

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

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BOARD OF TAX APPEALS
2007 OCT -1 PM 4:31

THE OHIO BELL TELEPHONE COMPANY, :

Appellee, :

v. :

WILLIAM W. WILKINS [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO, :

Appellant. :

07-1807

Case No. _____

Appeal from BTA Case
No. 2005-K-202

NOTICE OF APPEAL

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v.	:	
	:	Appeal from BTA Case
WILLIAM W. WILKINS [RICHARD A.	:	No. 2005-K-202
LEVIN], TAX COMMISSIONER OF OHIO,	:	
	:	
Appellant.	:	

NOTICE OF APPEAL

Richard A. Levin, Tax Commissioner of Ohio, successor to William W. Wilkins, hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio from a decision and order of the Ohio Board of Tax Appeals (“BTA”), journalized on August 31, 2007, in Case No. 2005-K-202 before the BTA. A true copy of the decision and order of the BTA being appealed from is attached hereto and incorporated herein by reference.

As set forth in R.C. 5727.11(A), the true value of taxable property of a telephone company’s taxable personal property “shall be determined by a method of valuation using cost as capitalized on the public utility’s [telephone company’s] books and records less composite annual allowances as prescribed by the commissioner [Tax Commissioner].” (Emphasis added.) Such methodology is often referred to for purposes of this Notice of Appeal as the “statutorily-mandated” methodology. As further set forth in R.C. 5727.11(A), the Tax Commissioner, however, “may use another method of valuation,” “if the commissioner finds that application of this method will not result in the determination of the true value of the public utility’s [telephone

company's] property.” (Emphasis added.) The Tax Commissioner’s determination either to apply the statutorily-mandated methodology or to depart from it is often referred to for purposes of this Notice of Appeal as the Commissioner’s “exercise of discretion.”

The errors in the decision and order of the BTA of which the Tax Commissioner (“Commissioner”) complains are as follows:

1. The BTA erred, as a matter of fact and law, in ordering the Commissioner to reduce the assessed valuation of the taxable personal property of Ohio Bell Telephone Company (“Ohio Bell”) for the 2003 tax year below the valuation that had been assessed by the Commissioner under application of the statutorily-mandated method for determining “true value” and which the Commissioner had affirmed pursuant to his final determination.
2. The BTA erred, as a matter of fact and law, in failing to apply the proper standard of judicial review of the Commissioner’s valuation of Ohio Bell’s taxable personal property set forth in R.C. 5727.11(A) and his affirmance of that valuation pursuant to his final determination. Under the proper standard of judicial review, Ohio Bell had the affirmative burden of establishing that the Commissioner abused his discretion in determining not to depart from the statutorily-mandated methodology for determining the true value of a telephone company’s taxable property set forth in that statute.
3. The BTA erred, as a matter of fact and law, in mischaracterizing the Commissioner’s position as to the plain meaning of R.C. 5727.11(A). Specifically, the BTA wrongly characterized that position as setting forth the statutorily-mandated method as the “exclusive” method for determining the valuation of a telephone company’s taxable personal property. Rather, the Commissioner’s position is that the Commissioner, in the

exercise of the discretion conferred upon him pursuant to R.C. 5727.11(A), may depart from the statutorily-mandated method if the Commissioner determines that such method does not reflect true value. Thus, the Commissioner's exercise of discretion in determining to apply or depart from the statutorily-mandated methodology is subject to an "abuse of discretion" standard of judicial review.

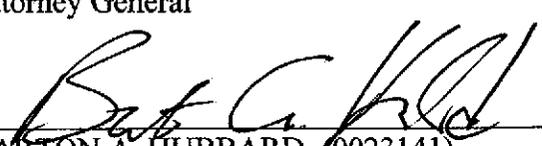
4. Alternatively, even if the Commissioner's valuation is not properly subject to the "abuse of discretion" standard set forth in the preceding paragraphs, the BTA erred, as a matter of fact and law, in failing to hold that Ohio Bell failed to meet an affirmative burden of (1) establishing that the Commissioner's determination of the true value of Ohio Bell's taxable property, as affirmed by the Commissioner in his final determination, was "clearly unlawful or unreasonable," and (2) establishing both the manner and the extent of the claimed errors in the Commissioner's valuation.
5. The BTA erred as a matter of fact and law in admitting into evidence and then considering and relying upon an "appraisal" prepared and authored by Thomas Tegarden ("Tegarden's appraisal") more than a year after Ohio Bell filed its notice of appeal to the BTA, when such appraisal had not been submitted to the Commissioner and, in fact, was not in existence during the Commissioner's administrative proceedings and auditing of Ohio Bell's personal property tax return. In creating such new evidence after the Commissioner's issuance of his final determination, Ohio Bell thereby circumvented the presumptive validity of the Commissioner's findings.
6. The BTA erred as a matter of fact and law in determining that any of the "unit value" of Ohio Bell's system-wide or Ohio-located property as set forth in Tegarden's appraisal

was properly allocated to the "spare parts" property excluded by the Commissioner from the Commissioner's valuation of Ohio Bell's taxable Ohio property.

7. The BTA erred as a matter of fact and law in weighing the evidence presented by the Commissioner and Ohio Bell, even assuming that the Tegarden appraisal was properly admitted into evidence at the BTA and considered and relied upon by the BTA in support of its decision and order.
8. The BTA erred, as a matter of fact and law, in failing to reject the Tegarden appraisal because it failed to consider any comparable sales approach to value and utilized a "back-door" income approach as its "cost approach," and was based upon only cursory, insufficient financial data and information concerning Ohio Bell's own books and records and was based upon unaudited adjustments to those financial records by Ohio Bell's internal personnel.
9. The BTA erred, as a matter of fact and law, by wrongly rejecting or failing to give proper consideration to the "stock and debt" valuation evidence and other evidence presented by the Commissioner's expert appraisal witness, Brent Eyre.

Respectfully submitted,

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OHIO BOARD OF TAX APPEALS

The Ohio Bell Telephone Company,)
)
 Appellant,) (PUBLIC UTILITY PERSONAL
) (PROPERTY TAX)
 vs.)
)
) DECISION AND ORDER
 William W. Wilkins, Tax Commissioner)
 of Ohio,)
)
 Appellee.)

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Entered August 31, 2007

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

Appellant, The Ohio Bell Telephone Company, now operating in Ohio as SBC Ohio, challenges a final determination issued by Tax Commissioner denying its petition for reassessment and affirming a public utility property tax assessment, as previously issued, which reflected an increase in the taxable value of appellant's property for tax year 2003. We consider this matter upon appellant's notice of appeal, the statutory transcript ("S.T.") certified by the Tax Commissioner pursuant to R.C. 5717.02, the

evidence presented at this board's hearing, and the written argument submitted by counsel. In support of its appeal, appellant presented the testimony of three witnesses: Thomas J. Mueller, who oversaw the preparation of appellant's 2003 annual report;¹ Patrick O'Connor, appellant's controller;² and appraiser Thomas K. Tegarden, MAI and CAE. In response, the Tax Commissioner called as his witness appraiser Brent Eyre, ASA.

Pursuant to the definition set forth in R.C. 5727.01(D)(2),³ appellant constitutes a "telephone company" and is required to file, on an annual basis, reports reflecting the value of its personal property used in business in Ohio. R.C. 5727.08. In its 2003 annual report, appellant disclosed the total true value of its public utility property as being \$2,416,838,541, with a corresponding taxable value of \$456,560,536. Following its consideration of appellant's report and the information available to it, the Department of Taxation issued preliminary assessment certificates increasing the overall true and taxable values of appellant's property to \$2,466,085,652 and \$943,372,990, respectively. Through its petition for reassessment, appellant sought a reduction in total true value of \$919,726,091 and, correspondingly, \$351,611,285 in total taxable value.

Although appellant waived hearing before the Tax Commissioner, it submitted a depreciated replacement cost study,⁴ prepared by Weber Fick & Wilson, an

¹ Mueller testified that he is director of property taxes for AT&T, explaining further that appellant is "a subsidiary, at the time of Ameritech, which is a wholly[-]owned company of subsidiary AT&T, at that time SBC Communications, Inc." H.R., Vol. I at 45.

² O'Connor testified that he is "the controller of the five midwestern telephone companies of AT&T. That would be Illinois Bell, Indiana Bell, Michigan Bell, Ohio Bell and Wisconsin Bell." H.R., Vol. II at 301.

³ R.C. 5727.01(D)(2) defines a "telephone company" as any person "primarily engaged in the business of providing local exchange telephone service, excluding cellular radio service, in this state[.]"

⁴ Although appellant refers us to this study, its author did not testify before this board and was therefore unavailable to respond to any questions opposing counsel or this board may have had regarding the nature of

operating division of AUS Consultants Utility Services, which suggested that the total true value of appellant's property was \$1,546,359,561. The commissioner rejected appellant's petition, criticizing the probative value of the information presented on its behalf:

"The petitioner contends that its equipment is overvalued due to the technological change and competition in its industry. This contention is not well taken. In the instant case, the petitioner has not shown that the technological change occurring in its industry is any different from the long march of progress that has been taking place for centuries across all sectors of society. The petitioner has not met its burden of proof of demonstrating that 'special or unusual circumstances' exist that make the use of the public utility tax prescribed rates produce an unreasonable and unjust result. The petitioner has not shown that the true value of its equipment as calculated under the standard computation is inaccurate.

"The replacement cost study calculated the value for the petitioner's property using replacement cost new less depreciation. First, replacement cost new was determined using cost indices created by C.A. Turner. This calculation recognizes that certain plant characteristics would not be reproduced in like kind, but substitute technologies would be utilized. Second, replacement cost was adjusted for depreciation using age-life formulas and further reduced by the costs for 'engineering costs.' The study also factors 'economic useful life' and the forecasted effects of future competition. Basically, the estimates in the study are based on estimates and suppositions in other studies, i.e. C.A. Turner Telephone Plant Indexes and Technology Futures, Inc. There is no connection between the estimates of useful lives and value in the study and the useful lives and value of the petitioner's property. The evidence indicates that the

Footnote contd. _____

the study or its development. Further, "Ohio Bell has chosen on appeal to rely on the more conservative, and more traditional, appraisal performed by Tegarden ***." Appellant's brief at 11. While properly part of the record in this matter, given concerns which we have previously expressed regarding similar studies and the absence of supporting testimony, we accord it limited weight. See, generally, *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al, unreported; *Omnipoint Holdings, Inc. v. Wilkins* (Oct. 21, 2005), BTA No. 2004-M-428, unreported; *Choice One Communications of Ohio, Inc. v. Wilkins* (June 9, 2006), BTA No. 2003-K-1461, et al., unreported.

petitioner has a significant amount of older property still in use in its business, and there has been provided no disposal study that would permit a comparison of the study's projection to the realities of this petitioner.

"The petitioner is using the equipment at issue to operate a going-concern business. The replacement cost of equipment is not equivalent to the in-place, in-use value that equipment has to an operating business. ***

"At best, in calculating its estimated valuation, the petitioner is providing a crude approximation of the value of its assets. The value is ultimately based on numerous layers of averages and estimates that are inherent in market indices. Such approximations of value are not probative evidence for a deduction from taxable personal property. *** In challenging the assessed value, the petitioner has the burden of establishing the value of its taxable property. The information submitted does not meet this burden." S.T. at 7. (Citations omitted.)

The commissioner also commented on appellant's failure to adjust its books and records so as to comport with its claim for reduction:

"The petitioner did not adjust its books and financial records as of the December 31, 2002 listing date at issue to reflect the reductions in asset values it is seeking for tax purposes. Thus, the petitioner is asking the Department to ignore its asset values in its financial records, and make an adjustment to the value of these assets that it did not make on its books as of the listing date at issue. It is well settled that a company is bound by its books and records. *** The burden is on the taxpayer to show that its book value does not accurately reflect true value. ***" Id. at 8. (Citations omitted.)

Appellant then filed the present appeal with this board, specifying the following as error:

"[T]he cost less depreciation method utilized by the Tax Commissioner does not reflect the true value in money of SBC's taxable property as required by Ohio law. The Tax

Commissioner's determination is erroneous, unjust and unreasonable because, inter alia, it overstates both costs and service lives and utilizes a method that does not reasonably reflect true value."⁵

Initially we acknowledge that in an appeal to this board, the burden of proof "rests on the taxpayer 'to show the manner and extent of the error in the Tax Commissioner's final determination' [and that t]he Tax Commissioner's findings 'are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.'" *Cousino Construction Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, at ¶11. (Citations omitted.)

R.C. 5727.11 establishes the method to be employed by the Tax Commissioner in valuing public utility property, providing in pertinent part:

"(A) Except as otherwise provided in this section, the true value of all taxable property required by division (A)(2) or (3) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation."

The Tax Commissioner devotes considerable discussion to the valuation methodology prescribed by the preceding statute and the standards which this board and

⁵ In its notice of appeal, appellant also challenged that portion of the Tax Commissioner's final determination in which he rejected appellant's argument certain software should not be considered tangible personal property subject to Ohio public utility personal property tax. S.T. at 1-6. However, at hearing and in the brief subsequently filed on its behalf, appellant's counsel confirmed appellant was no longer pursuing this claim. H.R., Vol. I at 31; appellant's brief at 5, fn. 5. Accordingly, this issue will not be further addressed herein.

appellate courts must thereafter apply in reviewing his decision. He points out that R.C. 5727.11 requires that he value public utility property utilizing a cost-based methodology, i.e., capitalized costs less prescribed depreciation. The commissioner then posits that it is only when he determines the use of such methodology will not result in true value, that another valuation method, which he selects, may be employed. As such, the commissioner maintains that his decision to use or reject the cost-based method of valuation set forth in R.C. 5727.11 must be reviewed on appeal under an abuse of discretion standard, a demonstration met only by showing that his decision reflects an attitude that is unreasonable, arbitrary or unconscionable. See *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶16.

In this instance, the commissioner insists appellant is incapable of demonstrating that he abused his discretion in adhering to the statutory valuation methodology. He argues that since the information offered by appellant in support of its petition for reassessment was clearly insufficient and because the appraisal evidence upon which appellant now relies was not previously presented to him, he could not possibly have abused his discretion in valuing appellant's property in accordance with R.C. 5727.11(A). We find these arguments to be substantially similar to those which have already been considered and rejected in this appeal.

Styled as a "motion for a jurisdictional ruling," the commissioner initially challenged appellant's ability to present appraisal evidence on appeal when such evidence had not been provided to him. The presiding attorney examiner made the following ruling:

“Ultimately, the commissioner’s argument must be viewed as a criticism of appellant’s decision to present evidence in support of its valuation claim *** that was different than that previously presented. The Supreme Court has expressly rejected the argument now advanced by the Tax Commissioner. In *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 13, the court expressly held:

“The BTA hearing is de novo. *Higbee Co. v. Evatt* (1942), 140 Ohio St. 325, 332 ***. The BTA is statutorily authorized to conduct full administrative appeals in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner. *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 ***.⁶

“The BTA may investigate to ascertain further facts and make its own findings independent of those of the Tax Commissioner. *Nestle Co., Inc. v. Porterfield* (1971), 28 Ohio St.2d 190, 193 ***. R.C. 5717.03 authorizes the BTA to modify orders based upon its independent findings. *Id.*’

“See, also, *Gen. Elec. Co. v. Zaino* (Interim Order, Mar. 5, 2004), BTA Nos. 2003-K-569, et al., unreported, at 2, fn. 3.

“As acknowledged by the court in *Key Serv.*, supra, and consistent with its holding more than five decades earlier, an appellant is not restricted on appeal to only that evidence it previously presented before the commissioner. See *Bloch v. Glander* (1949), 151 Ohio St. 381, 387 (‘Sections 5611 and 5611-1, General Code, contemplate full administrative appeals from the orders of the Tax Commissioner, in which the parties are entitled to produce evidence in addition to that considered by the Tax Commissioner, and the Board of Tax Appeals is authorized to exercise investigational powers to ascertain further facts.’). This is in contrast to the limitations which may be imposed upon an appellant challenging a decision of a

⁶ The commissioner argues in his post-hearing brief that the court’s holding in *Bloch v. Glander* (1949), 151 Ohio St. 381, as it pertains to a taxpayer’s ability to present additional evidence on appeal, was a situation where the “Court judicially inserted language into the statute [i.e., former Sections 5611 and 5611-1, now codified at R.C. 5717.02] that was not written by the General Assembly,” appellee’s brief at 47, and further that this allowance has been implicitly overruled by subsequent decisions. Given the court’s favorable citation to *Bloch* for this proposition in *Key Serv.*, supra, we find nothing that causes us to now deviate from our earlier ruling.

county board of revision. Compare, e.g., R.C. 5715.19(G) ('A complainant who fails to provide such information or evidence is precluded from introducing it on appeal to the board of tax appeals or the court of common pleas, except that the board of tax appeals or court may admit and consider the evidence if the complainant shows good cause for the complainant's failure to provide the information or evidence to the board of revision.'). See, also, *CASA 94, L.P. v. Franklin Cty. Bd. of Revision* (2000), 89 Ohio St.3d 622; *New Winchester Gardens, Ltd. v. Franklin Cty. Bd. of Revision* (1997), 80 Ohio St.3d 36." *Ohio Bell Tel. Co. v. Wilkins* (Interim Order, Feb. 3, 2006), BTA No. 2005-K-202, unreported, at 6-7. (Footnote omitted.)

Through motion filed eight months after the issuance of the above-quoted order and one week prior to the hearing convened in this appeal, the commissioner sought our reconsideration, arguing:

"Measured under this standard [i.e., an abuse of discretion], the Commissioner's discretionary decision is not properly subject to challenge through Ohio Bell's submission of an appraisal at this late juncture. The Commissioner's administrative decision below to apply his R.C. 5727.11-mandated methodology for determining the true value of Ohio Bell's taxable property was not informed by any such appraisal. This newly-created [sic] appraisal evidence could not possibly show that the Commissioner's discretionary determination constituted a 'perversity of judgment' – as would be required for Ohio Bell to demonstrate an 'abuse of discretion.'" Motion at 2-3.

We reviewed the commissioner's arguments, our examiner's ruling, and overruled the motion. *Ohio Bell Tel. Co. v. Wilkins* (Interim Order, Sept. 13, 2006), BTA No. 2005-K-202, unreported.

Having been previously unsuccessful in precluding appellant from presenting any additional evidence of value on appeal, comprised principally of Tegarden's "unit

appraisal,” the Tax Commissioner now asks that we ignore it on the basis that the decision to deviate from the valuation methodology set forth in R.C. 5727.11 is exclusively his. As has been frequently acknowledged, the use of a statutory method to ascertain the value of personal property serves a rationale purpose since “it is impractical for the commissioner to personally value all personal property in Ohio ***.” *Snider v. Limbach* (1989), 44 Ohio St.3d 200, 201. See, also, *Campbell Soup Co. v. Tracy* (2000), 88 Ohio St.3d 473. However, where competent and probative evidence is offered which demonstrates that the valuation methodology set forth in R.C. 5727.11 will not establish true value, it is appropriate to rely upon evidence that will provide for such a result. This was recognized by the Supreme Court in *Texas E. Transm. Corp. v. Tracy* (1997), 78 Ohio St.3d 83, when it rejected the commissioner’s suggestion that, absent a demonstration of “special and unusual circumstances,”⁷ alternate valuation methodologies may not be used to determine the value of public utility property:

“The ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed. *** If the statutory method does not yield true value, then another method of valuation may be used, whether or not there are special or unusual circumstances. Although a statute may

⁷ “[T]he words ‘special or unusual circumstances’ do not appear in R.C. 5727.11 and are not a prerequisite for using an alternate valuation method where appellees are contesting true value rather than depreciation rates.” *Id.* at 86. See, also, *MCI Telecommunications Corp. v. Limbach* (Sept. 20, 1990), Franklin App. No. 89AP-870, unreported (“[T]here are two ways in which the taxpayer may contest the commissioner’s valuation. The taxpayer may either offer direct evidence of the property’s true value or the taxpayer may offer evidence that the applicable rate of depreciation does not accurately measure the property’s true value, either because special or unusual circumstances exist or because a rigid application of the directive will create an unjust or unreasonable result.”); *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), BTA Nos. 2003-K-765, et al., unreported, at 21 (“The commissioner concedes that where ‘direct evidence’ of value is offered, such as an appraisal like that relied upon in *Texas E. Transm.*, a public utility need not demonstrate the existence of special and unusual circumstances in order to deviate from booked costs less prescribed allowances.”).

provide a prima facie estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value. ***” Id. at 85-86. (Emphasis sic and citations omitted.)

After having reviewed and considered the case authority cited by the commissioner, a significant portion of which relates to his clearly discretionary authority to remit penalties, we conclude that the obligation of this board remains in this appeal to ascertain whether the evidence presented supports a value different from that previously determined by the Tax Commissioner. As noted by the court in *Texas E. Transm.*, “[c]ontrary to the commissioner’s assertion, in deciding true value, the BTA need not adhere to the cost-based statutory method of valuation.” Id. at 86.

As previously indicated, appellant relies upon the written narrative appraisal report and testimony of Thomas Tegarden, an appraiser specializing in the valuation of public utility property. Within his report, Tegarden noted the evolving landscape within the telecommunications industry:

“The \$290 billion telecommunications industry was and is in the throes of transition. Technological advancements and regulatory reforms were driving traditional telecommunications service providers into a competitive environment that required innovative strategy and financial flexibility. Start-ups introduced new business models, and incumbent players made large investments to develop new market opportunities. Capital spending soared in the few years through 2000, far outpacing revenue growth. As a result, in 2002 both incumbents and newer arrivals struggled to survive in this environment of rapid change and heavy competition.” Ex. 5, at 6.

Tegarden expressly noted how substitute markets utilizing wireless and Internet-based technologies, i.e., Voice over Internet Protocol (“VoIP”), have caused a migration of customers from traditional telecommunications devices and, in turn, a decline in retail access lines. Referring to comments made by one telecommunications research analyst, “[i]n the data network era, the Bells circuit-switched networks were like railroad tracks at the dawn of the jet age.” *Id.* at 10.

In order to estimate the value of appellant’s operating telecommunications property, Tegarden concluded that the “unit appraisal concept” was appropriately applied:

“There are problems peculiar to the appraisal of telecommunications companies that make them best suited to the unit appraisal concept of valuation. Usually the property of a company that extends over several taxing districts, such as the property of OBT, has value and maintains value because it is operated as a system or unit.

“The telephone property has its greatest value as a part of a unit or system. The investments in specialized equipment, cable, digital switching systems, fiber optics, conduit, poles and wire would have less value if not used for the communication of messages and data. The individual portions of a telecommunications company would have little value if separated from the system.

“A telecommunications company is operated as a unit, provides telecommunications services as a unit, and reports its financial operating results as a unit. Further, to whatever degree the telecommunications properties are regulated, the state and federal regulatory authorities essentially exert their regulatory controls and decisions over the operating telecommunications property as a unit. Thus, the very nature of a telecommunication company and its property makes it an ideal candidate for the unit appraisal process.” *Id.* at 18.

Tegarden describing the process of developing an ultimate opinion of value under this methodology as follows:

“The unit appraisal concept is the appraisal of an integrated property as a whole, without reference to the value of its component parts. The unit appraisal concept is the opposite of the summation appraisal concept, which is the summing of two or more of the appraisals made of functional parts of the whole.” Id. at 17, fn. 22.

He explained the three steps employed in the process:

“First, the unit to be appraised is generally the operating property of the telecommunication company. The non-operating properties, if they exist, are generally appraised individually, independently of the operating unit, or are allocated out of the operating unit.

“Second, following the determination of the unit to be appraised, three indicators or approaches to value are used to determine the market value of the operating properties of the telecommunication company. They are the cost approach, the income approach, and the sales comparison approach. While it may not be possible or practical to use all three approaches in the appraisal process, all should be considered.

“Third, once the unit or system value is determined, a proper value is allocated to the taxing district. The allocation process is accomplished through the use of allocation factors which relate to the property being appraised.” Id. at 17-18.

Within his report, Tegarden considered all three appraisal approaches typically relied upon in opining value, i.e., the cost, income, and the market data/sales comparison approaches, but rejected the utility of the latter, as well as “its surrogate the

stock and debt approach,”⁸ citing the absence of reliable comparable data. Tegarden testified that while he stays abreast of sales data within the industry, there are relatively few sales that have occurred and the extrapolation of an opinion of value from such information can be difficult and misleading. As for the stock and debt approach, Tegarden noted that neither appellant nor its parent company has publicly traded stock; instead, the traded stock exists in the ultimate parent company which has “some 200 companies under their umbrella that that stock represents the value of.” H.R., Vol. III at 21. Within his report, he addressed at length the reasons why he considered the stock and debt approach to be unreliable:

“Because of the lack of comparable sales price data in the public utility field, appraisers have had to search for proxies or substitutes for such indicators of value. To some appraisers, it appears logical that since there seldom are available objective market evidences of value for business properties, the next best alternative is the market price of the securities of the enterprise owning the properties. It is assumed that the market value of the securities is the market value of the assets of the business enterprise. Thus the stock and debt approach emerges as a substitute for the traditional sales comparison approach.

“It is noteworthy to recognize that during any given day, month, or year, many of the outstanding securities of a particular enterprise are seldom involved in transactions. In fact, some companies have securities which are never publicly traded. Even when a company has common stock actively traded by the public, the portion traded in any time period is a relatively small part of the total shares outstanding. However, an additional problem exists when the company has no (or relatively few) securities publicly outstanding. The stocks of

⁸ Tegarden explained that “[t]he stock and debt approach is based on the accounting theory that assets equal liabilities and equity. The theory is if one can determine the value of the liabilities and equity, by default, one would have determined the value of the life of the assets.” H.R., Vol. II at 472-473.

regional Bell operating companies typically are owned by regional holding companies, which have many other business ventures as well. SBC, ultimate parent company of OBT (OBT's parent company, Ameritech, is owned by SBC) owns many subsidiaries directly or indirectly and thus its stock price includes the effect of all those companies.

“Even when security price data are available, an important question is, does such security price data, especially based on relatively small unit transactions, represent the value of the enterprise? Many financial experts believe the motivation and expectations of the investors, each separately buying insignificant quantities of the outstanding stocks, are geared very much to their individual portfolio and marketability needs. They do not want to own and operate the enterprise; they want to own the stock and all the rights which are attached to such ownership.

“Another disquieting factor is that the stock market is largely a market of secondary transactions, a market of derived demands. It is very unlike the wheat market, for example, where the ultimate purchasers do not make their purchases with a view to resale but rather to feed livestock or make flour. No investor ordinarily buys stocks to consume either them or their underlying resources. The latter are, of course, legally inaccessible to the shareholders. Instead, stocks are bought for resale, except such few as are from time to time taken off the market in mergers, liquidations, and stock repurchase programs. From year to year, the great majority simply move from hand to hand, bought by shareholders whose expectations of a return of capital and most of the return on capital depend entirely on the willingness of others to share such expectations. ***

“With different motives in the minds of the purchasers of stocks and purchasers of assets, the stock and debt indicator loses some of its credibility as an indicator of the market value of a company's operating properties.” Ex. 5, at 63-65.

In performing his cost approach to value, he noted at page 24 of his report that the “total net telephone plant plus materials and supplies of OBT on January 1, 2003, was \$2,562,919,575,” a figure which was confirmed by appellant’s controller. He opined that a prospective purchaser would typically expect a rate of return on its investment of 12.35%. However, citing as a major impact the trend of diminished retail access lines, he opined that the most likely return on appellant’s assets would only be 12%. Tegarden concluded that this .35% below-market rate of return should be accounted for as external obsolescence, calculated as having a 2.83% negative impact on value. Taking this into account, Tegarden arrived at a rounded value of \$2,490,000,000 through use of the cost approach.

Tegarden next performed an income approach to value, ultimately concluding that it should be accorded the most weight in his final conclusion of value. While considering appellant’s net operating income (“NOI”) for the prior five years, based upon regulatory changes, various investor trends within the industry, appellant’s historical and anticipated loss of retail access lines, and his experience in reviewing various other market conditions, he accorded primary weight to appellant’s 2002 NOI in deriving an estimated net operating income for 2003 of \$305,000,000. He then discounted this amount at a rate of 12.35%, derived using a weighted average cost of capital methodology, which measures a company’s cost of debt and equity financing weighted by the percentage of debt and percentage of equity in a company’s capital structure. Accordingly, Tegarden opined a rounded value through the income approach of \$2,470,000,000.

He then reconciled the values resulting from the two approaches employed, concluding to a value for appellant's operating properties of \$2,475,000,000. As noted in the transmittal letter to his report, he deducted \$830,987,807 from this amount in order to reflect a total true value for taxable property of \$1,672,518,399. However, of the property considered tax exempt, \$30,692,139 was attributed to property identified as "intangibles." Appellant's witness explained that this figure related to its original challenge that software constituted an intangible asset not subject to personal property tax. Since this claim was later withdrawn, appellant acknowledges that this amount should not now be excluded and that the total value of non-taxable items should be adjusted to \$800,295,668. H.R., Vol. I at 70-73. Applying the market-to-book ratio of 96.5696% used by Tegarden, an adjusted non-taxable figure of \$772,842,325 results. Deducting this amount from Tegarden's market value, appellant requests that its true value of its taxable public utility property for tax year 2003 be determined at \$1,702,157,675.

As previously indicated, the Tax Commissioner has asserted that the exclusive means by which to value appellant's property is that set forth within R.C. 5727.11. Although he has elected not to present his own appraisal evidence, independent of his reliance upon the valuation methodology provided for by statute, the commissioner has advanced several reasons why appellant's evidence is insufficient to support an alternative value.

The commissioner first points to appellant's failure to undertake an impairment analysis under Statement of Financial Accounting Standard ("FAS") No. 144 which "addresses financial accounting and reporting for the impairment or disposal of long-

lived assets.” Joint. Ex. 8, at 4. He posits that under generally accepted accounting principles, when appellant became aware of any circumstances which materially impacted the value of its assets, either appellant’s internal staff or its external auditors should have undertaken such an analysis. The absence of such evidence, according to the commissioner, runs contrary to appellant’s position advanced through this appeal that the value of its assets has declined. While an impairment analysis or, as in this instance, the lack thereof may be entitled to *some* consideration, we are unwilling to infer that appellant’s financial reporting is necessarily inconsistent with the relief sought through its appeal.

As for Tegarden’s appraisal, the commissioner suggests that this board “scrutinize that appraisal in light of the critical analysis and evidence presented by the Commissioner’s expert appraiser, Mr. Eyre, through his BTA testimony and the various BTA-admitted exhibits that Mr. Eyre’s [sic] prepared, compiled and authored.”⁹ In his

⁹ Eyre indicated that he did not perform an appraisal of appellant’s assets, but instead was asked to “critique” Tegarden’s appraisal, H.R., Vol. IV at 15-16, elaborating during cross-examination as follows:

“I’ve been asked to do what I would characterize as a consulting service, and in that regard I’ve been asked to perform certain types of analysis relating to valuation characteristics of the taxpayer, and also as relates to Mr. Tegarden’s report and showing the effect thereafter. But I haven’t rendered an opinion of value here.” H.R., Vol. IV at 142.

Such an engagement appears to be considered a “review appraisal,” a situation described in the comments to Standard 3 of the Uniform Standards of Professional Appraisal Practice (“USPAP”), promulgated by The Appraisal Standards Board (“ASB”) of The Appraisal Foundation, as “the act or process of developing and communicating an opinion about the quality of all or part of the work of another appraiser that was performed as part of an appraisal, appraisal review, or appraisal consulting assignment. The appraiser’s opinion about quality must encompass the completeness, adequacy, relevance, appropriateness, and reasonableness of the work under review, developed in the context of the requirements applicable to that work. *** Appraisal review requires the reviewer to prepare a separate report setting forth the scope of work performed and the results of the appraisal review.” This latter element appears tempered by USPAP Rule 3-4, which acknowledges that an oral presentation is permissible: “To the extent that it is possible and appropriate, an oral appraisal review report must address the substantive matters set forth in Standards Rule

brief, the commissioner specifically criticizes Tegarden's decision not to develop an opinion of value using the market approach, i.e., sales comparison approach, and questions the propriety of removing an amount attributable to "spare pairs" from the unit value of the operating properties' total value.

As for his first contention, the Tax Commissioner insists that since the "best evidence" of true value is typically a recent arm's-length sale of the property in issue, Tegarden's failure to develop a market approach within his appraisal is fatal to the reliability of his ultimate opinion. The commissioner directs our attention to Mr. Eyre's commentary, specifically "his testimony and exhibits [which] reflect a detailed 'stock and debt' approach to value,¹⁰ supporting a significantly greater true value for the taxable property than determined by the Commissioner." Appellee's brief at 55. Eyre indicated that the stock and debt approach, the most common approach used in developing a market approach in a unit appraisal, is a very pertinent indicator of value and, contrary to Tegarden's opinion, there exists sufficient market data from which the approach may be developed.

Footnote contd. _____

3-2." In a compilation of questions and responses, The Appraisal Foundation indicated that Standards Rule 3-4 was added, in part, in order to "address the fact that appraisal review reports are frequently given orally, in particularly in court testimony settings." *Frequently Asked Questions* (2006 Ed.), at 94.

¹⁰ We consider it appropriate to comment upon the utility of a review appraisal. USPAP contemplates situations where one appraiser will critically evaluate various aspects of another appraiser's work product. See fn. 9. A reviewer's "scope of work" may also include the expression of his or her own opinion of value. See Standards Rule 3-2(d). However, where such an undertaking occurs, the reviewing appraiser must minimally adhere to additional disclosure requirements. See, e.g., Standards Rule 8-2(b). See, also, *Advisory Opinion 20*. In this instance, Eyre made it clear that he was not engaged to develop, nor did he have, an opinion as to the value of the property in issue in this appeal. See, e.g., *H.R.*, Vol. IV 15-16, 85-86, 110, 141-142.

The practice of appraising property is not an exact science, but instead reflects the development of an opinion, the reliability of which depends upon the basic competence, skill, and ability demonstrated by the appraiser. As we have often noted, “[t]he discipline itself is often inexact; ultimate conclusions involve hearsay, suppositions, and subjective mental impressions as well as specific data. The Webster’s New World Dictionary (2nd ed. 1970) defines ‘opinion’ as a ‘belief not based on absolute certainty or positive knowledge but on what seems true, valid or probable to one’s own mind *** an evaluation, impression or estimation.’” *Cyclops Corp. v. Richland Cty. Bd. of Revision* (May 30, 1985), BTA Nos. 1982-A-566, et seq., unreported, at 6-7.

The Supreme Court has acknowledged this board’s role in weighing and evaluating evidence. For example, in *Snider*, supra, the court reaffirmed the discretion which we are accorded:

“The BTA is granted great latitude in determining the weight to be given evidence and the credibility of witnesses before it. It is not required to adopt the valuation fixed by any expert or witness. Value for tax purposes is a question of fact, and this finding is primarily within the province of the taxing authorities. This court will not disturb such a decision unless it affirmatively appears from the record that such decision is unreasonable or unlawful. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13, *** paragraphs two, three, and four of the syllabus.”). *Id.* at 202. (Parallel citations omitted.)

See, also, *Wolf v. Cuyahoga Cty. Bd. of Revision* (1984), 11 Ohio St.3d 205, 207 (“A great deal of appellants’ argument is devoted to the rebuttal of appellees’ expert testimony. Ultimately, they conclude that none of his conclusions is credible enough to be relied on by

the BTA. However, such a determination is precisely the kind of factual matter to be decided by the BTA.”).

While it may be optimal to have an appraisal in which all of the commonly employed methodologies are developed in determining the value of property, the absence of one approach or the fact that an expert places greater emphasis on an approach other than the market approach does not mandate rejection of the opinion in its entirety. In this instance, Tegarden, an expert with considerable experience in valuing public utility property, cogently explained why, in his opinion, a stock and debt approach would not serve as a reliable indicator of value. Although the commissioner disputes this,¹¹ along with several other aspects of Tegarden’s appraisal, we are not persuaded by his arguments or the criticisms offered by his witness. In his narrative appraisal report and during his testimony, Tegarden described in considerable detail the data he gathered and relied upon, and the steps which he undertook to develop his opinion.

¹¹ In an apparent effort to demonstrate an inconsistency, the commissioner’s counsel questioned Tegarden regarding a prior appraisal in which he performed a stock and debt approach. See Ex. S. Tegarden responded by pointing out that while the approach had been developed, in the final reconciliation of value, it was given little consideration.

We also reject the commissioner's contention that it was improper for Tegarden to remove value attributable to "spare pairs," i.e., copper wire not used in business. Because the value of such assets was included in the operating unit valued within Tegarden's unit appraisal, it was appropriate to remove such costs as they cannot be considered used in business and subject to taxation. See, generally, *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506. Although the commissioner's witness offered an alternative means by which such costs could have been accounted for, he nevertheless concedes that it is appropriate to eliminate the costs from an appraisal so as not to render them subject to assessment.

It is apparent from the present record that the telecommunications industry has undergone considerable change during the past decade and that the existence of a variety of factors, e.g., increased competition, dramatic technological advancements, shifts in consumer trends, may influence the value of participants' assets. It is reasonable that such factors be reflected as obsolescence impacting the property which, in this instance, we find has been fairly, reasonably, and more accurately captured by appellant's expert than that which would result from application of the method set forth in R.C. 5727.11(A). Although the commissioner refers us to recent decisions in which we have rejected reduction claims advanced by other providers of telecommunications services, we note that in those cases we had not been provided with an appraisal of the property in issue, but instead depreciation studies which we found unreliable and unpersuasive.

Upon review of the record, we find Tegarden's appraisal to be competent and probative evidence of the value of appellant's personal property and that as a result of such

evidence appellant has rebutted the presumption of correctness which must be accorded the commissioner's findings. It is therefore the order of this board that the final determination of the Tax Commissioner must be, and hereby is, reversed and that the true value of appellant's taxable property for 2003 be established at \$1,702,157,675.

ohiosearchkeybta

In The Supreme Court of Ohio
Case Information Statement

Case Name: <u>The Ohio Bell Telephone Company</u>	Case No.: _____
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I. Has this case previously been decided or remanded by this Court? Yes No
If so, please provide the Case Name: _____
Case No.: _____
Any Citation: _____

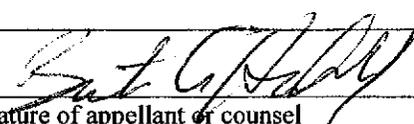
II. Will the determination of this case involve the interpretation or application of any particular case decided by the Supreme Court of Ohio or the Supreme Court of the United States? Yes No
If so, please provide the Case Name and Citation: _____
Will the determination of this case involve the interpretation or application of any particular constitutional provision, statute, or rule of court? Yes No
If so, please provide the appropriate citation to the constitutional provision, statute, or court rule, as follows:
U.S. Constitution: Article _____, Section _____ **Ohio Revised Code:** R.C. 5727.11
Ohio Constitution: Article _____, Section _____ **Court Rule:** _____
United States Code: Title _____, Section _____ **Ohio Admin. Code:** O.A.C. _____

III. Indicate up to three primary areas or topics of law involved in this proceeding (e.g., jury instructions, UM/UIM, search and seizure, etc.):
1) public utility personal property taxation
2) _____
3) _____

IV. Are you aware of any case now pending or about to be brought before this Court that involves an issue substantially the same as, similar to, or related to an issue in this case? Yes No
If so, please identify the Case Name: _____
Case No.: _____
Court where Currently Pending: _____
Issue: _____

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Name Atty.Reg. # Telephone # Fax #

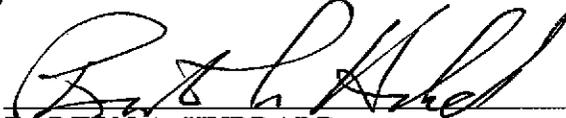
Address _____
30 East Broad Street, 25th Floor
Address _____
Columbus OH 43215-3428
City State Zip Code



Signature of appellant or counsel
Counsel for: Tax Commissioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Appeal was sent by certified U.S. mail to James F. Lang, Michael T. Mulcahy, and Peter A. Rosato, Calfee, Halter & Griswold LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, counsel for appellee, on this 18 day of October, 2007.



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