and the balance was distributed to Public Parent's shareholders who realized \$15 per share for their stock. The sponsor of the acquisition transaction was ABRY Partners, LLC.

RCN offered testimony in an effort to show that (i) the 2010 sale and merger transactions were based on arm's-length and fairly negotiated terms; (ii) the \$757 million price that Public Parent received for the Cable Business, including the Boston cable market, was reflective of its enterprise value; (iii) the fair value of the Boston cable market was \$57 million; and (iv) the value of the \$ 39 Property acquired by RCN ranged, for fiscal year 2012, from \$25,443,418 to something more than, but less than, \$57 million, RCN having bought all of the tangible assets of Public Parent's Boston cable business for \$31,581,200 from another entity indirectly owned by Public Parent in connection with the 2010 Acquisition Transaction.

The Board found that RCN's valuation methodology was dependent upon an allocation of the total consideration that Public Parent received for both its Cable Business and its Metro Business. The Board has historically found such an approach to valuation not to be probative of value because the price allocated to a

particular part of an acquired business may be set (or agreed to) for reasons other than its value. See **Mayflower Liberty Tree, L.L.C. v. Assessors of Danvers**, Mass. ATB Findings of Fact and Reports 2005-291, 327, where "[t]he Board recognized that the portfolio sale did not provide a reliable basis for demonstrating the fair cash value of the subject property for the fiscal year at issue." A number of factors detracted from its reliability, including - (i) the sale of the subject property was only a part of the sale of a mall as a whole; (ii) the sale of the mall was part of a portfolio transaction which included a number of other leased-fee mall properties; and (iii) the sale price recited for the mall was apparently a one-sided accounting allocation. See also **Northshore Mall Limited Partnership, et al. v. Assessors of Peabody**, Mass. ATB Findings of Fact and Reports 2004-195, 248, affirmed per Rule 1:28, 63 Mass. App. Ct. 1116 (2005) (noting no reliance by valuation expert on the sale price for mall where sale was part of a portfolio sale, recited price for mall was apparently a one-sided accounting allocation, and sale of the subject property was an undelineated part of mall as a whole); **PAC Realty Trust v. Assessors of New Bedford**, Mass. ATB Findings of Fact and Reports 2001-97, 104 (sale price resulting from an allocation recommended by buyer's mortgagee not necessarily representative of property's fair cash value); **Foxboro Associates**, 385 Mass. at 682 (consideration shown on a deed given as part of the sale of an

entire racing business found by the Board to be "unilaterally determined by the seller;" expert's opinion of value based on the sale therefore given no weight).

A purchase price allocation methodology is inconsistent with the long-recognized approach to the central valuation of a taxpayer's § 39 property for *ad valorem* property tax purposes. In ***Community Cablevision of Framingham v. Assessors of Framingham***, Mass. ATB Findings of Fact and Reports 1987-180, 184-87, this Board rejected an attempt to value the personal property of a cable television business by valuing the business as a whole and subtracting the value of intangibles and certain exempt assets, noting that the method "disregards the statutory scheme of valuing personal property according to the items listed on a Form of List to be submitted by the taxpayer or in the case no Form of List is filed, by the particulars of the taxpayer's personal estate as ascertained by the assessors." See ***MCI*** at 2008-259, note 7 and accompanying text (finding that a "valuation methodology [using business valuation techniques] was not a recognized approach for valuing telephone companies' personal property for *ad valorem* tax purposes").

In the instant case, the Board was asked to start with the total consideration paid to Public Parent in the 2010 Acquisition Transaction (approximately \$1.25 billion) and then recognize: (i) the attribution of \$757 million of that amount to the Cable

Business; (ii) the further allocation to RCN of some portion of the price paid for the Cable Business (with RCN's share determined to be \$57 million); (iii) an allocation of the price so allocated to RCN between its \$ 39 Property and its other assets, both tangible and intangible; and (iv) a final allocation of the amount allocated to RCN's \$ 39 Property among the Municipalities. No specific testimony was presented on how RCN allocated its \$ 39 Property values among the various Municipalities.

Starting with the first step in its analysis, RCN argued that the price that the buying entity paid for the Cable Business (\$757 million out of total consideration of approximately \$1.25 billion) was an arm's-length amount paid in a separate purchase transaction. The Board found, however, that RCN had not established that the amount attributed to the Cable Business represented its fair cash value determined in an arm's-length manner by a willing buyer and a willing seller. See ***Epstein v. Boston Housing Authority***, 317 Mass. 297, 300 (1944) ("[T]he burden of proof that the price was fixed by fair bargaining or bidding, and not by some form of compulsion preventing the normal operation of the self interest of buyer and seller, is on the party offering the price as evidence of value.").

The evidence indicated a single transaction with an allocated (not a negotiated) acquisition price paid for each of the two businesses acquired by a single buyer through two newly formed

entities. Among other relevant factors: (i) RCN's Cable Rating Agency Presentation of April 2010 stated that the acquisition strategy of the buyer, ABRY Partners, LLC, was to capitalize and operate the acquired Cable and Metro Businesses discretely; (ii) Ernst & Young was engaged, after the closing of the transaction, to prepare a valuation analysis of certain Cable and Metro Business assets of "RCN Corporation . . . that were acquired by ABRY Partners LLC (ABRY) as a result of" the 2010 Acquisition Transaction; and (iii) even the appraisal report introduced into evidence by RCN referred to ABRY Partners, LLC as the entity that acquired Public Parent in a two-part transaction.

The Board inferred from the evidence that the sponsor of the 2010 Acquisition Transaction, ARBY Partners, LLC, essentially determined the price to be paid for the Cable Business and for the Metro Business. According to two Memoranda prepared in connection with the solicitation of debt financing for the transaction, ABRY Partners, LLC "assigned a total enterprise valuation of \$771.4 million" to the Cable Business and "a total enterprise valuation of \$496 million" to the Metro Business. Further, the "Purchase Price Calculation" introduced into evidence showed an "RCN Value Allocation" of approximately \$754 million to the Cable Business and of \$496 million to the Metro Business. No compelling evidence was presented to allow the Board to treat the allocation of the total acquisition price between the Cable Business and the

Metro Business as reliable. The Proxy Statement indicating Deutsche Bank's estimated enterprise value ranges for both the Cable Business and the Metro Business, and opinions of value of officers of Public Parent based in part on withdrawn offers for portions of Public Parent's business, did not evidence the reliability of the purchase price allocation.

Indeed, the price paid for the Cable Business was not separately negotiated by two independent parties on an arm's-length basis. The evidence supports the conclusion that the ultimate price to be paid for the Cable Business was controlled by two related entities formed by the sponsor of the 2010 Acquisition Transaction to acquire Public Parent. The price for the Cable Business set forth in the Agreement and Plan of Merger was subject to adjustment only if the Cable Business buyer and the parent of the corporation which was to acquire the Metro Business (both formed by ABRY Partners, LLC) agreed.

In fact, both acquiring entities were related to one another. Over 50% of the ownership interests in the ultimate parents of the buyer of the Cable Business and the corporation that acquired the Metro Business were held by the same persons in the same percentages, the largest identical percentage being owned by ABRY VI, an entity affiliated with the sponsor of the transaction. ABRY VI was stated to be the majority owner of both ultimate parents in the 2010, 2011 and 2012 consolidated financial

statements prepared for the ultimate parent of the Cable Business buyer. Also, the lenders that provided debt financing for the 2010 Acquisition Transaction required ABRY VI, together with its affiliates and co-investors, to own and control (directly or indirectly) at least 51% of each class of each Direct Parent's outstanding equity. One of these lenders was the sponsor of the transaction, ABRY Partners, LLC.

RCN's efforts to establish the arm's-length value of each of the six acquired Cable Business markets were likewise without merit. RCN observed that, shortly before the Closing, third parties had offered to buy the Pennsylvania and Chicago cable businesses for \$390 million and approximately \$230 million, respectively, which Ernst & Young valued at \$345 million and \$240 million, respectively. RCN maintained that, based on Ernst & Young's total value of \$585 million for the Pennsylvania and Chicago cable business markets, only \$172 million remained to be allocated among the Boston cable market business owned by RCN, and the New York and District of Columbia markets. The Chief Financial officer of Public Parent (Mr. Sicoli) testified that, assuming that to be the case, the Commissioner's fiscal year 2012 value of \$154 million for RCN's S 39 Property was "way too high." The Vice President of Tax for RCN cable companies (Mr. O'Day) testified that, if the Commissioner's value for RCN's S 39 Property were correct, that would have left "an extremely low number" to be

allocated among the New York and District of Columbia locations and Boston's non-centrally valued assets. RCN maintained that, in fact, the Boston cable market was worth no more than \$57 million, the amount determined by Ernst & Young and an amount which was reflected in the stated opening book value (approximately \$53 million) of RCN's fixed assets for financial and federal and state income tax purposes.

The Board found, however, the offers made by two third parties to buy the Pennsylvania and Chicago cable market businesses of Public Parent shortly before the 2010 Acquisition Transaction were not evidence of their fair cash value. Both offers were withdrawn, and in one case the offered price was reduced after due diligence. Similarly, RCN's opening book entry for its fixed assets used for financial and federal and state income tax purposes was not probative of their value, being based on an allocation by Ernst & Young to RCN of \$57 million of the \$757 million amount paid for the entire Cable Business.

Finally, RCN sought to support the amount that it acknowledged in its initial fiscal year 2012 Form 5941 filings had been "allocated" to its tangible assets and its \$ 39 Property, by pointing out that it actually paid \$31,351,200 for its tangible assets at the Closing of the 2010 Acquisition Transaction, of which \$25,443,418 had been determined to be allocable to its \$ 39 Property. The Board found, however, that the approximately

\$31 million that RCN paid in connection with the Closing of the 2010 Acquisition Transaction for its tangible property could not be characterized as arm's-length consideration under the circumstances. The seller and the buyer, both being indirectly owned by Public Parent when the sale was agreed upon, were not unrelated. Therefore, the Board gave no probative weight to the \$31 million purchase price.

In short, RCN did not establish that, based on the 2010 Acquisition Transaction, the fair cash value of its \$ 39 Property was substantially lower than the value certified by the Commissioner.

B. Mr. Sicoli's Opinion of Value

In further support of its position that the fair cash value of its \$ 39 Property was substantially lower than the value certified by the Commissioner, RCN pointed to the opinion of the Chief Financial Officer of Public Parent (Mr. Sicoli) that a value of \$57 million was reasonable for the Boston cable market. RCN asserted that Mr. Sicoli's thorough understanding and knowledge of Public Parent's Boston cable market and its value, and his extensive expertise in buying and selling telecommunications property, qualified him to give this opinion of value.

Since Mr. Sicoli was not the owner of the subject property and had not been qualified as an expert valuation witness, the Board found that he was not qualified as such to express an opinion

regarding the property's value. See **Meyer v. Adams Express Co.**, 240 Mass. 94 (1921). The Board further found that even assuming that, as an officer of Public Parent, Mr. Sicoli possessed knowledge of and familiarity with the subject property, the opinion of value he offered was unsupported by a recognized valuation methodology and did not provide probative evidence of value. See **Salem Traders Way Realty LLC v. Assessors of Salem**, Mass. ATB Findings of Fact and Reports 2007-236, 246.

C. American Appraisal Report

Finally, to establish that the fair cash value of its \$ 39 Property was substantially lower than the value certified by the Commissioner, RCN introduced into evidence the American Appraisal Report prepared by Mr. Reilly, which the Board also found not to be probative of value. First, Mr. Reilly relied upon income valuation methods (discounted cash flow and direct capitalization) which, as discussed previously, the Board has found to be unreliable for purposes of valuing utility property. **Verizon New England** at 2009-974; **MCI** at 2008-375; see also **Assessors of Everett**, Mass. ATB Findings of Fact and Reports at 1996-845; **Assessors of Boston**, 402 Mass. at 17; cf. **Iantosca**, Mass. ATB Findings of Fact and Reports at 2008-952. Moreover, under both income valuation approaches, Mr. Reilly determined the value of the business as a whole and subtracted the value of intangibles, an approach that has been rejected by this Board because of the

assumptions necessary to value and deduct business intangibles. See **Community Cablevision**, Mass. ATB Findings of Fact and Reports at 1987-184-86 ("The difficulty of valuing intangibles for local taxation was one of the reasons for transferring them from local property taxation to state-wide excise taxation."). Other aspects of the income valuations were flawed as well, including the debt-to-equity ratio used in the determination of the discount rate and the expensing of corporate-rate income taxes for a limited liability company which itself was not subject to taxation.

Secondly, Mr. Reilly rejected the cost valuation method, notwithstanding that the reproduction cost new method has been determined by this Board and the Supreme Judicial Court to be a valid approach to the valuation of telephone company property. See **MCI WorldCom Network Services**, 454 Mass. at 644; **MCI** at 2008-376; **Assessors of Watertown**, 387 Mass. at 304.

Third, Mr. Reilly rejected a sales comparison approach based on separate outside sales, relying instead on the consideration paid in the 2010 Acquisition Transaction that had been allocated to RCN's acquired fixed assets for financial and federal and state income tax purposes. He found his sales approach to be deserving of the most weight. The Board found this approach not to be probative of the fair cash value of RCN's \$ 39 Property. First, it relied upon an accounting entry, an approach that this Board has found not to be germane to *ad valorem* property tax assessment

because the concept of central valuation requires that all companies report an original cost that has a common basis. **MCI** at 2008-312-313; see **Mayflower Liberty Tree**, Mass. ATB Findings of Fact and Reports at 2005-326; **Northshore Mall**, Mass. ATB Findings of Fact and Reports at 2004-248. Further, in addition to arriving at a value derived from that portion of the amount that Public Parent received for its Cable Business that Ernst & Young allocated to the Boston cable market, the American Appraisal Report failed to value RCN's tangible assets at January 1 of each of the fiscal years at issue, relying instead on a questionable application of trending indices to update the acquisition date value of the property, without addressing new property additions in his report.

Moreover, Mr. Reilly offered no independent support for his attribution of a portion of the value he determined for RCN's tangible assets first to all of RCN's § 39 Property and then to its § 39 Property located in each of the Municipalities. His allocations were based upon ratios developed from information reported by RCN to the Commissioner and local cities and towns for property tax purposes. Mr. Reilly did not undertake an independent review of RCN's reported numbers.

CONCLUSION

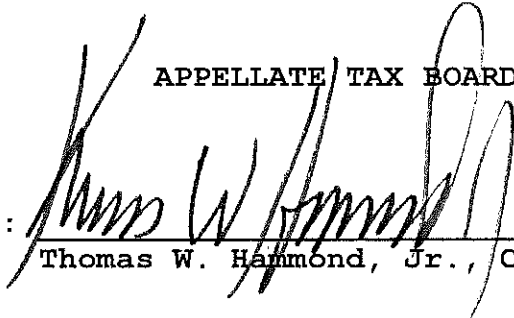
The Board found and ruled that it had jurisdiction to hear and decide these appeals, and that RCN had not established that

the fair cash value of its § 39 Property in each of the Municipalities was "substantially lower" than the value certified by the Commissioner for each of the fiscal years at issue.

On this basis, the Board issued decisions (1) for the Commissioner and the Municipalities in the RCN appellant appeals for the fiscal years at issue, and (2) for RCN and the Commissioner in the RCN/Commissioner appellee appeals for the fiscal years at issue.

APPELLATE TAX BOARD

By:


Thomas W. Hammond, Jr., Chairman

A true copy,

Attest:


Clerk of the Board

APPENDIX A

I.
Appeals filed by RCN BecoCom LLC

<u>RCN BecoCom LLC v. Commissioner of Revenue and Various Cities and Towns</u>			
<u>City or Town</u>	<u>FY 2012</u>	<u>FY 2013</u>	<u>FY 2014</u>
Arlington	C312499	C315860	C319523
Boston	C312500	C315861	C319524
Brookline	C312501	C315862	C319525
Burlington	C312502	C315863	C319526
Dedham	C312503	C315864	C319527
Framingham	C312504	C315865	C319528
Lexington	C312505	C315866	C319529
Milton	C312507	C315867	C319530
Natick	C312508	C315868	C319531
Needham	C312509	C315869	C319532
Newton	C312510	C315870	C319533
Norwood	--	C315871	C319534
Somerville	C312511	C315872	C319535
Stoneham	C312512	C315873	C319536
Wakefield	C312513	C315874	C319537
Waltham	C312514	C315875	C319538
Watertown	C312515	C315876	C319539
Woburn	C312516	C315877	C319540

II.
Appeals filed by Cities and Towns

<u>Board of Assessors v. Commissioner of Revenue and RCN BecoCom LLC</u>			
<u>City or Town</u>	<u>FY 2012</u>	<u>FY 2013</u>	<u>FY 2014</u>
Boston	C312268	C316729	C319906
Brookline	C312248	C316714	C319898
Burlington	--	C316744	--
Lexington	--	C316717	--
Newton	C312257	C316751	C319903

APPENDIX B

Value of RCN BecoCom LLC's § 39 Property by City or Town
as determined by the Commissioner

<u>City or Town</u>	<u>January 1, 2011</u> <u>FY 2012</u>	<u>January 1, 2012</u> <u>FY 2013</u>	<u>January 1, 2013</u> <u>FY 2014</u>
Arlington	\$ 7,566,700	\$ 7,781,000	\$ 8,607,200
Bedford	900	2,000	2,100
Boston	48,444,900	52,475,900	63,890,800
Brookline	16,014,600	16,635,300	17,681,800
Burlington	5,683,100	5,854,700	6,224,300
Dedham	5,065,300	5,227,900	5,541,600
Framingham	14,607,100	15,610,100	16,525,600
Lexington	8,839,400	9,165,900	9,662,600
Marlborough	39,900	41,900	44,400
Milton	1,228,600	1,272,200	1,351,200
Natick	3,134,200	3,192,100	3,372,600
Needham	4,118,800	4,210,600	4,446,900
Newton	8,994,400	9,259,900	9,920,200
Norwood *	131,500	122,700	127,400
Somerville	7,753,400	8,062,100	9,164,900
Springfield **	--	--	--
Stoneham	1,350,200	1,406,400	1,520,200
Wakefield	2,898,800	2,964,200	3,243,900
Waltham	8,176,800	8,411,000	9,043,200
Watertown	6,120,900	6,330,700	6,798,700
Westwood	59,700	63,200	69,600
Woburn	4,599,700	4,695,600	4,945,300
TOTAL	\$154,828,900	\$ 162,785,400	\$ 182,184,500

* RCN sought abatements from Norwood for fiscal years 2013 and 2014.

** RCN's Forms 5941 for the fiscal years at issue reported some property in Springfield.

APPENDIX C

Value of RCN BecoCom LLC's \$ 39 Property by City or Town
as Reported on its "First" Forms 5941 for FYs 2012, 2013, and 2014

<u>City or Town</u>	<u>January 1, 2011 FY 2012</u>	<u>January 1, 2012 FY 2013</u>	<u>January 1, 2013 FY 2014</u>
Arlington	\$ 1,400,879	\$ 1,404,613	\$ 1,803,634
Boston	12,678,477	15,922,190	24,684,716
Brookline	5,526,992	5,541,092	5,591,074
Burlington	1,357,674	1,367,634	1,382,384
Dedham	1,716,709	1,716,709	1,721,898
Framingham	3,750,037	4,491,593	4,552,205
Lexington	2,208,027	2,287,389	2,243,960
Milton	249,500	249,500	249,500
Natick	642,493	642,493	672,478
Needham	979,729	983,622	1,006,530
Newton	1,882,307	1,884,234	2,030,022
Norwood	--	--	--
Somerville	1,624,462	1,624,462	2,270,024
Stoneham	479,520	479,520	502,820
Wakefield	713,125	720,999	866,138
Waltham	1,663,300	1,697,683	1,872,749
Watertown	1,465,282	1,468,318	1,553,009
Woburn	1,024,008	1,029,443	1,048,370
	\$39,362,521	\$43,511,494	\$54,051,511
Less: Rounding			(5)
SUBTOTAL			\$54,051,506
 <u>Non-Appellees</u>			
Bedford **	--	1,200	1,200
Marlborough *	3,336	3,336	3,336
Springfield	1,235	1,235	1,235
Westwood *	7,213	7,213	7,213
TOTAL	\$39,374,305	\$43,524,478	\$54,064,490

* RCN stated in its briefs that it owned no property in Marlborough and Westwood during the fiscal years at issue.

** RCN stated in its briefs that it did not report any property in Bedford on its signed Forms 5941 for the fiscal years at issue. The Board observes that assets located in Bedford were reported on its signed Forms 5941 for fiscal years 2013 and 2014. Also, RCN's unsigned Forms 5941 for the fiscal years at issue listed digital circuit equipment and digital electronic switching located in Bedford, which were not shown on the previous owner's fiscal year 2011 Form 5941.

APPENDIX D

American Appraisal Report's Allocation of Value
of RCN BecoCom LLC's \$ 39 Property to Cities and Towns

<u>City or Town</u>	<u>January 1, 2011</u> <u>FY 2012</u>	<u>January 1, 2012</u> <u>FY 2013</u>	<u>January 1, 2013</u> <u>FY 2014</u>
Arlington	\$ 1,662,605	\$ 1,435,772	\$ 1,514,046
Boston	15,059,715	16,287,408	20,731,247
Brookline	6,559,599	5,664,012	4,693,380
Burlington	1,611,328	1,397,973	1,160,431
Dedham	2,037,441	1,754,792	1,445,433
Framingham	4,450,656	4,591,232	3,821,311
Lexington	2,620,552	2,338,131	1,883,674
Milton	296,114	255,035	209,441
Natick	762,530	656,746	564,506
Needham	1,162,772	1,005,442	844,924
Newton	2,233,978	1,926,033	1,704,086
Norwood	---	--	---
Somerville	1,927,960	1,660,498	1,905,553
Stoneham	569,109	490,157	422,088
Wakefield	846,358	736,993	727,072
Waltham	1,974,054	1,735,344	1,572,064
Watertown	1,739,040	1,500,890	1,303,661
Woburn	1,215,323	1,052,280	880,046
SUBTOTAL	\$ 46,729,134	\$44,488,738	\$45,382,963
 <i>Springfield</i> <i>[Not an</i> <i>Appellee]</i>	 <i>1,466</i>	 <i>1,262</i>	 <i>1,037</i>
TOTAL	\$ 46,730,600	\$44,490,000	\$45,384,000

APPENDIX E

Fiscal Year 2012 (January 1, 2011)

Value of RCN BecoCom LLC's § 39 Property by City or Town
from "First" Forms 5941, American Appraisal Report, and the Commissioner's Valuation

<u>City or Town *</u>	<u>From "First"</u> <u>Form 5941</u>	<u>From American</u> <u>Appraisal Report</u>	<u>Commissioner's</u> <u>Value</u>
Arlington	\$ 1,400,879	\$ 1,662,605	\$ 7,566,700
Boston	12,678,477	15,059,715	48,444,900
Brookline	5,526,992	6,559,599	16,014,600
Burlington	1,357,674	1,611,328	5,683,100
Dedham	1,716,709	2,037,441	5,065,300
Framingham	3,750,037	4,450,656	14,607,100
Lexington	2,208,027	2,620,552	8,839,400
Milton	249,500	296,114	1,228,600
Natick	642,493	762,530	3,134,200
Needham	979,729	1,162,772	4,118,800
Newton	1,882,307	2,233,978	8,994,400
Norwood	--	--	131,500
Somerville	1,624,462	1,927,960	7,753,400
Stoneham	479,520	569,109	1,350,200
Wakefield	713,125	846,358	2,898,800
Waltham	1,663,300	1,974,054	8,176,800
Watertown	1,465,282	1,739,040	6,120,900
Woburn	1,024,008	1,215,323	4,599,700
TOTAL	\$39,362,521	\$ 46,729,134	\$154,728,400

* Omits Bedford, Marlborough, Springfield, and Westwood.

APPENDIX F

Fiscal Year 2013 (January 1, 2012)

Value of RCN BecoCom LLC's § 39 Property by City or Town
from "First" Forms 5941, American Appraisal Report, and the Commissioner's Valuation

<u>City or Town *</u>	<u>From "First"</u> <u>Form 5941</u>	<u>From American</u> <u>Appraisal Report</u>	<u>Commissioner's</u> <u>Value</u>
Arlington	\$ 1,404,613	\$ 1,435,772	\$ 7,781,000
Boston	15,922,190	16,287,408	52,475,900
Brookline	5,541,092	5,664,012	16,635,300
Burlington	1,367,634	1,397,973	5,854,700
Dedham	1,716,709	1,754,792	5,227,900
Framingham	4,491,593	4,591,232	15,610,100
Lexington	2,287,389	2,338,131	9,165,900
Milton	249,500	255,035	1,272,200
Natick	642,493	656,746	3,192,100
Needham	983,622	1,005,442	4,210,600
Newton	1,884,234	1,926,033	9,259,900
Norwood	--	--	122,700
Somerville	1,624,462	1,660,498	8,062,100
Stoneham	479,520	490,157	1,406,400
Wakefield	720,999	736,993	2,964,200
Waltham	1,697,683	1,735,344	8,411,000
Watertown	1,468,318	1,500,890	6,330,700
Woburn	1,029,443	1,052,280	4,695,600
TOTAL	\$43,511,494	\$44,488,738	\$162,678,300

* Omits Bedford, Marlborough, Springfield, and Westwood.

APPENDIX G

Fiscal Year 2014 (January 1, 2013)

Value of RCN BecoCom LLC's § 39 Property by City or Town
from "First" Forms 5941, American Appraisal Report, and the Commissioner's Valuation

<u>City or Town *</u>	<u>From "First"</u> <u>Form 5941</u>	<u>From American</u> <u>Appraisal Report</u>	<u>Commissioner's</u> <u>Value</u>
Arlington	\$ 1,803,634	\$ 1,514,046	\$ 8,607,200
Boston	24,684,716	20,731,247	63,890,800
Brookline	5,591,074	4,693,380	17,681,800
Burlington	1,382,384	1,160,431	6,224,300
Dedham	1,721,898	1,445,433	5,541,600
Framingham	4,552,205	3,821,311	16,525,600
Lexington	2,243,960	1,883,674	9,662,600
Milton	249,500	209,441	1,351,200
Natick	672,478	564,506	3,372,600
Needham	1,006,530	844,924	4,446,900
Newton	2,030,022	1,704,086	9,920,200
Norwood	--	--	127,400
Somerville	2,270,024	1,905,553	9,164,900
Stoneham	502,820	422,088	1,520,200
Wakefield	866,138	727,072	3,243,900
Waltham	1,872,749	1,572,064	9,043,200
Watertown	1,553,009	1,303,661	6,798,700
Woburn	1,048,370	880,046	4,945,300
TOTAL	\$54,051,511	\$45,382,963	\$182,068,400

* Omits Bedford, Marlborough, Springfield, and Westwood.