

IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

THE OHIO BELL TELEPHONE COMPANY, :
: Appellee, :
: Case No. 07-1807
v. :
: Appeal from BTA
WILLIAM W. WILKINS [RICHARD A. :
LEVIN], TAX COMMISSIONER OF OHIO, :
: Case No. 2005-K-202
: Appellant. :

BRIEF OF APPELLANT

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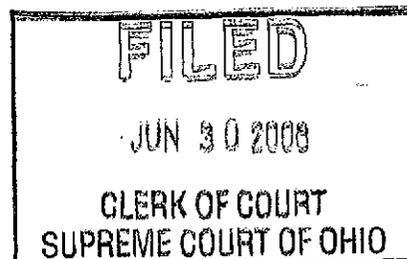


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Proposition of Law No. 1:

A taxpayer seeking to challenge a public utility personal property tax assessment pursuant to a petition for reassessment under R.C. 5727.47 is jurisdictionally required to raise the objections that it asserts justify the relief requested in writing in its petition for reassessment or in the Commissioner’s administrative proceedings on the petition thereafter.

Upon appeal to the BTA, an appellant taxpayer invokes the BTA’s jurisdiction to consider an objection only if the taxpayer had raised such objection in writing in the Commissioner’s proceedings on the petition for reassessment prior to the Commissioner’s issuance of his final determination on the petition. By failing to raise such objection in writing in the administrative proceedings before the Commissioner, the appellant taxpayer fails to confer jurisdiction upon the BTA to consider it.

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Proposition of Law No. 7:

The BTA acts unreasonably and unlawfully in reducing the valuation determined by the Tax Commissioner under his application of the legislatively prescribed valuation methodology for determining the true value of public utility personal property where:

- (1) the utility’s acquisition/retirement history, as revealed by an examination of Schedules B and C of its property tax return for the tax year at issue, evidenced that it had continuously engaged in regular investment in plant property over its previous years of Ohio operations and had engaged in modest retirements of existing property over that time, consistent with the specially-tailored rates of depreciation and obsolescence prescribed by the Commissioner under the legislatively prescribed valuation methodology;

- (2) this Schedule B and Schedule C evidence, provided by the utility in compliance with the legislatively prescribed acquisition-cost-less-prescribed-annual-allowances methodology, was wholly un rebutted by any presentation of evidence by Ohio Bell concerning any sales or other disposals of any of its telecommunications property;
 - (3) for financial accounting statement reporting purposes, from the four years preceding the valuation date to the four years thereafter, the utility’s and its parent corporation’s external accounting auditors and in-house accounting/management personnel did not undertake any “impairment” analysis under SFAS 144, belying any claim to excessive obsolescence or depreciation of the fixed assets at issue;
 - (4) the BTA testimony of the Commissioner’s expert appraisal witness and the supporting documentary evidence he utilized under his “market approach” valuation analysis strongly supported a true value of the taxable property in excess of the true value resulting from application of the legislatively prescribed methodology applied by the Commissioner; and
 - (5) the utility relied exclusively on a retroactive, unit-value appraisal that, in turn, relied exclusively on an income approach for which the resultant valuation estimate depended on an estimate of a capitalization rate for which even a small difference in appraisal opinion would yield a major difference in the valuation estimate33
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BRIEF OF APPELLANT

I. Introduction/Summary

- A. Through the vehicle of a retroactive appraisal commissioned during the BTA proceedings, Ohio Bell raised a wholly new valuation challenge that it had not raised in its petition for reassessment or in its notice of appeal to the BTA.**

This public utility personal property tax appeal for the 2003 tax year is taken as of right pursuant to R.C. 5717.04. The most fundamental reason for the appeal is that the BTA impermissibly usurped for itself the Commissioner's role as tax assessor. The BTA ignored Ohio Bell Telephone Company's (Ohio Bell's) circumvention of the Commissioner's administrative review process. Specifically, the BTA's wrongly disregarded Ohio Bell's failure to have complied with the jurisdictional requirements for raising issues, both at the Tax Commissioner's administrative-review level and at the BTA.

Under the express requirements of R.C. 5727.47, in order to invoke the Commissioner's jurisdiction to consider an objection to the Commissioner's assessment, a public utility taxpayer must raise the issue in his petition for reassessment or in writing during the course of the Commissioner's administrative proceedings on the petition. Similarly, under the express requirements of R.C. 5717.02, in order to invoke the BTA's jurisdiction on appeal of the Commissioner's final determination, an appellant taxpayer's notice of appeal must specify the asserted error in the Commissioner's final determination. The BTA's decision below contravenes those jurisdictional requirements.

In its decision and order, the BTA modified the Tax Commissioner's valuation of Ohio Bell's taxable personal property for the 2003 tax year at issue. In ordering the Commissioner to substantially reduce the assessed true values of Ohio Bell's taxable personal property, the BTA based its decision exclusively on the appraisal-based challenge to the Commissioner's valuation

that Ohio Bell first made at the BTA evidentiary hearing. The appraisal that Ohio Bell relied on at the BTA as its basis for challenging the Commissioner's valuation was premised on an entirely different valuation methodology than the one that Ohio Bell had previously presented to the Commissioner.

Specifically, the appraisal presented by Ohio Bell to the BTA used a "unit valuation" methodology under which the entire value of Ohio Bell's property, both taxable and exempt, was determined. Then, that "unit value" was allocated as between the taxable and exempt assets. In determining the unit value of Ohio Bell's taxable and exempt property, the appraiser relied heavily on an "income approach" to determining value, under which the income-producing capacity of the property serves as the measure of value. In addition, the appraiser measured value under a "cost approach," based on Ohio Bell's depreciated book value as reported for financial statement purposes and then adjusting that depreciated book value for additional obsolescence. BTA Ex. 5, Supp. 892-1012.

By contrast, in the Tax Commissioner's administrative proceedings, Ohio Bell did not advance a "unit value" methodology for determining value. Nor did it rely on an income approach. Instead, Ohio Bell objected to the Commissioner's assessment solely on the basis of a replacement-cost-new (RCN) study. S.T. 9-122, Supp. 314-420. Under that RCN methodology, Ohio Bell urged that the true value of its taxable personal property should be determined by reference to the current replacement costs for that property, as adjusted for depreciation.

Ohio Bell asserted that the Commissioner should utilize the RCN methodology, rather than the original-acquisition-cost-less-depreciation methodology prescribed by the General Assembly pursuant to R.C. 5727.11(A) that the Commissioner had used to determine Ohio Bell's assessed values. In his final determination dated December 13, 2004, the Commissioner affirmed

the valuation under the legislatively prescribed methodology and provided detailed reasoning and findings for rejecting the RCN-based methodology advanced by Ohio Bell. S.T. 1-8, Supp. 421-428.

Nearly a year later, in December 2005, Ohio Bell decided to procure a retroactive, unit-value appraisal. Thereafter, at the BTA evidentiary hearing on September 19, 2006, Ohio Bell presented the retroactive, unit value appraisal dated August 31, 2006, BTA Ex. 5, Supp. 894, together with testimony from its author, Thomas K. Tegarden.

Consequently, in his consideration of Ohio Bell's petition for reassessment, the Commissioner never had the opportunity to consider or review that retroactive appraisal or the methodologies and evidence on which it was based. Because Ohio Bell had not provided the appraisal to the Commissioner in the Commissioner's administrative proceedings on the petition for reassessment, the Commissioner could not, and did not, make any findings concerning it or incorporate any such findings into his final determination.

B. By predicating its decision on acceptance of Ohio Bell's appraisal-based challenge, the BTA directly contravened several statutory provisions enacted by the General Assembly, as well as this Court's established case law applying those statutes.

1. The BTA's decision contravenes the jurisdictional requirements of the petition-for-reassessment statute, R.C. 5727.47.

As we detail under Proposition of Law No. 1, pursuant to R.C. 5727.47, a public utility personal property taxpayer must raise its objections in its petition for reassessment, or present them to the Commissioner in writing prior to the Commissioner's issuance of his final determination. For all the various taxes administered by the Tax Commissioner, each of the respective statutes governing petitions for reassessment contains the identical jurisdictional requirement. This Court, the courts of appeal, and the BTA itself have long held that

taxpayer/petitioners must strictly comply with that requirement in order to confer jurisdiction on the Commissioner and, subsequently, on the BTA and courts of appeal, to consider an issue. *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28; *Shugarman Surgical Supply v. Zaino*, 97 Ohio St. 3d 183, 186; 2002 Ohio 5809; *Nimon v. Zaino* (Feb. 27, 2002), 2002 Ohio 822; 2002 Ohio App. LEXIS 801, unreported, Appx. 90-92; and *Ohio Edison Co. v. Tracy* (May 21, 1999), B.T.A. No. 97-K-322, unreported, Appx. 93.

Applying the R.C. 5727.47 jurisdictional requirement here properly bars Ohio Bell's appraisal-based challenge. In the Commissioner's administrative proceedings, Ohio Bell failed to make any objection to the Commissioner's valuations based on the assertion that the Commissioner should have applied a unit-value methodology or any kind of an income approach to valuing its taxable property. Accordingly, the Commissioner's final determination addressed no such issue. Thus, when at the BTA evidentiary hearing raised a challenge to the Commissioner's valuation through an appraisal that utilized a unit value/income approach methodology, the BTA had no jurisdiction to consider it. Accordingly, the BTA erred as a matter of law in reversing the Commissioner on a basis for which it had not been conferred with jurisdiction.

2. The BTA's decision contravenes the jurisdictional requirements of the statute governing appeals to the BTA from the Commissioner's final determinations, R.C. 5717.02.

Moreover, as set forth in Proposition of Law No. 2, *infra*, the BTA's decision should be reversed on jurisdictional grounds under R.C. 5717.02, which requires that an appellant's notice of appeal to the BTA "specify the errors *** complained of" in the Commissioner's final determination. This Court has long and uniformly interpreted this requirement to impose a jurisdictional obligation on appellants to "specify," i.e., "to state in full and explicit terms," the

“precise” errors complained of in the Commissioner’s final determination. *Lovell v. Levin*, 116 Ohio St. 3d 200 at ¶35, 2007 Ohio 6054 (quoting *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, 583, quoting Black’s Law Dictionary (4th Ed.1951)).

By reason of its failure to have complied with the “specification of error” requirement of R.C. 5717.02, Ohio Bell failed to invoke the BTA’s jurisdiction to consider its appraisal-based challenge to the Commissioner’s final determination for independent, but related reasons. First, in its notice of appeal to the BTA, Ohio Bell failed to “specify” any challenge to the Commissioner’s valuation on the grounds that the Commissioner should have used a unit-value/income approach methodology. In other words, in its notice of appeal to the BTA, Ohio Bell raised no challenge to the Commissioner’s valuation on the basis that Ohio Bell subsequently asserted at the BTA evidentiary hearing. Rather, through the vehicle of a newly-minted, retroactive appraisal, Ohio Bell impermissibly raised an entirely new and different challenge to the Commissioner’s valuations that Ohio Bell had not specified in its notice of appeal.

Second, under the plain terms of R.C. 5717.02, in order for a taxpayer or county auditor¹ to confer the BTA with jurisdiction to consider an issue, the Commissioner must have committed an error in his final determination concerning that issue. Here, the Commissioner could not possibly have committed any error regarding Ohio Bell’s appraisal-based challenge because, in the administrative proceedings on Ohio Bell’s petition for reassessment, the Commissioner had

¹ Under R.C. 5717.02(B), county auditors are given the same right of appeal from the Commissioner’s final determinations of personal property tax valuations as are personal property taxpayers. See, e.g., *Deweese v. Zaino* (2003), 100 Ohio St. 3d 324; 2003 Ohio 6502 (holding that, in appeals from the Commissioner’s final determinations, taxpayer appellants and county-auditor appellants may confer jurisdiction on the BTA only regarding issues that were set forth in the Commissioner’s final determination).

not been presented with the appraisal, or, in fact, with any unit value/income approach-based challenge to his assessed values.

- 3. The BTA's decision contravenes this Court's well-established decisional law requiring that the party challenging the Commissioner's findings has the affirmative burden of demonstrating those findings to be clearly unreasonable or unlawful.**

As we discuss under Proposition of Law No. 3, the BTA's consideration of the retroactive appraisal permitted Ohio Bell to unlawfully circumvent the affirmative burden of proof that applies to the party challenging the Commissioner's findings. By allowing Ohio Bell to by-pass the Commissioner's administrative review of the appraisal, the BTA could not apply to the appraisal the required burden-of-proof standard. Namely, under this Court's established precedent, the BTA must affirm the Commissioner's findings unless the one challenging those findings demonstrates them to be "clearly unreasonable or unlawful." *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus.

This Court's directive concerning the burden of proof could not be applied by the BTA in this matter because the Commissioner had not, and could not have, made any findings concerning the appraisal or the unit-value/income-approach methodology on which the appraisal was based. Ohio Bell's failure to have presented the Commissioner with the appraisal during the administrative proceedings on the petition for reassessment precluded that possibility. Thus, as a consequence of the BTA's failure to exclude the appraisal, the BTA reviewed it without the benefit of any findings of the Commissioner concerning its merits.

In contrast, had Ohio Bell submitted the appraisal to the Commissioner during his consideration of Ohio Bell's petition for reassessment, the Commissioner would have had the opportunity to consider fully the appraisal and to have made findings concerning it, as part of his over-all valuation findings. Then, on appeal, Ohio Bell would have had the affirmative burden of

demonstrating the Commissioner's valuation findings, including those concerning the appraisal, to have been clearly unreasonable or unlawful. In other words, the BTA's approach unreasonably and unlawfully allowed Ohio Bell to present the appraisal to the BTA free of any adverse findings of the Commissioner relating to the appraisal and, hence, free of meeting the heavy burden of proof that would have attached to those findings.

Under the BTA's approach, prior to the BTA evidentiary hearing, taxpayers would have every incentive to hold back on identifying any valuation methodologies they may desire to rely on to challenge the Commissioner's valuations, and to hide any evidence in support of those methodologies. Allowing taxpayers to by-pass the Commissioner's administrative review, as the BTA allowed Ohio Bell to do in this case, would render meaningless the entire administrative review process.

4. The BTA's decision contravenes R.C. 5727.11(A) and R.C. 5727.10.

As detailed under Proposition of Law No. 4, in addition to the foregoing reasons that the BTA erred in failing to exclude the retroactive appraisal from its consideration, the BTA contravened two further statutes. Specifically, the BTA's consideration of Ohio Bell's unit value/income approach appraisal, without Ohio Bell first having presented that appraisal to the Commissioner, violated R.C. 5727.11(A) and R.C. 5727.10. Pursuant to R.C. 5727.11(A) the General Assembly grants to the Commissioner exclusive discretion to depart from the methodology legislatively prescribed by the General Assembly. In turn, pursuant to R.C. 5727.10 the General Assembly requires the Commissioner, in the exercise of that exclusive discretion, to be guided by the evidence presented to him.

Reading these two provisions in *pari materia* compels the conclusion that taxpayers must present to the Commissioner the valuation methodology upon which they seek to challenge the

Commissioner's assessed values and the taxpayer must provide the Commissioner supporting evidence under that methodology. That result comports with the plain language of R.C. 5727.11(A) and R.C. 5727.10. Once the Commissioner is presented with a method of valuation and evidence in support, these statutes require him to give it the consideration it is due. But, where, as here, the public utility taxpayer fails to present to the Commissioner a valuation methodology that the taxpayer, upon appeal, then asserts for the first time at the BTA evidentiary hearing, the BTA contravenes the General Assembly's legislative directives in R.C. 5727.11(A) and R.C. 5727.10 by proceeding to consider that valuation methodology and any supporting evidence.

C. The Commissioner did not commit an "abuse of discretion" of the discretionary authority granted to him by the General Assembly pursuant to R.C. 5727.11(A) when he chose to use the valuation methodology prescribed by the General Assembly, rather than to adopt an alternative valuation methodology.

1. The one challenging the Commissioner's discretionary choice to use the legislatively prescribed valuation methodology bears the burden of showing the Commissioner's choice to have constituted an "abuse of discretion."

As we discuss in Proposition of Law No. 6, *infra*, even if the BTA's consideration of Ohio Bell's appraisal-based challenge were not properly barred for multiple jurisdictional reasons, the BTA erred in applying the wrong standard of review to resolve that new issue. Namely, even if Ohio Bell had conferred jurisdiction on the BTA to consider its appraisal-based challenge, the proper standard for the BTA to have applied in this case was whether the Commissioner abused his discretion in choosing to use the valuation methodology prescribed by the General Assembly pursuant to R.C. 5727.11(A), rather than using an alternative methodology. R.C. 5727.11(A) provides, in pertinent part, as follows:

(A)*** [T]he true value of all taxable property *** **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.

(Emphasis and underlining added.)

As this Court has long and uniformly held, a statutory mandate using the word "shall," followed by a permissive exception using the word "may," denotes the General Assembly's grant of discretionary authority. In fact, the Court very recently recognized the importance of the General Assembly's usage of "may," in affirming the BTA's application of an abuse-of-discretion standard of review in a tax-penalty remission case, as follows: "'may' is generally construed to render optional, permissive, or discretionary the provision in which it is embodied." *Smucker v. Levin*, 113 Ohio St.3d 337 at ¶14, 2007 Ohio 2073 (quoting *State ex rel. Niles v. Bernard* (1978), 53 Ohio St.2d 31, 34.

Accordingly, because the General Assembly has mandated the proper valuation methodology to be applied by the Commissioner, subject only to the Commissioner's discretion to utilize another method of valuation if he so chooses, the proper standard of review of the Commissioner's choice not to depart from the legislatively prescribed valuation method is an "abuse of discretion" standard. In other words, the BTA should have applied the same "abuse of discretion" standard in this case as the Court requires it to do in reviewing the Commissioner's discretionary penalty-remission determinations under the various penalty-remission statutes throughout the various tax chapters of R.C. Title 57 and in reviewing the discretionary determinations of county budget commissions under R.C. 5747.53.

2. Ohio Bell failed to show that the Commissioner's exercise of discretion in choosing to use the legislatively prescribed valuation methodology constituted an "abuse of discretion" under the Court's well-established definition of that phrase.

Under the Court's definition of "abuse of discretion," Ohio Bell's burden would be to show that the Commissioner's decision was "unreasonable, arbitrary and unconscionable." *Buckley v. Wilkins*, 105 Ohio St. 3d 350 at ¶25, 2005 Ohio 2166 (citing *Southwestern Portland Cement Co. v. Limbach* (1991), 57 Ohio St.3d 22, 23). In the present case, Ohio Bell has made no assertion that the Commissioner's choice of valuation methods fit that description.

As we set forth in the Statement of Case and Facts, *infra*, any such claim would be wholly unsupported on this record. The testimony and documentary evidence adduced at the BTA did not include any evidence that the Commissioner acted "unreasonably, arbitrarily and unconscionably" against Ohio Bell. In fact, according to the Commissioner's independent expert appraisal witness, Mr. Brent Eyre, the Commissioner acted reasonably in making that choice.

In Mr. Eyre's expert opinion, the assessed true values resulting from the legislatively prescribed methodology applied by the Commissioner resulted in a reasonable and fair valuation of Ohio Bell's taxable Ohio property as of the December 31, 2002, valuation date. Notably, Ohio Bell did not question Mr. Eyre's independence or qualifications as an expert appraisal witness. Moreover, in this regard, that concession was routine in light of Mr. Eyre's well-established credentials and appraisal experience. See his curriculum vitae, BTA Ex. M, Supp. 766-772. As Mr. Eyre testified, he "has been universally recognized as an expert whenever he has testified" in appraisal matters, which, by his testimony, totaled between 70- 80 cases. See Tr. IV at 12, Supp. 670. Mr. Eyre used a much more comprehensive range of valuation methodologies and evidence than did Ohio Bell's appraiser, Thomas K. Tegarden. Thus, the reasonableness of the

Commissioner's valuation, and the underlying methodology on which it was based, was confirmed in multiple ways through this independent testimony of an appraisal expert.

In sum, Ohio Bell fell far short of establishing that the Commissioner's choice of valuation methods constituted an "abuse of discretion." Therefore, the BTA erred in failing to affirm the Commissioner for this reason as well. Indeed, under the evidentiary record of this case, even under a "preponderance of evidence" burden-of-proof standard Ohio Bell's untimely appraisal-based challenge to the Commissioner's valuation properly would fail.

II. STATEMENT OF CASE AND FACTS

1. Course of proceedings

On May 2, 2003, Ohio Bell submitted its 2003 Annual Report for purposes of public utility personal property tax. S.T. 481, Supp. 1. Pursuant to his statutory obligations, the Tax Commissioner issued his preliminary assessment, S.T. 201-319, Supp. 196-313, and by valuation notice dated October 6, 2003, the Tax Commissioner summarized the proposed taxable values. S.T. 320, Supp. 190. On December 5, 2003, Ohio Bell filed its Petition for Reassessment. S.T. 198, Supp. 193. Ohio Bell was accorded its statutory right to a hearing before the Department of Taxation. On November 19, 2004, Ohio Bell submitted a depreciation study to the Tax Commissioner. S.T. 9 et seq., Supp. 314-420. The Commissioner denied the petition for reassessment by Final Determination dated December 13, 2004. S.T. 1-8, Supp. 421-428.

On or about February 11, 2005, Ohio Bell filed its notice of appeal to the BTA. By letter dated May 17, 2005, hearing was set for August 15, 2005. Ohio Bell filed a motion for continuance on July 25, 2005, asking for additional time based upon its contention that it intended "to present detailed testimony regarding an alternative method of valuation of its public

utility property using a Replacement Cost New Less Depreciation (RCNLD) study.” That motion was granted by BTA letter dated August 2, 2005, and a new hearing was set for January 9, 2006.

On or about December 7, 2005, Ohio Bell filed a second motion for continuance. This time, Ohio Bell changed its theory. Because of the BTA’s ruling in *Cincinnati Bell Tel. Co. v. Zaino* (June 10, 2005), B.T.A. No. 03-K-765, unreported, Appx. 70-89, Ohio Bell announced it

“retained Mr. Thomas Tegarden, whom the Board previously has regarded as an expert in the field of public utility property valuation, to provide an appraisal of Ohio Bell’s public utility property. Ohio Bell believes Mr. Tegarden’s testimony is necessary to assist the Board in fulfilling its statutory responsibility of determining the fair market value of Ohio Bell’s property.”

Due to Tegarden’s limited availability, Ohio Bell asked for an open-ended extension, until “June 2006 or later.”

Based on the parties’ agreement that, for different reasons, the January 9, 2006 hearing date needed to be continued, the BTA vacated that date and set January 6, 2006 as the date for the Tax Commissioner to file a motion to exclude any such appraisal from the BTA’s consideration. Following further briefing of the matter, the BTA denied the Commissioner’s motion, *The Ohio Bell Telephone Company v. Wilkins* (Feb. 3, 2006), BTA Case No. 2005-K-202 (Interim Order), unreported, Appx. 30-34. Upon motion for reconsideration, the BTA declined to reverse its previous ruling on the matter, *The Ohio Bell Telephone Company v. Wilkins* (August 31, 2007), BTA Case No. 2005-K-202 (Interim Order), unreported, Appx. 6-29.

At the BTA hearing, running from September 19, 2006 through September 22, 2006, Ohio Bell presented a retroactive, unit value appraisal authored by Thomas K. Tegarden. BTA Ex. 5, Supp. 892-1012. The Commissioner relied, in part, on the substantial evidence of true value reflected in Ohio Bell’s annual personal property tax return with attachments thereto, S.T. 481-

668, Supp. 1-189. Additionally, the Commissioner presented testimony of expert appraisal witness Brent Eyre as well as his documentary evidence and analysis rebutting Ohio Bell's appraisal.

Following briefing of the matter, the BTA issued its decision and order relying exclusively on Ohio Bell's appraisal as the basis for ordering the Commissioner to reduce the assessed true value of Ohio Bell's taxable personal property to \$ 1,702,157,675, i.e., the valuation amount set forth in Mr. Tegarden's appraisal as adjusted to include software costs that Ohio Bell conceded at the BTA hearing were properly treated as taxable property. *BTA Decision and Order* at 25-26, 33, Appx. 19-21,27. The Commissioner then timely filed his appeal to this Court from the BTA's decision and order.

2. The method of valuation Ohio Bell presented to the Tax Commissioner in proceedings on the petition for reassessment

In its petition for reassessment, S.T. 198-199, Supp. 193-194, Ohio Bell asserted two specifications of error. Because Ohio Bell has conceded the taxability of its software costs, not pertinent here is the first specification, which addresses the inclusion of software costs in the value assessment. Second, Ohio Bell stated that

“the 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.”

In addition, Ohio Bell contended that the Tax Commissioner's legislatively prescribed method did not constitute a proper true value calculation, S.T. 199, Supp. 194., and quantified the alleged taxable value error at \$351,611,285 (both software and valuation issues). *Id.*

In the course of the proceedings on the petition for reassessment, Ohio Bell presented

“SBC Ameritech Corporation Ohio Depreciated Replacement Cost as of December 31, 2002,” a study designed to support Ohio Bell’s claim for reduction of property value. S.T. 10-121, Supp. 315-420. The executive summary of the study, S.T. 15-18, Supp. 320-323, sets forth its method: beginning with the company’s actual “vintaged cost records for the Company’s utility plant in service,” the study utilized “C.A. Turner Telephone Plant Indexes” with technology-substitution adjustments to generate new “replacement cost new” figures. Next, a multi-factored analysis was used to develop “the depreciated value as of December 31, 2002,” including lives derived from Company “regulatory remaining life studies,” the results derived from “recently completed industry group Technology Futures, Inc.,” and lives derived from other property groups “more representative of economic useful life.” These factors allowed the development of what the study calls “theoretical depreciation,” S.T. 16, Supp. 321.

Finally, applying the new depreciation schedules to the newly developed replacement cost figures as adjusted, Ohio Bell’s valuation study generated a “Depreciated Replacement Cost” figure as the basis for true value. S.T. 18, Supp. 323.

In evaluating this evidence, the Tax Commissioner noted that, although the study asserted that “equipment is overvalued due to the technological change and competition in its industry,” S.T. 7, Supp. 427, the taxpayer had not overcome the prima facie validity of the prescribed cost-less-allowances method specifically developed by the Tax Commissioner for telephone company assets. Moreover, the study failed to “demonstrate[e] that ‘special and unusual circumstances’ exist,” or that the prescribed valuation method would create an “unjust or unreasonable result,” inasmuch as the study failed to show “the true value of its equipment as calculated under the standard computation is inaccurate.”

Quite simply, the prescribed allowances already build obsolescence factors into industry-

specific composites, and the alternative depreciation schedule proffered by Ohio Bell did not probatively establish itself as superior in this regard. In fact, these findings parallel the BTA's conclusions with respect to a similar valuation study in *Cincinnati Bell*, supra.

3. The notice of appeal to the BTA

Ohio Bell's notice of appeal to the BTA devoted two brief paragraphs to discharge its jurisdictional obligation under R.C. 5717.02 to "specify the errors [] complained of" in the Final Determination. The following paragraph addresses valuation:

"Second, the 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."

The most significant features of this specification are the focus on the alleged flaws in the cost figures and the depreciation lives – a focus that reflects the alternative cost methodology Ohio Bell presented below. Nothing in this paragraph even remotely suggests that the Commissioner erred by failing to have considered the various kinds of valuation methodologies, approaches to value and supporting evidence that are entailed when the Commissioner is presented with an appraisal.

4. The unit-value appraisal that Ohio Bell presented at the BTA raised a dramatically different valuation claim from the one Ohio Bell raised in the Commissioner's administrative proceedings.

The appraisal presented by Ohio Bell to the BTA used a "unit valuation" methodology under which the entire value of Ohio Bell's property, both taxable and exempt, was determined. Then, that over-all "unit value" was allocated as between the taxable and exempt assets. In determining the unit value of Ohio Bell's taxable and exempt property, the appraiser relied heavily on an income approach to value. In addition, Ohio Bell's appraiser, Thomas Tegarden,

used a cost approach methodology based on Ohio Bell's net book values for financial statement purposes and then adjusting those values for obsolescence. BTA Ex. 5, Supp. 892-1012.

Indeed, illuminating the vast difference between the valuation challenge that Ohio Bell had advanced below from the new one embodied in the appraisal, the Commissioner's final determination contains no findings whatsoever on any of the evidence that Ohio Bell relied on for its appraisal. Nor, even in general terms, does the Commissioner's final determination contain any findings or discussion of the propriety of a unit-value appraisal or of the use of an income approach, or of an SEC-net-book-value cost approach, to value.

Due to page-limitation constraints, a factual analysis of the Ohio Bell's appraisal and the critique of that appraisal by the Commissioner's expert appraisal witness, Brent Eyre, will be incorporated into the Law and Argument Section, which follows, with citations directly to the evidentiary record.

III. LAW AND ARGUMENT

Proposition of Law No. 1:

A taxpayer seeking to challenge a public utility personal property tax assessment pursuant to a petition for reassessment under R.C. 5727.47 is jurisdictionally required to raise the objections that it asserts justify the relief requested in writing in its petition for reassessment or in the Commissioner's administrative proceedings on the petition thereafter.

Upon appeal to the BTA, an appellant taxpayer invokes the BTA's jurisdiction to consider an objection only if the taxpayer had raised such objection in writing in the Commissioner's proceedings on the petition for reassessment prior to the Commissioner's issuance of his final determination on the petition. By failing to raise such objection in writing in the administrative proceedings before the Commissioner, the appellant taxpayer fails to confer jurisdiction upon the BTA to consider it.

CNG Dev. Co. v. Limbach (1992), 63 Ohio St.3d 28; *Shugarman Surgical Supply v. Zaino*, 97 Ohio St. 3d 183, 186; 2002 Ohio 5809, followed.

As detailed in the Statement of Case and Facts, the valuation challenge raised by Ohio Bell at the BTA evidentiary hearing differed dramatically from the one that it had raised in the Commissioner's administrative proceedings on its petition for reassessment. The valuation challenge that Ohio Bell had raised in the Commissioner's proceedings was based on a replacement-cost-new valuation study, whereas the valuation challenge advanced by Ohio Bell at the BTA hearing was based exclusively on a unit-value appraisal that heavily relied on an income-approach methodology.

In its decision and order, the BTA ordered the Commissioner to reduce the assessed true values of Ohio Bell's taxable personal property to the amounts set forth in Ohio Bell's appraisal. The BTA relied exclusively on the appraisal and the testimony concerning it as the basis for granting Ohio Bell the reduced valuations. The BTA erred as a matter of law in relying on the appraisal because Ohio Bell failed to raise that challenge in writing in proceedings before the Commissioner and, therefore, failed to confer jurisdiction on the BTA to consider it. *CNG Dev.; Shugarman, supra*.

Under the petition for reassessment statute applicable to public utility personal property taxpayers, R.C. 5727.47, public utilities seeking to contest their personal property tax assessments must file petitions for reassessment. Under the express requirements of R.C. 5727.47, such taxpayers' petitions "shall indicate the utility's objections, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination." In *CNG Dev.*, the Court held that a similar requirement of former R.C. 5739.13, pertaining to petitions for reassessment under the sales tax law, ran to the "core of procedural efficiency" and, therefore, constituted a jurisdictional requirement with which

petitioning taxpayers must strictly comply. 63 Ohio St.3d at 31-32. In *Shugarman*, the Court expressly followed *CNG Dev.*

Particularly significant to the present case, the Court in *CNG Dev.* held as follows:

***** [S]ince the commissioner does not have jurisdiction over an error not specified in the petition, the final order should not, and in this case did not, mention the unclaimed error. Since the final order does not contain any disposition of that alleged error, CNG does not possess any basis on which to appeal regarding that error.**

Id. at 32.

This holding is directly on point here. At the BTA evidentiary hearing, in advancing its appraisal-based challenge to the Commissioner's valuation, Ohio Bell effectively claimed that the Commissioner's valuation was erroneous because the Commissioner erred in failing to adopt the unit valuation/ income approach methodology, analysis and valuation amount set forth in the appraisal. As in *CNG Dev.*, the Commissioner's final determination in the present case had no "disposition of the alleged error."

Instead, as in *CNG Dev.*, the final determination of the Commissioner addressed only the objections that the taxpayer had raised in the proceedings on the petition for reassessment, i.e., those based on its replacement-cost-new valuation study. Indeed, in the present case, the absence of any disposition of Ohio Bell's appraisal-based challenge is evident not only from the total absence of any findings of the Commissioner concerning the appraisal, but also because the appraisal did not even come into existence until long after the Commissioner's final determination was issued.

Thus, for this jurisdictional reason, the BTA's decision should be reversed.

Proposition of Law No. 2:

An appellant confers jurisdiction upon the BTA, and subsequently upon this Court, to consider an asserted error in the Commissioner's final determination only if such asserted error is timely specified as error in the notice of appeal to the BTA.

This Court consistently has held that the "specification of error" requirement of R.C. 5717.02 is a mandatory, jurisdictional requirement which must be strictly complied with to invoke the jurisdiction of the BTA to consider an asserted error in the Tax Commissioner's final determination. *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73; *Dana Corp. v. Limbach* (1991), 60 Ohio St.3d 26; *Cleveland-Cliffs Iron Co. v. Limbach* (1991), 61 Ohio St.3d 349; *Gen. Motors. Corp. v. Wilkins* (2004), 102 Ohio St.3d 33; *Ellwood Engineering Castings Co. v. Zaino* (2003), 98 Ohio St.3d 424; *Castle Aviation, Inc. v. Zaino*, (2006), 109 Ohio St.3d 290.

In the present case, Ohio Bell failed to confer jurisdiction on the BTA to consider its appraisal-based challenge because Ohio Bell's notice of appeal failed to specify any error in the Commissioner's final determination relating to that appraisal challenge. The reason that Ohio Bell's notice of appeal did not include any specification of error relating to the appraisal challenge is obvious: Ohio Bell had not yet created the appraisal, so the Commissioner could not have possibly committed any error regarding that challenge.

Moreover, even putting aside that Ohio Bell's notice of appeal did not specify any "error" in the Commissioner's final determination concerning its appraisal challenge, its notice of appeal did not "specify" any issues even remotely alluding to the appraisal or any of the methodologies set forth therein or any of the evidence used in support of the appraisal. To illustrate this point, supposing hypothetically that Ohio Bell had submitted its appraisal to the Commissioner in the

Commissioner's administrative proceedings on the petition for reassessment and the Commissioner simply had declined to consider the appraisal, the issue presented to the BTA on appeal would be whether Ohio Bell's notice of appeal "specified" any error in the final determination relating to the appraisal. Under this Court's established decisional law defining "specify," the notice of appeal would not confer the BTA with jurisdiction to consider such a challenge. *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579.

In *Queen City Valves*, the Court pointed out that the language of the statute required that the BTA was "to be advised specifically of the various errors charged to the Tax Commissioner." 161 Ohio St. at 583. After noting that the statute "requires in plain language that the errors complained of be specified[,]" the Court looked to the definition of the term "specify":

The word, "specify," according to Black's Law Dictionary (4 Ed) means "to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize; or to distinguish by words one thing from another."

Id.

Held against this standard, Ohio Bell's notice of appeal to the BTA cannot be viewed as having specified any appraisal-based challenge. Rather, the notice of appeal asserted only that:

*** the 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."

In sum, Ohio Bell's notice of appeal did not specify any asserted error in the Commissioner's final determination concerning the appraisal for two basic reasons. First, the Commissioner did not commit, and could not have committed, any error concerning the appraisal or any of its methodologies, evidentiary support, or analysis. Second, the notice of appeal did not "specify" any error regarding the Commissioner's failure to have considered the appraisal, or any

of its methodologies, evidentiary support, or analysis. Thus, the BTA was not conferred with jurisdiction to consider Ohio Bell's appraisal-based challenge for failure to meet the jurisdictional requirements of R.C. 5717.02, as well as for failing to meet the jurisdictional requirements of R.C. 5727.47.

Proposition of Law No. 3:

A BTA decision that reduces the Tax Commissioner's assessed valuation of a taxpayer's personal property on the basis of an appraisal that the taxpayer did not present to the Commissioner during his administrative proceedings and, consequently, regarding which the Commissioner made no findings, contravenes this Court's well-established decisional law requiring that the party challenging the Commissioner's findings has the affirmative burden of demonstrating those findings to be clearly unreasonable or unlawful.

Under the Court's established precedent, the BTA must affirm the Commissioner's findings unless the one challenging those findings demonstrates them to be "clearly unreasonable or unlawful." *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus. This standard is well entrenched in this Court's decisional law. The Court has required that affirmative burden of proof to be met by the one challenging the Commissioner's findings in every Tax Commissioner case decided thereafter. The Court has done so most recently in *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008 Ohio 68, at ¶16; and *Columbia Gas Transmission Corp. v. Levin*, 117 Ohio St. 3d 122; 2008 Ohio 511, at ¶11.

Underlying the substantial deference accorded the Commissioner's findings is the Commissioner's acknowledged role as an "expert" in tax matters. *Bd. of Educ. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184, 186. Similarly, the Court has expressly held that the Commissioner's determination of taxable value involves "the highest degree of official

judgment and discretion.” *Ashland County Bd. of Comm'rs v. Ohio Dep't of Taxation* (1992), 63 Ohio St.3d 648, 656².

This Court’s directive concerning the burden of proof could not be applied by the BTA in this matter because the Commissioner had not, and could not have, made any findings concerning the appraisal or the unit-value/income-approach methodology on which the appraisal was based. Ohio Bell’s failure to have presented the Commissioner with the appraisal during the administrative proceedings on the petition for reassessment precluded that possibility. Thus, as a consequence of the BTA’s failure to exclude the appraisal, the BTA reviewed it without the benefit of any findings of the Commissioner concerning its merits.

If the BTA’s decision is permitted to stand, the consequences of the BTA’s decision are easy to foresee. Following the lead of Ohio Bell in this case, personal property taxpayers who seek to challenge the Commissioner’s valuations inevitably will choose to by-pass the Commissioner’s consideration of an appraisal. Instead, they will wait until after filing their notices of appeal from the Commissioner’s final determinations so as to spring the appraisals on the Commissioner later at the BTA, free of any factual findings or analysis by the Commissioner.

Under such a radical minimalization of the Commissioner’s administrative review functions, the Commissioner effectively would be prevented from performing his “expert” role in his administrative review of tax valuation matters, pursuant to which he exercises the “highest

²Perhaps because the county boards of revision lack comparable tax expertise to that of the Commissioner, the substantial deference accorded the Commissioner’s personal property tax valuation findings contrasts starkly with the lack of such deference regarding real property valuation findings of the county boards of revision. Specifically, “decisions of boards of revision should not be accorded a presumption of validity.” *Colonial Vill., Ltd. v. Wash. County Bd. of Revision*, 114 Ohio St. 3d 493, 2007 Ohio 464 (citing *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13, 15, 1996 Ohio 432; and *Springfield Local Bd. of Edn. v. Summit Cty. Bd. of Revision* (1994), 68 Ohio St.3d 493, 494, 1994 Ohio 501.

level of official judgment and discretion.” The Commissioner’s administrative review would be reduced to a meaningless clerical exercise. Taxpayers would decline to provide the Commissioner with any documentation or information on which the Commissioner could then make alternative valuation findings from those made in his review of the taxpayers’ returns. Instead, taxpayers would “keep their powder dry” and simply present their documentary and testimonial evidence for the first time on appeal to the BTA. It would be difficult to imagine a result more at odds with the decisional law of this Court.

The instant case presents a particularly egregious violation of jurisdictional requirements in which, at the BTA, the taxpayer radically altered its challenge to the Commissioner’s valuation by urging an entirely new valuation methodology from the one that it had advanced in the Commissioner’s administrative proceedings. The jurisdictional deficiencies involved here are, therefore, patent and extreme. In other cases, however, it may be less clear-cut whether the nature of a taxpayer’s valuation challenge at the BTA fundamentally differs from the challenge the taxpayer had earlier raised at the Commissioner’s administrative-review level. In such instances, the lack of a particular Commissioner finding or findings in his final determination potentially could be properly remedied by the BTA’s remanding the case back to the Commissioner for further findings, rather than the BTA’s excluding consideration of the valuation challenge altogether.

Proposition of Law No. 4:

A BTA decision that reduces the Tax Commissioner’s assessed valuation of a taxpayer’s personal property on the basis of an appraisal that the taxpayer did not present to the Commissioner during his administrative proceedings and, consequently, regarding which the Commissioner made no findings, contravenes the General Assembly’s legislative directives in R.C. 5727.11(A) and R.C. 5727.10.

The BTA's failure to exclude the retroactive appraisal from its consideration directly contravened the statutes prescribing the Commissioner's valuation duties under the public utility property tax law. Specifically, pursuant to R.C. 5727.11(A), the General Assembly grants to the Commissioner exclusive discretion to depart from the methodology legislatively prescribed by the General Assembly, as follows:

(A)*** [T]he true value of all taxable property *** **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.

(Emphasis and underlining added.)

Further, R.C. 5727.10 requires the Commissioner, in the exercise of his exclusive discretion, to be "guided by" the evidence presented to him, as follows:

***[The Commissioner] *** **shall be guided** by the information contained in the report filed by the public utility **and such other evidence** and rules as will enable him to make these determinations.

(Emphasis added.)

Reading these statutes in pari materia compels the conclusion that, in order to impose an obligation on the Commissioner to exercise his discretion to depart from the legislatively prescribed valuation methodology, a public utility must present the Commissioner with the evidence it relies on during the Commissioner's own administrative review of the matter, rather than to the BTA on appeal. Otherwise, on appeal to the BTA from the Commissioner's final determination, the taxpayer could not reasonably establish that the Commissioner had abused that discretion.

In this regard, the Court's previous decision in *Texas Eastern Transmission Corp. v. Tracy* (1997), 78 Ohio St.3d 83, is instructive because the Court read R.C. 5727.11(A) and R.C.

5727.10 in pari materia as the key statutes defining the Commissioner's responsibilities and authority to determine the true value of public utility personal property. Reading these two provisions together, the Court concluded that the Commissioner may exercise his discretionary authority and depart from the legislatively prescribed method for determining true value. Moreover, the Court held that the Commissioner's adoption of an alternative valuation method did not depend on a pre-showing of "special or unusual circumstances" by the taxpayer. The Court declined to insert that pre-condition into the statutory text. *Id.* at 86. Rather, the Court, held that, under the mandate of R.C. 5727.10, the Commissioner must consider the evidence presented to him and then, in the exercise of his discretion under R.C. 5727.11(A)(1), he "may" use an alternative valuation method instead of the legislatively prescribed one. *Id.*

Texas Eastern differs from the present case in precisely the respect that compels reversal of the BTA's decision here. In *Texas Eastern*, the appraisal relied on by the taxpayer **was presented first to the Commissioner**, i.e., during the Commissioner's administrative review of the taxpayer's petition for reassessment. See the Commissioner's *Texas Eastern* Final Determination, dated May 27, 1993, Appx. 147-151. The BTA derived its jurisdiction to consider the appraisal from the fact that the appraisal had been presented to, and rejected by, the Commissioner.

This Court's ruling in *Texas Eastern* is consistent with the cited language of both statutes, which by their plain terms authorize **the Commissioner** to look to an alternative method of valuation. Obviously, the Commissioner can only consider a proposed method of valuation if the taxpayer presents it to him. When the proposed method of valuation is not presented to the Commissioner, the taxpayer has no further right to receive consideration of it under the statutes.

Proposition of Law No. 5:

When, at the BTA, the Commissioner raises new grounds for affirmance of his final determination the jurisdictional consequences differ from when, at the BTA, an appellant taxpayer raises additional challenges to the Commissioner's final determination that were not specified in the taxpayer's notice of appeal. The former is jurisdictionally permissible, the latter is not. *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 16, followed.

For the reasons we have outlined in Propositions of Law 1-4, supra, upon discovering Ohio Bell's intent to obtain a retroactive, unit-value appraisal, the Commissioner moved the BTA to exclude any such appraisal from its consideration. In denying the motion, the BTA relied heavily on a recent decision of this Court. See, *The Ohio Bell Tel. Co. v. Wilkins* (Feb. 3, 2006), BTA Case No. 2005-K-202 (Interim Order), unreported at 9 (citing *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11), Appx. 30-34. The BTA 's reliance on *Key Serv.* as the basis for denying the Commissioner's motion to exclude, however, was wholly misplaced. In actuality, *Key Serv.* strongly supported the Commissioner's motion to exclude.

In *Key Serv.*, this Court reversed a ruling of the BTA barring the Commissioner from obtaining discovery from the taxpayer/refund claimant concerning a basis for denying the refund claim that had not been mentioned by the Commissioner in his final determination. The Court held that the Commissioner was within his rights to seek affirmance of his final determination on this new basis and to obtain discovery on that issue. The Court reasoned that it is the taxpayer who must file a notice of appeal specifying error, not the Commissioner, and that the BTA evidentiary hearing permits the admission of additional evidence, citing to *Bloch v. Glander* (1949), 151 Ohio St. 381, 387. *Key Serv.*, 95 Ohio St.3d at 16.

As *Key Serv.* instructs, a situation in which the Commissioner raises a new issue in support of affirmance of his final determination that he did not mention in his final determination is treated jurisdictionally differently from the situation where an appellant taxpayer raises a new

issue at the BTA hearing that it had not specified in its notice of appeal. The former is jurisdictionally permissible, the latter is not.

The latter situation is precisely the one involved here. Through the vehicle of an appraisal commissioned during the BTA proceedings, Ohio Bell raised a wholly new valuation challenge at the BTA hearing that it had not raised in its petition for reassessment or in its notice of appeal to the BTA. Thus, *Key Serv.* strongly supported the granting of our motion.

Proposition of Law No. 6:

Under the plain meaning of R.C. 5727.11(A), the General Assembly vests sole discretion in the Commissioner to depart from the methodology prescribed in that Section for determining the true value of public utility personal property. Accordingly, on appeal from the Commissioner's final determination applying the legislatively prescribed methodology, the appellant must show that the Commissioner "abused his discretion" in choosing not to adopt a different valuation methodology than the one legislatively prescribed in that Section.

- A. The Commissioner's determination to use a different valuation methodology from the method prescribed by the General Assembly under R.C. 5727.11(A) is purely discretionary.**

The first sentence of R.C. 5727.11(A) provides that the Commissioner "shall" determine the true value of taxable public utility personal property "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." The methodology mandated for the Commissioner to apply in the first sentence of R.C. 5727.11(A) is followed by a second sentence which modifies that directive to the Commissioner. Specifically, the second sentence provides that "[i]f the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, he may use a different method."

The General Assembly's use of the word "shall" in the first sentence and the word "may" in the second compels the conclusion that the General Assembly vested the

Commissioner with a permissive right, but not a duty, to use a different method of valuation from the method prescribed in the first sentence of R.C. 5727.11(A). In other words, the Commissioner may choose to adopt an alternative valuation methodology or not, but that choice is purely discretionary. *Dennison v. Dennison* (1956), 165 Ohio St. 146, 149 (“[o]rdinarily, the word ‘shall’ is a mandatory one, whereas ‘may’ denotes the granting of discretion”); *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, paragraph one of the syllabus (“ *** the word “may” shall be construed as permissive and the word “shall” shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that they receive a construction other than their ordinary usage”), accord, *Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534; and *State ex rel. Adams v. Aluchem, Inc.* (2004), 104 Ohio St.3d 640, ¶12.

In fact, this Court uniformly has applied this established principle regarding the Ohio taxing statutes. The discretionary language of R.C. 5727.11(A) finds its counterpart in several current and previous penalty remission statutes. In interpreting those statutes, the Court consistently has held that they vest sole discretion in the Commissioner, whose decision to grant or deny the penalty remission request may be overturned only by showing an “abuse of discretion.” *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483 (highway use tax); *General Motors Corp. v. Tracy* (1995), 73 Ohio St. 3d 29 (use tax); *Smucker v. Levin*, 113 Ohio St.3d 337 at ¶14, 2007 Ohio 2073 (personal property tax) (citing *State ex rel. Niles v. Bernard* (1978), 53 Ohio St.2d 31, 34).

In its decision in *Interstate Freight*, the Court undertook a detailed analysis of the pertinent statutory language of the penalty remission statute at issue in that case, as follows:

*** [W]e must first look to the statute under which the penalty is imposed.

Section 5728.10, Revised Code, reads in part as follows:

‘A penalty of 15 per cent **shall** be added to the amount of assessment made pursuant to the provisions of this section. The Tax Commissioner shall have power to adopt and promulgate rules and regulations providing for the remission of penalties added to assessments made pursuant to the provisions of this section.’

An examination of this section clearly shows that the imposition of penalty **is mandatory** with power reposed in the Tax Commissioner to adopt rules and regulations for the remission thereof.

On July 14, 1958, in order to implement the penalty remission power granted by Section 5728.10 Revised Code, the Tax Commissioner promulgated Rule No. 126, which provides in part as follows: ‘In the event of a tax assessment to which a 15 per cent penalty has been added under the provision of the Ohio sales tax, use tax or highway use tax laws is paid in its entirety within 30 days after the date on which noticed of assessment is served on the person assessed, the Tax Commissioner **may** remit such part of the penalty as he **may** deem proper. ***.

Clearly, therefore, before the Board of Tax Appeals can order the remission of a penalty imposed by the Commissioner under this section it must affirmatively find that the Tax Commissioner **abused his discretion** in refusing to remit the penalty.

Interstate Freight, Id. at 484-485. (Emphasis added.)

The statutory language of R.C. 5727.11(A) at issue in the present case even more clearly vests discretion in the Commissioner to depart from the statutory mandate than did the language of the penalty remission statutes at issue in *Interstate Freight*. This is so because in enacting R.C. 5727.11(A) the General Assembly has not required the Commissioner to promulgate any rules or regulations to apply in determining whether to depart from the statutorily prescribed methodology for determining true value. The Commissioner himself has not self-imposed any limitation on his own exercise of discretion.

- B. The appellate review of the Commissioner’s discretionary power is limited to whether an “abuse of discretion” has occurred.**

In *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70, the Court held, in pertinent part, as follows:

We do not have authority to reverse unless we find the Tax Commissioner "abused his discretion."

"Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 483, 485 [11 O.O. 2d 240]. An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St. 2d 151, 157 [16 O.O. 3d 169]; *Chester Township v. Geauga County Budget Commission* (1976), 48 Ohio St. 2d 372, 373 [2 O.O. 3d 484]." (Emphasis added.)

Similarly, this Court recently reiterated that for an appellant to prevail on an abuse-of-discretion claim, "the Commissioner's action must be shown to have been unreasonable, arbitrary and unconscionable." *Buckley v. Wilkins*, 105 Ohio St.3d 350 at ¶25, 2005 Ohio 2166 (quoting *Southwestern Portland Cement Co. v. Limbach* (1991), 57 Ohio St.3d 22, 23).

Applying *Jennings* and *Buckley* here, even if Ohio Bell had conferred jurisdiction to consider its appraisal-based challenge, Ohio Bell did not demonstrate that the Commissioner's exercise of his discretionary authority constituted an abuse of discretion. In fact, the BTA made no such finding. Nor did Ohio Bell suggest that the Commissioner had done so and the record is devoid of any evidence that would support any such allegation.

C. Even if the Commissioner's exercise of discretion in choosing to use the legislatively prescribed methodology were not properly subject to an "abuse of discretion" standard of review, however, the Commissioner's decision to use that methodology would constitute a Commissioner "finding" that Ohio Bell failed to demonstrate was "clearly unreasonable or unlawful."

As we detail under Proposition of Law No. 3, *supra*, as to the Commissioner's findings generally, the one challenging those findings on appeal to the BTA has the affirmative burden of showing those findings to be "clearly unreasonable or unlawful." As emphasized above, the

Commissioner's choice to apply the legislatively prescribed valuation method is properly challengeable only on "abuse of discretion" grounds. But, even if that discretionary decision were relegated to the status of a mere "finding," Ohio Bell plainly failed to meet the heavy evidentiary burden of proof necessary to overcome the presumptive validity of such a "finding."

In fact, the litigation position taken by Ohio Bell at the BTA evidentiary hearing effectively precluded Ohio Bell from establishing that the Commissioner's decision to apply the legislatively prescribed methodology was "clearly unreasonable or unlawful." First, at the BTA hearing, Ohio Bell abandoned the basis on which it had previously relied to challenge the Commissioner's valuation. That is, Ohio Bell presented no testimony regarding the RCN study that Ohio Bell had presented to the Commissioner in support of its petition for reassessment. Nor did Ohio Bell provide any of the necessary underlying documentation on which that study was based or include any analysis of the study in its BTA briefing.

Moreover, at the BTA hearing Ohio Bell did not challenge any aspect of the reasonableness of the Commissioner's application of the legislatively prescribed methodology. Ohio Bell did not identify any fundamental, inherent deficiency in that methodology or even any deficiency in that methodology as applied particularly to Ohio Bell. Rather, Ohio Bell challenged the Commissioner's valuation only indirectly, by presenting an alternative valuation methodology, using a combination of approaches to value and asserting that that methodology and those approaches to value better reflected true value.

Most remarkably, Ohio Bell failed to present any evidence under a "market approach" to valuing its Ohio property under which the appraised property is valued based on market sales of comparable properties. By contrast, the Commissioner, through Mr. Eyre's presentation, established that under such approach, Ohio Bell's taxable and exempt property should be valued

at \$3.783 billion, an amount over 50% greater than the unit valuation claimed in Ohio Bell's appraisal of \$2.475 billion. See, Tr. IV at 98, Supp. 692; BTA Ex. H, Supp. 755 (Mr. Eyre's analysis) and BTA Ex. 5, Supp. 894-895 (Ohio Bell's appraisal's claimed unit value).

Using Ohio Bell's own method for allocating the unit value between exempt and taxable assets (the reasonableness and lawfulness of which we strongly challenge in this brief, *infra*), the \$3.783 billion unit valuation results in a true value of Ohio Bell's taxable Ohio property of approximately \$2.55 billion (i.e., $\$3.783 \times 67.5\%$), as compared with the Commissioner's assessed true value of \$2,466,085,652.

For these reasons, Ohio Bell plainly failed to meet the affirmative burden that applies to the Commissioner's findings. Indeed, under the evidentiary record of this case, even under a "preponderance of evidence" burden-of-proof standard Ohio Bell's challenge to the Commissioner's valuation properly would fail. Several major fundamental flaws in Ohio Bell's valuation challenge are addressed in the following Propositions of Law.

Proposition of Law No. 7:

The BTA acts unreasonably and unlawfully in reducing the valuation determined by the Tax Commissioner under his application of the legislatively prescribed valuation methodology for determining the true value of public utility personal property where:

- (1) the utility's acquisition/retirement history, as revealed by an examination of Schedules B and C of its property tax return for the tax year at issue, evidenced that it had continuously engaged in regular investment in plant property over its previous years of Ohio operations and had engaged in modest retirements of existing property over that time, consistent with the specially-tailored rates of depreciation and obsolescence prescribed by the Commissioner under the legislatively prescribed valuation methodology;**
- (2) this Schedule B and Schedule C evidence, provided by the utility in compliance with the legislatively prescribed acquisition-cost-less-prescribed-annual-allowances methodology, was wholly unrebutted by any presentation**

of evidence by Ohio Bell concerning any sales or other disposals of any of its telecommunications property;

- (3) for financial accounting statement reporting purposes, from the four years preceding the valuation date to the four years thereafter, the utility's and its parent corporation's external accounting auditors and in-house accounting/management personnel did not undertake any "impairment" analysis under SFAS 144, belying any claim to excessive obsolescence or depreciation of the fixed assets at issue;
- (4) the BTA testimony of the Commissioner's expert appraisal witness and the supporting documentary evidence he utilized under his "market approach" valuation analysis strongly supported a true value of the taxable property in excess of the true value resulting from application of the legislatively prescribed methodology applied by the Commissioner; and
- (5) the utility relied exclusively on a retroactive, unit-value appraisal that, in turn, relied exclusively on an income approach for which the resultant valuation estimate depended on an estimate of a capitalization rate for which even a small difference in appraisal opinion would yield a major difference in the valuation estimate.

Even if Ohio Bell were to have conferred jurisdiction on the BTA to consider the unit valuation appraisal, the BTA failed to act reasonably and lawfully in reducing the assessed true values determined by the Commissioner under his application of the legislatively prescribed methodology set forth in R.C. 5727.11(A). We set forth several compelling factors for this conclusion in the following sub-sections of this Proposition of Law.

- A. **The methodology prescribed by the General Assembly under R.C. 5727.11(A) rests on the most bedrock of personal property valuation principles and the rates of depreciation and obsolescence prescribed by the Commissioner there under are specially tailored to the telecommunications industry to recognize the differing useful lives of five distinct asset classes of telecommunications property based upon the Commissioner's on-going study of the telecommunications industry in collaboration with industry participants.**

Perhaps the most "bedrock" of property tax valuation principles is that the "best method of determining value is the actual sale of *** [the subject property] *** on the open market and at arm's length, between one who is willing to sell, but is not compelled to do so, and one who is

willing to buy, but is not compelled to do so.” *Grabler Mfg. Co. v. Kosydar* (1975), 43 Ohio St.2d 75, paragraph one of the syllabus; *In re Estate of Sears* (1961), 172 Ohio St. 443; *State ex rel. Park Investment Co. v. Bd. of Tax Appeals* (1964), 175 Ohio St. 410, 412; *Walters v. Knox Cty. Bd. of Revision* (1989), 47 Ohio St.3d 23. This principle pervades property tax valuation.

In fact, the legislatively prescribed methodology set forth in R.C. 5727.11(A) quintessentially embodies this “best evidence” principle. That is, the starting point in the legislatively prescribed method for the Commissioner to value telecommunications personal property is the property’s original, arm’s-length purchase prices, i.e., the “capitalized costs.”

These purchases are real market transactions and thus confer a unique intrinsic validity to the statutory method prescribed by the General Assembly for the Commissioner to apply in determining true value. In contrast to the legislatively prescribed methodology applied by the Commissioner, such transactional, “real-world,” market evidence is not central to alternative valuation methodologies. In fact, as we detail in the following sub-sections of this Proposition of Law, Ohio Bell’s appraisal methodology ignores these market transactions altogether.

To these “capitalized costs,” the Commissioner then applies his prescribed allowances for depreciation and obsolescence, based upon the remaining estimated useful lives of the various classes of property. As shown from Ohio Bell’s 2003 return, S.T. 481-498, Supp. 1-18, and the Commissioner’s “Guidelines for Filing Public Utility Property Tax Returns,” BTA Ex. C, Supp. 730-750, the statutorily prescribed methodology applied by the Commissioner to determine the true value of Ohio Bell’s telecommunications property uses separate prescribed rates of depreciation and obsolescence for five different classes of telecommunications property, ranging from property having 5-year, to 7.5-year, to 15-year useful lives.

This special tailoring of the prescribed rates to the telecommunications industry recognizes the differing useful lives of such distinct asset classes based upon the Commissioner's on-going study of the telecommunications industry in collaboration with industry participants. As the Commissioner's "Guidelines" booklet explains, the Commissioner's prescribed rates of depreciation and obsolescence are based upon his study of the various telecommunications industries, with direct assistance and input from taxpayers in each of those industries. See *Cincinnati Bell Telephone Co. v. Zaino* (June 10, 2005), BTA Case Nos. 2003-K-765; 2003-K-1612 at 25 (quoting from page two of the "Guidelines" as follows: "The property groups and class life assigned to each group as set forth in this publication reflect conclusions developed by the Department of Taxation in which public utilities and interexchange telecommunications companies from each class participated."), Appx. 79.

B. Ohio Bell's 2003 public utility tax return provided compelling evidence in support of the reasonableness and lawfulness of the Commissioner's valuation that went wholly unrebutted by Ohio Bell.

Ohio Bell's public utility personal property tax return for the 2003 tax year at issue, ST. 481-498, Supp. 1-8, reflects its regular investment in Ohio plant property over the years. This investment history is reflected in Schedules B and C of the return. Schedule B, captioned "Listing of Ohio Property," ST. 485-487, Supp. 5-7, discloses the acquisitions and retirements of Ohio Bell's telecommunications property during the 2002 calendar year using five separate classes of property, namely, "General Support Assets"; "Central Office Assets"; "Information Origination/termination Assets"; "Cable & Wire Facilities Assets"; and "Amortizable Assets."

Ohio Bell's purchases in Ohio during the 2002 calendar year for these five classes of property are shown under the "Additions" column for each such class of property in the following respective amounts: \$34,855,624 (as corrected by the Commissioner upon audit –

reported by Ohio Bell as \$35,392,717); \$225,811,440; \$639,642; \$148,396,123; and \$435,850,737 (as corrected by the Commissioner upon audit – reported by Ohio Bell as \$436,387,830). Id. The percentage increases represented by these additions from the “beginning balance” acquisition cost figures as of January 1, 2002 for these five classes of property are as follows: $\$34,855,624 / \$863,584,711 = 4.03\%$ (general support assets); $\$225,811,440 / \$3,516,836,003 = 6.42\%$ (central office assets); $\$639,642 / \$45,510,334 = 1.4\%$ (information origination/termination assets); $\$148,396,123 / \$3,309,230,767 = 4.484\%$ (cable and wire facilities assets); and $\$435,850,737 / \$7,775,850,737 = 5.6\%$ (amortizable assets). Id.

The Schedules C to Ohio Bell’s 2003 tax year return show the specific acquisition years and acquisition costs for all of Ohio’s plant equipment held during the 2002 calendar year for each of the five classes of Ohio Bell’s telecommunications plant property, ST. 485-494, Supp. 7-14. This data reflects that Ohio Bell’s new investment in plant equipment, over an extended number of previous years, has been remarkably consistent, and at roughly similar rates to the figures set forth above for the 2002 calendar year. See the specific Schedules C for each of the five classes of property showing Ohio Bell’s previous years’ acquisitions. Id.

In comparison, Ohio Bell’s “Retirements” of previously acquired assets in these five classes generally have been at significantly lower rates relative to Ohio Bell’s new plant investment. For the 2002 calendar year, the rates of retirements for each of the five classes of telecommunications property during that year, as a percentage of the January 1, 2002 acquisition costs, may be derived from the figures set forth on Schedule B, in the following amounts, respectively: $\$50,763,424 / \$863,584,711 = 5.87\%$ (general support assets); $\$74,954,312 / \$3,516,836,003 = 2.13\%$ (central office assets); $\$127,730 / \$45,510,334 =$

0.28%(information origination/termination assets); and $\$149,108,593/\$7,775,176,290 = 1.91\%$ (amortizable assets), ST. 485-487, Supp. 5-7.

Ohio Bell's acquisition and retirement history, as revealed in Schedules B and C of its 2003 public utility property tax return, constitute compelling probative evidence in support of the reasonableness and lawfulness of the Commissioner's true value determination. The acquisition history reveals that Ohio Bell had a long history of substantial, regular investment in new plant equipment, and that such regular investment continued unabated during the calendar year immediately preceding the December 31, 2002 tax listing date at issue. Such regular, substantial expenditures in plant infrastructure evidence a viable, stable business in which the owners continue to earn a reasonable rate of return on new investment.

Ohio Bell's retirement history, conversely, reveals that Ohio Bell's disposal of previously acquired telecommunications equipment was quite modest – indicating long holding periods for the equipment and effective repair and maintenance programs to extend the life of that equipment. Ohio Bell's retirement rates as set forth above for the 2002 calendar year -- in the low single digits -- reflect that almost none of Ohio Bell's equipment on hand on January 1, 2002 had outlived its useful life during 2002. When businesses that have long been engaged in business acquire new plant property on a regular and continuous basis, as here, such low rates of disposals are particularly indicative of the long-lived nature of the plant assets.

Records of retirements and sales of a taxpayer's personal property have long and uniformly been recognized by this Board and the Ohio Supreme Court as probative evidence in evaluating the merits of a taxpayer's challenge to the Commissioner's true value determinations. *Champion Spark Plug Co. v Lindley* (April 10, 1978), BTA Case Nos. E-1578, E-1579 at 24-25 ("the significance of equipment disposal records in verifying true value determinations has been

recognized by the Supreme Court and the BTA,” citing, *Vroman Ice Cream Co. v. Porterfield* (1969)³

Despite this impressive line of cases establishing disposal and sales establishing disposal and sales records of the taxpayer’s personal property as probative evidence of true value, Ohio Bell chose not to present any such evidence. Both in the Commissioner’s administrative proceedings and at the BTA evidentiary hearing, Ohio Bell did not to present any documentary or other evidence concerning whether any of the personal property at issue was sold or otherwise disposed of at any time since the inception of its business, and, if so, for what price.

In this instance, the absence of such evidence should give rise to a reasonable inference: the absence of evidence is evidence of absence. This failure on Ohio Bell’s part is in addition to the affirmative evidence of very modest disposals and sales (“retirements”) of Ohio Bell’s telecommunications property as shown in its Schedules B and C of its 2003 tax year return. Thus, the Court must reasonably conclude, as should have the BTA below, that Ohio Bell’s disposal rates do not support lower true values for its property than were determined by the Tax Commissioner below.

C. For financial accounting statement reporting purposes, none of the Ohio Bell assets were ever subjected to any “impairment” analysis under SFAS 144. This

³ See also, *Treasure Chest Advertising Company v. Wilkins* (Mar. 9, 2007), BTA Case No. 2003-V-285 at 16-17 Appx. 35-45; *Vertis, Inc. v. Wilkins* (Mar. 9, 2007) BTA Case No. 2004-V-381 at 18-19 Appx 94; *Choice One Communications of Ohio, Inc. v. Wilkins* (June 9, 2006), BTA Case Nos. 2003-K-1461; 2004-K-409 at 62 Appx. 46-69; *Cincinnati Bell Telephone Co. v. Zaino* (June 10, 2005), BTA Case Nos. 2003-K-765; 2003-K-1612 at 37 Appx. 70-89; and Ohio Adm. Code 5703-03-10(B)(3)(b) Appx. 152 (explicitly recognizing such evidence as probative), *Final Determination of the Tax Commissioner* in the present case at S.T. 7, Supp. 427 (noting that “there has been provided no disposal study that would permit a comparison of the study’s projections to the realities of the petitioner”).

inaction for financial accounting purposes belies any claim to excessive obsolescence or depreciation of the fixed assets at issue.

Pursuant to subpoena, Ohio Bell was ordered to produce at the BTA hearing all studies, analyses, reports, and tests pertaining to the impairment and/or fair value of any portion of its assets and those of its parent corporation, including the fixed asset property for which Ohio Bell Telephone is seeking a reduction in public utility property tax valuation in the present case. See numbered paragraph two of the Required Documents portion of the subpoena, BTA Ex A.

In response, Ohio Bell's counsel stipulated that a thorough search of Ohio Bell's and its parent corporation's records did not reveal any documentation relating to this subpoena request. For the entire reporting periods of January 1988 through September 2006 covered by the subpoena, Ohio Bell determined that there were no documents existing that would meet the subject matter of the subpoena, and Ohio Bell, after consultation with appropriate personnel, had no knowledge of any such documentation ever existing. Tr. II 339, Supp. 536.

Yet, had Ohio Bell's fixed asset property truly been subject to any "significant adverse" circumstances or events that could materially affect the value of these assets, the external and internal auditors and management personnel of Ohio Bell and/or its parent corporation would have been duty-bound to have tested those assets for impairment under Statement of Financial Accounting Standards No.144, BTA Joint Exhibit 8. Accordingly, the failure of those personnel to have undertaken any such impairment tests provides powerful evidence for the conclusion that those events and circumstances did not occur at any time during 1998 through 2006.

D. Through the market-approach analysis of Ohio Bell's property by the Commissioner's expert appraisal witness, Brent Eyre, the Commissioner presented a compelling confirmation of the assessed true value, wholly

unrebutted by Ohio Bell because its appraiser fundamentally erred by failing to consider any market approach at all.

In the Ohio Bell appraisal, Mr. Tegarden did not present any analysis or data relative to any “market” or “sales comparison” approaches to determine value. In unit-value appraisals, the typical market approach employed is the “stock and debt” approach, but other “sales comparison” approaches may be used as well. Tr. IV 87-88, Supp. 689. In fact, Mr. Tegarden did not even attempt to undertake any sales comparison approach.

By omitting any such “market” approach from his appraisal, Mr. Tegarden may not have been cognizant of the great probative value accorded by this Court and the BTA to arm’s-length, market sales in valuing personal property. In fact, the BTA itself emphasized the lack of any such market data in strongly rejecting a personal property tax valuation challenge by a telecommunications company. *Choice One Communications of Ohio, Inc. v. Wilkins* (June 9, 2006), BTA Case Nos. 2003-K-1461; 2004-K-409, Appx.

In rejecting Choice One’s claims to a substantially lower true value than was determined by the Commissioner under application of the legislatively prescribed methodology, the BTA cogently held as follows:

Although such information presumably exists, appellant has not provided this board with any evidence as to the amount for which its equipment would transfer in the open market during the years in question. The absence of such evidence is particularly disconcerting where it appears appellant seeks to immediately achieve a significant depreciation immediately following its acquisition of its personal property where it is typically the cost of acquisition which provides the best evidence of its value. (Emphasis added.)

Choice One Communications at 39-40.

In contrast, Mr. Eyre, in his critical evaluation of Mr. Tegarden’s appraisal, did undertake such analysis and did obtain and compile the necessary data to determine a “stock and debt”

approach to value. In that endeavor he compiled and presented probative evidence of actual market prices paid for telecommunications businesses comparable to Ohio Bell in real-world, arm's-length transactions. He then compared those sales prices with the sellers' carrying values (net book values) to generate "market-to-book ratios." BTA Exs. G-I, Supp. 754-756; Tr. IV 95-107, Supp. 691-694.

Mr. Eyre's presentation of evidence under the "stock and debt approach" included exhibits comparing actual market prices paid for telecommunications businesses, or divisions thereof, with their carrying values (net book values). Exs. G and J. As applied here, the substantial premiums to net book value paid by purchasers to acquire comparable telecommunications businesses to Ohio Bell strongly supports the Commissioner's determination of true value here. As shown in Ex. G, the average market-to-book ratio for sales involving telecommunications companies comparable to Ohio Bell was 2.1:1, constituting compelling support for a higher true value for Ohio Bell's operating property than the Commissioner's. Tr. IV 95-96, Supp. 691.

For purposes of comparison, Mr. Teagarden's opinion of value as set forth in his appraisal reflected a slightly less than a 1:1 estimated true value-to-book value ratio, whereas the Commissioner's assessed true value-to-book value ratio, is not precisely calculable but would be higher than Mr. Tegarden's 1:1 ratio, and far lower than the 2.1:1 market-to-book ratio reflected by the market data in Mr. Eyre's BTA exhibits.

Even more compelling as support for the Commissioner's valuation than the foregoing market-to-book-ratio evidence set forth in Ex. G averaging 2.1:1 is the market-to-book-ratio analysis performed by Mr. Eyre of a transaction occurring in 1999 that included Ohio Bell's very own assets. Ex. J, Supp. 757; Tr. IV 104-106, Supp. 693-694. Specifically, Mr. Eyre

analyzed the purchase by SBC Communications, Inc. of Ameritech (Ohio Bell's then-parent corporation). His study revealed a market-to-book ratio for the transaction of 2.67:1.

In stark contrast, Mr. Tegarden's appraisal estimate of the true value of Ohio Bell's assets as of the December 31, 2002 tax listing date at issue here was slightly less than those assets' net book value on that date. Indeed, the drastic reduction in the true value of Ohio Bell's assets estimated by Mr. Tegarden to have occurred over the three-year period from the date of the SBC/Ameritech transaction is comparable to the 50% reduction in value that Mr. Tegarden estimated to have occurred to Trunkline Pipeline's operating property in just one year's time, and the similar drastic reduction in value that Choice One asserted it had experienced with its newly-acquired property. *Trunkline Gas Company v. Tracy* (June 30, 1995), BTA Case No. 93-P-593.

To explain his failure to perform any stock-and-debt approach or other sales comparison approach to value, Mr. Tegarden offered two basic reasons, neither of which is persuasive. First, he maintained that there were simply no sales of comparable businesses that he could use to perform a stock-and-debt approach or other sales comparison approach. He asserted that all of the market transactions involved larger, more diverse, publicly-held entities.

But this explanation should be particularly unconvincing because it belies Mr. Tegarden's use of the **very same** data of such companies in his performance of income and cost approaches. To support his income and cost approaches to value, Mr. Tegarden found plenty of such comparable companies – including companies used by Mr. Eyre in his stock-and-debt approach and in his market-to-book ratio analyses. Indeed, it would be difficult to imagine a more comparable sale than SBC's purchase of Ameritech in 1999 – which at that time consisted

of several local telephone operating entities, including Ohio Bell itself. Yet, Mr. Tegarden made no use of that recent arm's-length sale in his appraisal, and does not undertake any analysis of it.

Mr. Tegarden's second explanation for failing to perform any market approach is no more persuasive than his first. He contended that the stock and debt approach should be rejected because it is based on sales of small fractions of sales of the business ownership. However, when entire businesses are sold, the sellers often receive a *premium* to the current share price -- in recognition of the worth to the purchaser of obtaining a controlling ownership interest, rather than a fractional share of that ownership. Thus, rather than providing a reason for rejecting outright the use of a stock and debt approach, Mr. Tegarden's rationale actually provides a justification for adjusting the value derived under the stock and debt approach upward to account for the typical premium paid by the acquirers to obtain controlling ownership of the businesses.

- E. **“Where data for use of the three approaches to value [income, cost, and comparable sales] are available, the overwhelming weight of authority on the part of writers and qualified experts is that each of the three approaches to value should be utilized.”**
(Bracketed language added.) *United Tel. Co. v. Department of Revenue* (1989), 307 Ore. 428, 443-444, 770 P.2d 43, 51

Thus, by placing exclusive reliance on an income approach as the basis for his opinion of Ohio Bell's system value Mr. Tegarden's appraisal is fundamentally flawed.

As Mr. Eyre's testimony established, Mr. Tegarden's "cost approach" is a species of income approach. Tr. IV 18, 99, 100, Supp. 672, 692. Indeed, Mr. Tegarden himself acknowledged that his so-called "cost approach" is referred to in court decisions as an "income shortfall method." Tr. III 58, Supp. 627. Under that approach, Mr. Tegarden applies an imputed rate of return on income to determine his obsolescence adjustment. In so doing, he converts a cost approach to an income approach. Tr. IV 18-19, Supp. 672.

The Oregon Supreme Court provides a particularly clear explanation of why the nature of the approach to value that Mr. Tegarden has characterized as his “cost approach” is, in reality, an income approach. *United Tel. Co. v. Department of Revenue* (1989), 307 Ore. 428; 770 P.2d 43. In so holding, the Court quoted with approval from the Oregon Tax Court’s decision below that colorfully, but accurately, characterized such approach as a “back door” income approach, as follows:

** * the mathematical logic of Dr. Davis' approach essentially converts the cost approach to an income approach. Where the income and the rate are given, Dr. Davis' method will always result in a value exactly the same as the income approach because it shoves the cost out the back door. Algebraically, the method cancels all cost in excess of the value indicated by the income approach as obsolescence.

United Tel, 770 P.2d at 51, quoting *United Telephone Co. v. Dept. of Rev.*, 10 OTR 333, 337-338 (1986).

Further quoting from the Oregon Tax Court’s decision, Oregon’s High Court then further strongly condemned such practice:

*** In theory, each approach [to valuation] views the concept of value from a different perspective, with the intent of considering all facts and perspectives relevant in the result in the marketplace. Adjusting one approach to make it rely on the result in the same indication of value as another approach effectively eliminates a relevant perspective from consideration.

'Where data for use of the three approaches to value [income, cost, and comparable sales] are available, the overwhelming weight of authority on the part of writers and qualified experts is that each of the three approaches to value should be utilized.' *Pacific Power & Light Co. v. Dept. of Rev.*, 7 OTR 203, 217 (1977). (Bracketed language added.)

Id.

In fact, Mr. Tegarden’s appraisal methodology is even more subject to the criticism expressed by the Oregon Supreme Court above in *United Telephone* because as we emphasized

in sub-section a, supra, Mr. Tegarden did not undertake any “stock-and-debt” or other sales comparison approach to valuation. So, because his cost approach is in actuality an income approach in methodology and result, Mr. Tegarden’s estimate of true value for Ohio Bell’s operating property may be fairly and accurately characterized as an income approach exclusively. Indeed, that is precisely how Mr. Eyre’s characterized Mr. Tegarden’s entire appraisal methodology:

[T]he methodology that Mr. Tegarden uses to come up with the system value is based *** one hundred percent on the income capabilities of the property.

He has done an income approach, which is obviously one hundred percent related to the income capabilities of the property. ***

His cost approach, as we will get into later, is also one hundred percent dependent upon the income capabilities of the property, because he makes an adjustment for obsolescence based upon the income capabilities that he estimates for the property.

So he forces his cost approach to agree with his income approach by the way he calculates obsolescence. So his whole approach to value of the system value is based upon analyzing income.

Tr. IV 18-19, Supp. 672.

F. The BTA unreasonably and unlawfully disregarded the fundamental flaws in Mr. Tegarden’s income approach, as set forth in Mr. Eyre’s testimony and hearing exhibits.

Finally, the BTA unreasonably and unlawfully failed to consider any of the litany of criticisms concerning Mr. Tegarden’s income approach estimate. Using Mr. Tegarden’s own methodology, as adjusted for those errors, Mr. Eyre determined that the income-approach estimate of value, would result, very reasonably, in an increase in the unit value from Mr. Tegarden’s estimate of \$2.47 billion to \$3.23 billion. Tr. IV 84, Supp.688.

For his analysis of Mr. Tegarden’s appraisal estimate under the income approach, Mr. Eyre relied exclusively on Mr. Tegarden’s own financial figures and well-established public

domain data that he included in his exhibits. Thus, the BTA acted unreasonably and unlawfully in its observations that Mr. Eyre failed to perform a full-blown appraisal. Had he done so, his valuation analysis may have been much higher. But, instead, relying on Mr. Tegarden's methodology and underlying data pertaining to Ohio Bell's financial status, Mr. Eyre gave Mr. Tegarden's approach the greatest possible benefit of the doubt.

Proposition of Law No. 8:

For purposes of determining the true value of a public utility's taxable personal property, reliance on a unit-value appraisal that allocates the "unit value" between its taxable and exempt Ohio property on the basis of estimated net book value is unreasonable and unlawful as a matter of law when no evidence is adduced to show that the relative values of the taxable and exempt assets is in direct proportion to their respective estimated net book values.

Ohio Bell's appraisal reflected an allocation of 67.6% of its claimed "unit value" amount of \$2,475,000,000 to its various kinds of exempt taxable property, i.e., $\$1,672,518,399 / 2,475,000,000 = .6757$. The remaining \$802,481,601 was allocated to its various kinds of exempt property. BTA Ex. 5, Supp. 894-895. By contrast, under the legislatively prescribed methodology applied by the Commissioner, no such allocation was necessary because, under that methodology, the taxable property is separately valued. In other words, under the "unit value" methodology used in Ohio Bell's appraisal an allocation estimate is required that is not required under the legislatively prescribed methodology.

The inherent assumption in Ohio Bell's appraisal's allocation method is that the true value of its various kinds of taxable property, relative to the true value of its various kinds of exempt property, was in exact proportion to their respective estimated net book values. Yet, Ohio Bell presented no evidence in support of the reasonableness of that assumption. The Court has

strongly rejected a public utility personal property taxpayer's reliance on such unsupported estimates in similar circumstances. *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506.

Moreover, that method of allocation is particularly suspect as applied to the exempt property classified as "spare pairs," to which Ohio Bell's allocation of unit value was \$1,722,273,590, i.e., $\$178,393,190 \times .965696 = \$1,722,273,590$. As this Court explained in *United Tel*, supra, "spare pairs," [referred to by the Court as "dead pairs"] are pairs of telecommunications cable wires or fibers that have been installed but which have never been activated or "lit." 84 Ohio St.3d at 510.

As Mr. Eyre testified, none of unit value should have been allocated to the "spare pairs." Under the assumptions in Ohio Bell's unit value appraisal, the "spare pairs" lack of current income-generating capability meant that the value of that property had already been excluded from Ohio Bell's unit valuation, as determined under the income approach.

To be sure, as Mr. Eyre acknowledged in his testimony, under a cost approach, a portion of the unit value would be appropriately allocated to the "spare pairs," but as Mr. Eyre further testified, and by Mr. Tegarden's own account, Ohio Bell's appraisal relied heavily, if not, exclusively, on its income approach, under which no value would be appropriately allocated to the "spare pairs." Thus, to attribute a pro-rata allocation of Ohio Bell's claimed-unit value to the "spare pairs" effectively would allow a double exemption for that property that the General Assembly did not provide.

By definition, such "spare pairs" are not being used to generate income. So, as Mr. Eyre explains in his testimony, none of the system value estimated by Mr. Tegarden should be allocated to such spare pairs. Rather, under Mr. Tegarden's methodology, non-income producing property is given no value in deriving his over-all system value. Accordingly, the "spare pairs"

category should be eliminated as a non-taxable category. To allocate any of the system value to such "spare property" would be to allow for a double exemption. Tr. IV 17-19, Supp. 672.

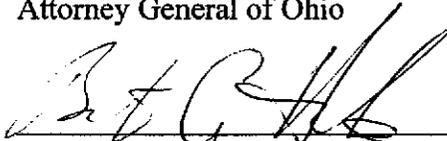
Significantly, in his extensive testimony at the BTA, Mr. Tegarden never makes any attempt to defend his pro rata allocation of his estimated system value to the "spare pairs" category. Rather, in the face of Mr. Eyre's emphatic objection to the allocation of any amount of Mr. Tegarden's estimated system value to the spare pairs category, he is totally silent.

CONCLUSION

For all the reasons set forth above, the BTA's decision reducing the Commissioner's determination of true value under the valuation methodology prescribed by the General Assembly under R.C. 5727.11(A) should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant was sent by regular U.S. mail to James F. Lang, Michael T. Mulcahy and Peter A. Rosato, Calfee, Halter and Griswold, LLP, 1400 McDonald Investment Center, 800 Superior Avenue, Cleveland, Ohio 44114-2688, counsel for appellee, on this 31st day of June, 2008.



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