IN THE SUPREME COURT OF OHIO

Appeal From the Ohio Board of Tax Appeals

AMERICAN FIBER SYSTEMS, INC.,	:	
	:	
Appellant,	:	
	:	Case No. 08-1338
v.	:	
	:	Appeal from BTA
WILLIAM W. WILKINS [RICHARD A. LEVIN], TAX COMMISSIONER OF OHIO,	:	Case No. 2006-B-118
	:	
Appellee.	:	

BRIEF OF APPELLEE

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A. STATEMENT OF CASE AND FACTS

1. Statement of Facts

a. The nature of the tax at issue and the applicable statutory law governing AFS' partial exclusion claim from that tax.

The appellant, American Fiber Systems ("AFS"), is an "interexchange telecommunications company" ("IEX") as defined in R.C. 5727.01(H). Accordingly, for the 2004 tax year at issue in this appeal, AFS reported and was assessed Ohio personal property tax under the Ohio public-utility tax chapter of the Ohio Revised Code, R.C. Chapter 5727.

The personal property tax on IEXs is governed by R.C. 5727.111 and R.C. 5727.06(A)(1)(c)(i). Specifically, R.C. 5727.111 levies an annual *ad valorem* tax on the "taxable property" of IEXs. And R.C. 5727.06(A)(1)(c)(i) defines the "taxable property" of an IEX as including "all tangible personal property that on the 31st day of December of the preceding year was both located in this state and owned by the *** interexchange telecommunications company."

Moreover, as this Court has previously held, R.C. 5727.06 must be read in *pari materia* with R.C. 5709.01(B)(1), under which all personal property located and "used in business" in Ohio is subject to taxation, unless otherwise expressly exempted from taxation. In turn, R.C. 5701.08 defines the phrase "used in business." Thus, "[personal] property that is not 'used in business' within the meaning of R.C. 5701.08 is properly excludable from personal property taxation." *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 371 [*United Telephone I*] (citing *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, 68).

In this appeal, as further explained below, AFS seeks to exclude from its Ohio personal property tax base the true value of an across-the-board 87.5% portion of the personal property that it reported as taxable on its annual Ohio personal property tax report for the 2004 tax year at issue. AFS now claims that such property is excludable as not "used in business" under R.C. 5701.08.

On both legal and factual grounds, however, the BTA and the Commissioner rejected that claim in its entirety. We detail the facts relevant to the resolution of AFS' exclusion claim in the following sub-sections of this Statement of Case and Facts.

b. The nature of AFS' dark-fiber leasing business and AFS' "use" of its personal property in that business

As its name describes, AFS is engaged in a business in which it owns fiber-optic wire strands ("dark fiber") that are used to provide telephony and information services. Rather than employ the dark fiber to provide telephony or information services itself, however, AFS, instead, holds the dark fiber out to others as inventory for lease. *BTA Decision and Order* at 2-4, 12, quoting the *Tax Commissioner's Final Determination* at 1-2, St. 1-2 [1], Supp. 3-4. See also, St. 134, Supp. 136 (April 24, 2003 letter from AFS' Director of Finance, Martin Constable, stating "[o]ur revenue comes from leasing dark fiber strands ***"); St. 109, Supp. 111 (logo setting forth AFS' business motto: "Our dark fiber is your bright future"), St. 88, 94, Supp. 90, 96 (testimony of AFS' project manager, Gary J. Azzolini that "AFS is holding *** [its dark fiber] *** with a view to allowing others to use it").

In turn, AFS' lessee customers use the dark fiber to supply telephony and information services, either to third parties or internally to themselves. See Mr. Azzolini's testimony explaining that AFS holds its dark fiber strands for lease to telecommunications carriers and other commercial enterprises such as banks. St. 75-76, 94, Supp.77-78, 96.

When held as inventory for potential lease, AFS does not activate the dark fiber wire strands. Rather, it is AFS' lessee customers, upon entering lease transactions with AFS, who take the necessary steps to activate or "light" the dark fiber, including acquiring and installing ("provision[ing]") their own transmitters and receivers. St. 76, 94, Supp. 78, 96.

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[1] For purposes of this brief, the statutory transcript certified by the Commissioner to the BTA will be referred to as "St. __". AFS waived its right to an evidentiary hearing before the BTA and, thus, the transcript of the BTA hearing in the present case is limited to the presentation made by the Commissioner at the BTA hearing. The statutory transcript, however, contains the BTA transcript and exhibits in *American Fiber Systems, Inc. v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222, unreported, involving AFS' public utility personal property tax liability for the 2003 tax year (the tax year immediately preceding the 2004 tax year at issue here), T.C. Br. Appx. 1-7.

AFS' fiber-optic inventory comprises only a portion of its Ohio personal property; the backbone of AFS' business is its 41-mile "fiber loop" telecommunications system, consisting of millions of dollars of conduit pipes, above-ground poles and computer monitoring equipment. *BTA Decision and Order* at 2-4, 11-12; *Tax Commissioner's Final Determination* at 1-2, St. 1-2, Supp. 3-4; St. 124-125, Supp. 126-127; St. 131, Supp. 133 (map showing the location of the 41-mile telecommunication system fiber-loop).

Because AFS itself owns, operates and maintains the fiber-loop telecommunications system, AFS' lessee customers are able to lease and utilize dark fiber from AFS without having to construct, operate and maintain their own "fiber loops." St. 74-77, Supp. 76-79 (testimony of Mr. Azzolina: "our business motto is to provide dark fiber to a carrier, which doesn't require them to build [a fiber loop]")).

Without AFS' continuous operation of the entire fiber-loop system, none of AFS' dark-fiber lessees could effectuate their own telephony and information services. As Mr. Azzolina testified, in order for any of AFS' leased dark fiber-optic wire strands to be used for telecommunications purposes by any of AFS' lessee customers, all of the various elements of AFS' fiber loop are necessary. St. 91, Supp. 93. Thus, the fiber-loop telecommunications system is the supportive, integrated infrastructure which allows AFS' dark-fiber lessees to perform their own telephony or information services.

As a relatively new-to-Ohio business (commencing Ohio operations in 2002), on the December 31, 2003 tax listing date at issue in this case, AFS had been only partially successful in leasing out its inventory of dark fiber. AFS asserts that, at that time, it held 288 fiber-optic wire strands, 36 of which were then being leased to lessee customers, and the remainder of which were held out for potential lease to others. *Tax Commissioner's Final Determination* at 1-2, St. 1-2, Supp. 3-4; St. 133, Supp. 135 (Mr. Constable's April 24, 2003 letter), see also St. 134, Supp. 136 (AFS' outside counsel, Todd Slegg's May 25, 2004 letter referencing "36 strands that we have leased to others identified as our lit fiber above"); St. 156, 159, Supp. 158, 161 (Schedules C to AFS' 2004 annual public-utility personal property tax report showing all of its "General Support Assets" and "Cable and Wire Assets" to have been acquired in calendar year 2002).

In its appeal, AFS seeks to exclude the true value of: (1) the "unlit" dark fiber, held as inventory for potential lease, which it asserts, as of the December 31, 2003 tax listing date, comprised 87.5% (i.e., 255/288) of its entire inventory of fiber-optic wire strands; and (2) the same proportionate amount (87.5%) of its fiber-loop telecommunications system property. AFS' predicates this across-the-board exclusion on the assertion that, on an 87.5% percentage basis, its fiber-loop telecommunications system property and fiber-optic wire strand inventory were not "used in business" within the meaning of R.C. 5701.08.

2. Procedural Posture

In the proceedings below, the BTA affirmed the Commissioner's final determination, which had rejected AFS' across-the-board 87.5% exclusion claim in its entirety. The BTA affirmed on two independent, but mutually supportive, grounds. Additionally, for both jurisdictional and substantive reasons, the BTA rejected a new "collateral estoppel" defense to the Commissioner's assessment, first raised in AFS' notice of appeal to the BTA. In the following sub-sections, we further detail the pertinent procedural history concerning the BTA's rulings on these subjects.

a. For the 2004 tax year at issue, AFS' self-reported all of its Ohio capitalized personal-property assets as taxable property, and the Commissioner, accordingly, issued an assessment on all of that property in the valuation amount reported by AFS.

On or about March 31, 2004, and as required pursuant to R.C. 5727.08, AFS filed its annual 2004 personal property tax report as an "interexchange telecommunications company." St. 148-156, Supp. 150-158 (AFS' "Interexchange Telecommunications Company 2004 Annual Report"). Mr. Constable, as AFS' Director of Finance, signed the report "under penalties of perjury." St. 164, Supp. 166.

In completing the various schedules of the annual report, AFS listed as taxable various kinds of "cable and wire assets" property (see the "2004 Schedule C for Cable and Wire Assets," St. 159, Supp. 161). All of its various kinds of cable and wire assets were purchased in 2002 in the total acquisition cost amount of $5,439,057. Id. (line 2). AFS reported a more detailed breakdown of the make-up of that total of $5,439,057 in asset cost pursuant to Schedule B of the report, captioned "2004 Schedule B - Listing of Ohio Property," as follows:

(Line 40)	Poles	$406,000
(Line 41)	Aerial Cable	$ 195,357
(Line 43)	Buried Cable	$ 1,562,700
(Line 48)	Conduit Systems	$ 3,275,000
	Total.................	$ 5,439,057

See St. 153-154, Supp. 155-156.

Under the legislatively prescribed methodology set forth in R.C. 5727.11(A) for the Commissioner to apply to determine the "true value" of taxable IEX property, the capitalized acquisition costs of "cable and wire assets" are aggregated by acquisition year. Then the Commissioner's prescribed annual allowances for depreciation and obsolescence are applied, resulting in the "true value" of those assets. Specifically, as shown in the Schedule C for Cable and Wire Assets, AFS applied a "percent good" percentage of 90.0% (i.e., reflecting a 10% allowance for depreciation and obsolescence applicable to property purchased in 2002) to the $5,439,057 of acquisition costs, yielding a "true value of taxable property" of $4,895,151. St. 159, Supp. 161.

Additionally, on its Schedule C for "General Support Assets," AFS reported $37, 954 for the 2002 acquisition year as its "net cost of taxable property." St. 156 (line 2), Supp. 156. AFS then applied the 80% "percent good" percentage prescribed by the Commissioner for general support assets acquired in 2002 to derive a "true value" for its general support assets of $30,363. Id. Thus, the total "true value" of AFS' taxable property, as reflected by AFS in the pertinent Schedules C of its 2004 report, was $4,925,514, computed as follows: $4,895,151 (true value of "cable and wire assets) + $30,363 (true value of "general support assets") = $4,925,514 (total true value of taxable assets).

On review of AFS' 2004 report, the Commissioner's public-utility tax agents simply followed the valuations set forth in AFS' report. The agents determined the "total true value" of AFS' taxable property to be $4,925,514, i.e., the same figure as self-reported by AFS. See the Commissioner's "2004 Valuation Notice," St. 140, Supp. 142. Then, the Commissioner's agents multiplied the $4,925,514 true value figure by the statutory assessment rate of 25% to derive a "total taxable value" of $1,231,380. Id.

b. The Commissioner's final determination rejected AFS' claim in its petition for reassessment seeking an across-the-board exclusion of 87.5% of its self-reported taxable personal property, holding that AFS' dark-fiber inventory held for lease and AFS' telecommunication-system infrastructure (its 41-mile "fiber loop"') were "used in business" within the meaning of R.C. 5701.08.

Following the Commissioner's issuance of his assessment certificates reflecting AFS' total true value amount of $4,925,514, and a total taxable value of $1,231,380, AFS filed a petition for reassessment pursuant to R.C. 5727.47 with attachments thereto. St. 117-136, Supp. 119-138. In its petition, AFS sought an across-the-board 87.5% exclusion of its personal property from taxation, reducing its total "taxable value" from $1,231,380 to $153, 922, computed as follows: [$1,231,380 X (100% - 87.5%)] = $153,922[2]. St. 117, Supp. 119. AFS claimed that because only 36 of its 252 strands of fiber-optic wire (i.e., 12.5%) were lit (activated) by AFS' lessee customers as of the December 31, 2003 tax listing date, 87.5% of its personal property was excludable as not "used in business." *Tax Commissioner's Final Determination* at 1-2, St. 1-5, Supp. 3-4.

Regarding AFS' unlit dark fiber wire strands, comprising 87.5% of AFS' total fiber-optic wire strands held for lease, the Commissioner rejected that contention under the plain meaning of the phrase "used in business" in R.C. 5701.08(A) and this Court's holding in *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506 [*United Telephone II*]. Id. at 2-3, St. 2-3, Supp. 4-5. The Commissioner's applied the plain meaning of R.C. 5701.08 directly and explicitly, holding that the unlit "dark fiber" inventory met no less than three distinct categories of personal property defined as "used in business."

Specifically, the Commissioner determined that under AFS leasing business, AFS' unlit, dark-fiber wire strand inventory met the following

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[2] AFS' petition for reassessment for the 2004 tax year at issue actually requested a reduction in taxable value from the Commissioner's assessed amount of $1,231,389 to $156,200, reflecting an across-the-board exclusion of 87.32%. Id. However, as reflected in AFS' opening merit brief filed with this Court (in which AFS seeks a reduction in taxable value to $153,922), AFS' intent all along appears to have been to request an 87.5% exclusion, not 87.32%. See the "Conclusion" section of AFS' opening brief at 12.

separate categories of personal property "used in business." Namely, under the statutory language of R.C. 5701.08(A), AFS' personal property was:

(i) "held as means or instruments for carrying on the business" (see *Tax Commissioner's Final Determination* at 2-3, St. 2-3, Supp. 4-5);

(ii) utilized in AFS' "ordinary operations," *Id.* at 2; and

(ii) "stored or kept on hand as material, parts, products or merchandise." *Id.* at 3.

Additionally, the Commissioner found that AFS' facts concerning its use of its dark-fiber wire strand inventory differed fundamentally from the facts involved in the case relied on by AFS, *United Telephone II.* In that case, the Court held that the unlit, never-activated, fiber-optic cable "dead pairs" therein at issue were excludable from personal property taxation as not "used in business," but that decision entailed a far different exclusion question than at issue here.

As the Commissioner correctly observed in his final determination, the taxpayer in *United Telephone II* was engaged in a fundamentally different business from AFS'. United Telephone Company was a long-distance telecommunications carrier which held its fiber-optic cable as telecommunications plant equipment for the purpose of providing its own telecommunications services as a telecommunications carrier. By contrast, AFS holds its dark fiber to be leased to other businesses so that those other businesses can effectuate their own telephonic and information services. *Tax Commissioner's Final Determination* at 2-3, St. 2-3, Supp. 4-5.

Regarding AFS' 41-mile fiber-loop telecommunications system, comprised of above-ground poles, conduit pipes and computer monitoring equipment, the Commissioner found that this property, too, was 'used in business" within the meaning of R.C. 5701.08(A). In so holding, the Commissioner followed the BTA's previous decision in *American Fiber Systems*, (Sept. 16, 2005), BTA No. 2004-K-1222, unreported, in which AFS' personal property tax liability for the 2003 tax year was at issue. *Tax Commissioner's Final Determination* at 3, St. 3, Supp. 5. In that case, the BTA rejected AFS' claim that any of the above-ground poles, conduit pipe or computer monitoring equipment comprising AFS' 41-mile "fiber-loop" were excludable from personal property taxation as not "used in business." Id.

c. On both legal and factual grounds, the BTA affirmed the Commissioner's holding that none of AFS' fiber-loop communication system property and none of its inventory of fiber-optic wire strands were properly excluded from personal property taxation as not "used in business."

On appeal, the BTA affirmed the Commissioner's application of the plain meaning of R.C. 5701.08(A), holding that, because AFS was engaged in the business of leasing the fiber-optic strands to others -- who then used the strands for their own telecommunications services, AFS' unlit dark fiber was "used in business." Simply stated, AFS' unlit fiber-optic wire strands were held as inventory for lease. *BTA Decision and Order* at 12 (citing *United Telephone II*; and *Equilease Corp. v. Donahue* (1967), 10 Ohio St.2d 18; *CC Leasing Corpo. v. Limbach* (1986), 23 Ohio St.3d 204). AFS Br. Appx. 12.

Likewise, the BTA affirmed the Commissioner's application of the plain meaning of R.C. 5701.08(A) regarding AFS' "fiber loop" property, reiterating its holding in *American Fiber Systems*, (Sept. 16, 2005), BTA No. 2004-K-1222, unreported. In that case, the BTA held that AFS' conduit pipe, above-ground poles and computer monitoring equipment comprising the fiber loop is needed to support the lit fiber-optic wire strands that AFS' leases to its lessee customers and, thus, is "used in business." *BTA Decision and Order* at 10-11 (quoting *American Fiber Systems* at 2-3), AFS Br. Appx. 10-11.

Moreover, the BTA affirmed the Commissioner's denial of AFS' across-the-board 87.5% exclusion claim on an independent, factual ground. The BTA held that, even if, somehow, 87.5% portion of AFS' fiber loop and 87.5% of its fiber-optic wire strand inventory were not "used in business," AFS' pro rata methodology for determining the true value of that excludable property was "far too simplistic to be useful." *BTA Decision and Order* at 12, AFS Br. Appx. 12. Specifically, the BTA noted that AFS waived an evidentiary hearing in the matter and that "we have no way of determining the costs that should be considered fixed and those that are variable and the proper allocation of those costs." Id.

d. On jurisdictional and substantive grounds, the BTA rejected AFS' "collateral estoppel" defense to the Commissioner's determination that AFS' unlit dark fiber inventory is excludable from personal property tax.

Finally, the BTA rejected AFS' assertion that the BTA's previous decision for the 2003 tax year in *American Fiber Systems*, (Sept. 16, 2005), BTA No. 2004-K-1222, unreported, "collaterally estopped" the Commissioner from holding that AFS' unlit dark fiber inventory was "used in business" within the meaning of R.C. 5701.08 and, thus, was not excludable from personal property taxation. The BTA did so for two independent reasons.

First, the BTA held that AFS failed to have raised any such collateral-estoppel issue in the Commissioner's administrative proceedings on AFS' petition for reassessment for the 2004 tax year and, thus, failed to confer jurisdiction on the BTA to consider that issue on appeal from the Commissioner's final determination. *BTA Decision and Order* at 8 (citing, among other decisions, *CNG Dev. Corp. v. Limbach* (1992), 63 Ohio St.3d 28), AFS Br. Appx. 8.

Indeed, the BTA went on to note that AFS had a full opportunity to have raised the collateral estoppel defense in the Commissioner's proceedings, particularly given that the BTA's decision on AFS' 2003 tax year liability in *American Fiber Systems* was issued on September 16, 2005 -- over two months prior to the Commissioner's November 30, 2005 issuance of his final determination for the 2004 tax year at issue in the present case. *BTA Decision and Order* at 11, AFS Br. Appx. 11.

Second, the BTA held that even if AFS had, instead, raised the issue during the Commissioner's consideration of AFS' petition, the collateral-estoppel defense would have failed for a fundamental substantive reason: the conditions for the doctrine's application were not met. Namely, in *American*

Fiber Systems whether AFS' unlit fiber-optic wire strand inventory was or was not "used in business" "was never litigated." Rather, in that case, the BTA affirmed the Commissioner's final determination for the 2003 tax year in its entirety. Whether AFS' unlit dark fiber inventory was excludable from personal property taxation as not "used in business" simply was not placed in controversy at the BTA. Id. at 10, AFS Br. Appx. 10.

Furthermore, subsequent to his September 15, 2004 issuance of AFS' final determination for the 2003 tax year, the Commissioner's legal and administrative personnel undertook a thorough review of the case law and determined that dark-fiber wire strand inventories held for lease are "used in business" within the meaning of R.C. 5701.08. Accordingly, the Commissioner issued his final determination in the present matter on November 30, 2005 so holding, as well as issuing a like final determination on the same date and for the same 2004 tax year. See *In Re City Signal Communications, Inc.* (Nov. 30, 2005), Tax Commissioner Case No. 05-01185, unreported, T.C. Br. Appx. 8-10.

Any further facts will be referenced directly to the evidentiary record in the Law and Argument Section which follows.

LAW AND ARGUMENT

<u>Proposition of Law No. 1</u>:
Unlit dark fiber inventory held by a lessor/taxpayer for potential lease and the taxpayer's integrated, "fiber loop" telecommunication-system equipment infrastructure that supports the leased dark fiber are "used in business" within the meaning of R.C. 5701.08.

A. AFS' assessed personal property fits within several categories of personal property expressly defined by the General Assembly in R.C. 5701.08(A) as "used" in business.

As of the December 31, 2003 tax listing date, AFS had leased 36 strands of its fiber-optic wire strands (dark fiber), so that only those 36 strands had, at that time, been activated or "lit" by its lessee customers. As we explained in the Statement of Facts, upon entering leasing transactions with AFS, AFS' lessee customers activate the dark fiber through the provisioning of activation equipment, including transmitters and receivers. St. 76, 94, Supp. 78, 96. AFS asserts that the remaining 252 strands were not "used in business" as of the tax listing date because they remained "unlit" and held for potential lease at that time.

Similarly, AFS claims that a proportionate 87.5% share of its "fiber loop," consisting of pipes, conduits and computer equipment, was not "used in business" either. AFS constructed its 41-mile fiber loop for purposes of supporting its leased dark fiber and contends that 87.5% of this equipment, too, should escape personal property taxation as not "used in business," despite the fiber loop's active operation in supporting the 36 lit fiber-optic strands that had been leased by AFS to lessee customers as of the December 31, 2003 tax listing date.

As we outlined supra in the opening section of our brief, R.C. 5701.08(A) is the statute under which AFS necessarily predicates its partial-exclusion claim. T.C. Br. at 1. Specifically, as AFS self-reported on its 2004 annual report, all of the personal property that the Commissioner included in AFS' 2004 tax year assessment was Ohio-located and owned by AFS on the December 31, 2003 tax listing date. Such property, therefore, constituted "taxable property" as defined in R.C. 5727.06(A)(1)(c)(i).

For this reason, if any of AFS' assessed property is to qualify for exclusion from Ohio personal property taxation, it must be excludable as not "used in business" as defined in R.C. 5701.08, or otherwise be expressly exempted from taxation. AFS does not rely on any personal property tax exemption to support its exclusion claim other than R.C. 5701.08. Thus, to prevail, AFS must establish that the BTA and Commissioner erred in rejecting AFS' contention that 87.5% of its assessed property was excludable as not "used in business."

Consideration of the plain meaning of R.C. 5701.08 and the case law applying that plain meaning are of critical importance in determining the merits of AFS' appeal. R.C. 5701.08 provides, in pertinent part, as follows:

> (A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, **when acquired or held as means or**

> **instruments for carrying on the business, when kept and maintained as a part of plant capable of operation, whether actually in operation or not, <u>or</u> when stored or kept on hand as material, parts, products or merchandise.** Machinery and equipment classified upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed an in operation or capable of operation in the business for which acquired. ***
>
> (Emphasis and underlining added.)

Given the foregoing R.C. 5701.08(A) definition of "used in business" it is highly understandable why, in its opening brief filed with this Court, AFS cites that statute only once in passing, without any analysis. See AFS Br. at 5. Under that statute, AFS' unlit dark fiber inventory meets at least three separate categories of personal property so "used." Namely, the dark fiber inventory constitutes personal property (1) "stored or kept on hand as materials, parts, products or merchandise"; (2) "held as means or instruments for carrying on the [AFS' leasing] business"; and (3) "employed or utilized in connection with ordinary *** operations."

Similarly, the supporting "fiber-loop" equipment infrastructure comprising the "fiber loop" likewise meets several categories of personal property defined as "used in business." Not only does the fiber loop property easily qualify under categories (2) and (3), it also qualifies as "maintained as part of a plant capable of operation, whether actually in operation or not."

Unsurprisingly, in view of this express statutory language, a myriad of decisional law has applied the plain meaning of R.C. 5701.08(A) to hold that inventory held for lease to others is properly subjected to Ohio personal property taxation against the lessor/owner thereof. This vast and uniform body of case law precedent includes this Court's decisions in *Southland Stores No. 3, Inc. v. Bowers* (1960), 171 Ohio St. 271, 272; *Equilease Corp. v. Donahue* (1967), 10 Ohio St.2d 81, 83; and *CC Leasing Corp. v. Limbach* (1986), 23 Ohio St.3d 204, 208 (citing *Commonwealth Plan, Inc. v. Kosydar* (1976), 47 Ohio St.2d 39, 41, and *State ex rel. v. Halliday* (1899), 61 Ohio St. 352, paragraph two of the syllabus). See also, *BTA Decision and Order* at 12 (citing *Equilease* and *CC Leasing*), AFS Br. Appx. 12.

In *Southland Stores*, the Court held that a business owner began "engaging in business" in Ohio when it "had acquired and was holding a working inventory of equipment for leasing." 171 Ohio St. at 272. Thereafter, in *Equilease*, the Court reaffirmed that "one engaged in the business of leasing of tangible personal property to others is engaged in an enterprise conducted for gain, profit or income within the meaning of Section 5701.08(B)." *Equilease*, 10 Ohio St.2d at 83 (citing *Southland Stores*).

Finally, in *CC Leasing*, the Court held that the value of leased nuclear fuel rods must be determined by reference to the value of such leased items in the hands of the lessor, citing *Commonwealth Plan, Inc. v. Kosydar* (1976), 47 Ohio St.2d 39, 41; and *State ex rel. v. Halliday* (1899), 61 Ohio St. 352, paragraph two of the syllabus. 23 Ohio St.2d at 208. In so ruling, the *CC Leasing* Court reaffirmed its previous holding in *Equilease*, as follows: "There [in *Equilease*] we held that the taxpayer's business of leasing equipment to others is using property **in its own business**." (Emphasis added.) Id. at 207.

Thus, under the Court's well-established precedent, AFS' leasing of its dark fiber to others constitutes AFS' "own business" under R.C. 5701.08 and, therefore, its dark fiber held out for lease is "used in business" as "material, parts, products or merchandise." Similarly, its fiber-loop property is "used in business" as constituting personal property "acquired or held as means or instruments for carrying on the business" within the meaning of R,C, 5701.08(A).

Consequently, in its appeal AFS is implicitly asking the Court to misread R.C. 5701.08(A) in a way that would require the Court to delete major portions of the statute. Granting AFS' implicit request, therefore, would directly contravene the Court's proper judicial role by requiring the Court to replace the General Assembly's legislative will with AFS'. *R.W. Sidley, Inc. v. Limbach* (1993), 66 Ohio St.3d 256, 257 (characterizing such rewriting of statutes as "blatant judicial fiat").

B. None of AFS' assessed personal property qualifies for the limited exception to the definition of "used in business" set forth in the second sentence of R.C. 5701.08(A).

AFS ignores R.C. 5701.08 in a second fundamental way. Its claimed exclusions from personal property taxation not only would require judicial erasure of the foregoing express statutory language providing that merchandising inventory is "used in business," AFS' exclusion claims are based on a fundamental misreading of further language of R.C. 5701.08(A), and the case law applying that language.

As set forth in R.C. 5701.08(A), certain "machinery and equipment" are expressly defined in that statute not to constitute personal property "used in business." Specifically, the General Assembly has provided that "**while under construction or installation** to become part of a new or existing plant," machinery and equipment is not considered to be "used by the owner" thereof "until such machinery and equipment is installed and in operation or capable of operation **in the business for which acquired** (emphasis added)."

Applying this language, the Commissioner and the Ohio Supreme Court have recognized a limited exclusion from personal property taxation for taxpayer/owners engaged in the business of providing telecommunications services. When acquired by a telecommunications provider for purposes of its own business of supplying telecommunications services, unlit cable pairs that previously have never been lit but which are housed within an installed cable line may qualify as not "used in business." *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, 69; *United Tel. Co. v. Tracy* (1999), 84 Ohio St.3d 506 (*United Telephone II*), a decision following remand to the BTA from the Court's previous decision in *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369 (*United Telephone I*).

Unfortunately, for AFS, however, the limited exclusion recognized in *Hatchadorian* and *United Telephone II* does not apply to AFS' situation for two independent, but related, reasons. First, AFS' dark fiber inventory, when held by AFS for potential lease on the December 31, 2003 tax listing date, was not "under construction or installation to become part of a new or existing plant," as would be required in order to qualify as not "used in business." On that date, no construction or installation relative to the unlit dark fiber inventory was occurring.

Instead, AFS' construction of its fiber loop had previously been completed, and at that time AFS was not engaged in any further installation or construction activities regarding any of the unlit dark fiber strands for which it seeks to exclude from taxation here. In fact, it is only when AFS' unlit dark fiber strands are leased by AFS to its customers that the previously unlit dark fibers are activated, and this activation of the previously unlit fiber strands is done for the business purposes of AFS' lessee customers, not for AFS' business purposes. In such event, AFS' lessee customers incur the costs and acquire the equipment necessary to activate the dark fiber strands. Such subsequent-to-the-tax-listing-date construction or installation activities by AFS' customers do not comport with the requirements necessary to qualify for this limited statutory exception.

Second, and perhaps even more fundamentally, AFS holds out the dark fiber as merchandising inventory for lease to others and, thus, its dark fiber is fully in use **for purposes of AFS' business** of leasing dark fiber to others. AFS' dark fiber's status is that of "merchandise" held for use in AFS' leasing business. The dark fiber serves AFS' business purpose, and thus is AFS' "merchandise," regardless of whether it subsequently will be lit by an AFS lessee/customer.

The Court's decision in *United Telephone II* confirms the reasonableness and lawfulness of the foregoing plain reading of R.C. 5701.08(A). To extend the limited statutory exception for certain "machinery and equipment" recognized in *United Telephone II* as AFS requests would require the BTA to ignore the Court's own analysis of R.C. 5701.08 in that decision. The Court distinguished the facts presented to it from those involved in earlier tax years, as follows:

> The commissioner next contends that because **the entire cable is taxed when it is being held in inventory**, no part of it can later be excepted from taxation. We disagree.
>
> **The fact that the cable, including the dead and bad pairs contained within it, may have been subjected to taxation as inventory at some time in the past is not relevant to its current status. For personal property tax purposes the status of the property on the tax listing date is the relevant fact that determines its taxability**. R.C. 5727.06. (Emphasis added.)

United Tel. II at 510.

Just as the various unlit pairs of fiber or wire pairs housed within the cable at issue in *United Telephone II* were deemed to be "used in business" when held as "inventory" on previous tax listing dates, so, too, AFS' inventory of dark fiber strands are "used in business" as of the December 31, 2003 tax listing date at issue here. On that pertinent date for determining the taxable status of AFS' property, all of the unlit dark fiber strands were being held by AFS for potential lease to others. In the words of the statute, not only were the fiber strands "capable" of use as merchandising inventory for lease, they were actually being held out to potential lessee customers for lease and, thus, were "held as means or instruments for carrying on the business."

A moment's reflection establishes that the foregoing analysis applicable to AFS as a holder of merchandising inventory consisting of dark fiber is no different from the analysis that properly applies regarding any other merchant engaged in the business of selling or leasing any kind of merchandise. When, on the applicable tax listing date, the merchandising inventory is held by the merchant for potential sale or lease, the inventory is "used in business."

As *United Telephone II* instructs, the possibility of subsequent use of AFS' dark fiber on some future tax listing date by a subsequent acquirer of the property is simply not applicable to determining its current taxable status as of the December 31, 2003 tax listing date at issue here. At some future time, as of some future tax listing date, AFS' dark fiber merchandise may be acquired from AFS and be under installation or construction and not capable of being used for the purpose for which it was acquired in the acquirer's business. But such future possibility is simply not relevant to determining the current taxable status of the merchandising inventory in AFS' hands on the December 31, 2003 tax listing date at issue here.

In addition to the foregoing reasons for rejecting AFS' claims to exempt status for a an across-the-board 87.5% portion of its dark fiber and "fiber loop" property, additional grounds apply for rejecting the claim as to the fiber loop equipment. As previously held by the BTA for the 2003 tax year, the true value of AFS' fiber loop is not properly excluded from personal property taxation for the simple reason that all of the fiber loop equipment was not only "capable" of use, it was actively being used to support at least 36 lit fiber-optic wire strands that AFS had leased to various lessee customers. *American Fiber Systems, Inc. v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222 at 5, citing *United Telephone II* ("whether such equipment [the fiber loop equipment] supports a single fiber-optic wire or multiple wires, it is used in appellant's [AFS'] business and is therefore subject to taxation [under R.C.5701.08]"), T.C. Appx. 5.

To summarize this Proposition of Law, R.C. 5701.08(A) expressly defines merchandising inventory to be "used in business." Thus, the further language of R.C. 5701.08(A) defining certain "machinery and equipment" not to be "used in business" must be read, if possible, in *pari materia* with that express directive, so as not to directly conflict with that directive. It is axiomatic that statutes relating to the same subject matter must be read together in an attempt to "arrive at a reasonable construction giving the proper force and effect, if possible, to each statute." *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health* (2002), 96 Ohio St. 3d 250, ¶20. Here, the "*pari materia*" principle applies with the greatest force because all of the statutory language involved is contained in consecutive sentences of the same statute.

Consistent with this polestar principle of statutory interpretation, *United Telephone II* instructs that the taxable or exempt status of unlit cable pairs or fiber-optic wire strands is properly determined based on their use "in the business for which acquired" on the applicable tax listing date. Thus, when such property is held by the acquirer/owner thereof as "inventory" on such date it is "used in business." *United Telephone II* at 510. Moreover, as the BTA has previously held, the supporting fiber loop equipment at issue here is "used in business" for an additional reason. The fiber loop constituted personal property "kept and maintained as a part of plant capable of operation, whether actually in operation or not" because, on the tax listing date, the fiber loop supported the 36 lit fiber-optic wire strands leased by AFS to others. *American Fiber Systems* at 5, citing *United Telephone II.*

__Proposition of Law No. 2__:

When, at the BTA, an appellant taxpayer relies exclusively on simplistic estimates based on assumptions that are unsubstantiated and unreasonable on their face, it fails to meet its affirmative burden of factually establishing the reductions in true value that would result from excluding from taxation all of its personal property except 12.5% of its fiber-optic wire strands and 12.5% of its fiber loop equipment that the taxpayer concedes were "used in business" as of the tax listing date.

The Ohio public utility personal property tax is an *ad valorem* tax imposed on the true value of taxable personal property. Therefore, to successfully challenge the Commissioner's assessment of true value, an appellant taxpayer must establish both the manner and extent of the claimed error in the assessment valuations.

In other words, the taxpayer must adduce probative evidence factually demonstrating the reduction in true value (i.e., the "extent" of the error -- if any) arising from the asserted legal error (i.e., the "manner" of the error) committed by the Commissioner in arriving at his determination of true value. *United Telephone II*, 84 Ohio St.3d at 511; *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68, at ¶16; *Snider v. Limbach* (1989), 44 Ohio St.3d 200; *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 124; *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, 69; and *American Fiber Systems, Inc. v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222, unreported.

Measured under this affirmative burden of proof, AFS' presentation of evidence falls woefully short. AFS arbitrarily has assumed that the true value of its 36 lit fiber-optic wire strands is reflected by using a simplistic estimate. AFS merely divides the total cost it incurred to acquire and install the cable housing the dark fiber by 12.5% and then applies the Commissioner's prescribed rates of depreciation and obsolescence to that figure. Yet, the unstated, but necessarily-implied, assumptions in this approach are unsubstantiated and unreasonable on their face.

Assuming arguendo, as we do solely for this proposition of law, that only the 36 lit fiber-optic wire strands were "used in business" by AFS, the true value of these 36 strands would be properly determined by considering how much less in true value an installed cable housing only 36 fiber-optic wire strands would be worth than one housing 288 such strands. For this purpose, the statutorily-mandated methodology for determining true value set forth in R.C. 5727.11 would be applied, particularly, where, as here, the appellant has chosen generally not to contest the Commissioner's application of that methodology. The legislatively prescribed methodology requires the Commissioner to determine the true value of personal property by using its acquisition cost less Commissioner-prescribed rates for depreciation and obsolescence[3].

[3] As shown from the Commissioner's "Guidelines for Filing Public Utility Property Tax Returns" (Appellee's BTA Exhibit A, Supp. 178-199), the legislatively prescribed methodology applied by the Commissioner to determine the true value of public utility personal property uses separate prescribed rates of depreciation and obsolescence for four 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

Thus, under the legislatively prescribed methodology for determining true value, AFS' pro-rata estimate would be reasonable only if the total costs associated with AFS' acquiring and installing cable housing 36 fiber-optic wire strands would reasonably constitute only 36/288 of the total costs for acquiring and installing cable housing all 288 strands. In other words, AFS' estimate is predicated on the premise that no "fixed" or "semi-variable" costs were incurred by AFS relating to its acquisition and installation of the 288 fiber-optic wire strands.

Yet, most installation costs are largely fixed. Thus, under that general rule, the incremental cost of adding wire fiber strands would increase only slightly on the basis of number of strands. In other words, the costs to install cable housing just 36 fiber-optic wire strands would be as great, or almost as great, as the costs to install a cable housing 288 fiber-optic wire strands. Even regarding costs for materials, rather than for installation labor, the general rule is that material costs have both fixed and variable cost components, i.e., these costs are generally "semi-variable." Under this general rule, the incremental costs for increasing the number of fiber strands within the cable are likely to be semi-variable ones. In other words, the costs increase with each addition of a cable strand, but at a decreasing rate per strand.

(Footnote 3 continued) industry in collaboration with industry participants. For a comprehensive discussion of this methodology, see *Cincinnati Bell Telephone Co. v. Zaino* (June 10, 2005), BTA Case Nos. 2003-K-765, 1612 at 23-27, unreported, T.C. Br. Appx. 11- 30.

AFS did not present any evidence to establish that the labor and material costs it incurred for acquiring and installing its cable housing 288 fiber-optic wire strands varied in direct relationship to the number of strands housed within the cable. Indeed, for virtually all products and services, there exists at least some component of "economies of scale." In other words, AFS' requested reductions are most assuredly too large – the only question is by how much. Yet, AFS bears the affirmative burden of answering that question. This it failed to do.

As for AFS' fiber loop property, AFS uses the same simplistic formula to determine the true value of 12.5% of that collective property as it does for the lit fiber strands. It simply takes the total acquisition costs for the fiber loop, multiplies that figure by 12.5%, and then applies the Commissioner's prescribed rates of depreciation and obsolescence.

Unsurprisingly, therefore, AFS' estimate of the true value of 12.5% of its fiber loop equipment suffers from the same fatally deficient assumptions as its estimate of the true value of its 36 lit fiber-optic wire strands. To accept AFS' estimate as reasonable, the BTA would have to find that all costs to acquire and install each item of the fiber loop, i.e., for each pole, conduit and monitoring computer, were purely "variable" costs, with no fixed or semi-variable aspects.

Furthermore, AFS' estimate hinges upon an additional unsubstantiated assumption: that AFS would not be required to incur additional expenditures relating to its present fiber loop in order for that loop to support all 288 fiber-optic wire strands in a lit or "activated" state. No evidence has been adduced to support such assumption.

To summarize, AFS waived a BTA evidentiary hearing in this matter and thereby foreclosed any possibility that any information or documentation on its behalf would be presented to the BTA that had not been presented to the Commissioner below. Similarly, in the administrative proceedings before the Commissioner below, AFS failed to adduce any evidence to substantiate the reasonableness of the assumptions implicit in its estimates of the true value reductions that would result from granting AFS the exclusions it seeks.

Thus, AFS failed to meet its affirmative burden of showing the "extent," if any, of the reduction in true value that would result from excluding the true value of all but 36 (i.e., 12.5%) of its fiber-optic wire strands, and all but 12.5% of its "fiber loop" property. For this independent reason, the BTA properly affirmed the Commissioner's final determination. See the *BTA Decision and Order* at 12, AFS Br. Appx. 12.

Proposition of Law No. 3:

Upon appeal to the BTA, an appellant taxpayer invokes the BTA's jurisdiction to consider an issue only if the taxpayer had raised such issue in writing in the Commissioner's proceedings on the taxpayer's petition for reassessment prior to the Commissioner's issuance of his final determination on the petition. By failing to raise such issue in writing in the administrative proceedings before the Commissioner, the appellant taxpayer fails to confer jurisdiction upon the BTA, and subsequently on the appellate courts, to consider that 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; and *American Fiber Systems*, (Sept. 16, 2005), BTA No. 2004-K-1222, unreported, **followed.**

AFS' opening brief hardly attempts to challenge the BTA's substantive legal and factual grounds for affirming the Commissioner's final determination. Instead, AFS takes a different course. AFS relies on a basis for challenging the Commissioner's assessment first raised in its notice of appeal to the BTA. AFS discusses its collateral-estoppel claim to the virtual exclusion of any other argument. But this argument should be unavailing for several reasons.

First, as the BTA reasonably and lawfully held in its decision below, AFS' collateral estoppel claim fails jurisdictionally because AFS did not raise it in writing during the Commissioner's administrative proceedings on AFS' petition for reassessment. As the evidentiary record reflects, neither in its petition for reassessment, dated December 2, 2004, St. 117-136, Supp. 119-138, nor at any time in the Commissioner's administrative proceedings thereafter, did AFS raise any such issue. See AFS' three-page supplemental memorandum to its petition for reassessment, dated May 11, 2005, St. 7-9, Supp. 9-11. Because AFS did not raise the issue below, it could not even "get to first base" on that issue at the BTA.

The application of the jurisdictional bar under these circumstances is well established, not only through this Court's precedence in *CNG* and *Shugarman*, but in the BTA's own decisional law. Among the myriad of cases that could be appropriately cited, we particularly commend to the Court the BTA's previous decision involving AFS, *American Fiber Systems, Inc. v. Wilkins* (Sept. 16, 2005), BTA No. 2004-K-1222, supra, at 5-6.

In that previous appeal for the 2003 tax year, AFS similarly failed to confer jurisdiction upon the BTA to consider an issue (regarding the taxability and valuation of "make ready costs") because AFS failed to raise that issue in writing in its petition for reassessment or at any other time thereafter prior to the Commissioner's issuance of his final determination on the petition. The BTA found such failure to be jurisdictionally fatal, as follows:

> R.C. 5727.47 provides the manner by which a public utility may challenge an assessment issued to it:
>
> > "If a public utility objects to any assessment certified to it pursuant to such sections, it may file with the commissioner *** a written petition for reassessment. *** The petition 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."
>
> Consistent with case law interpreting similar statutory mandates, see, e.g., *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, **a taxpayer has an obligation to raise issues**

> **justifying the relief requested at the earliest stage of proceedings, and a failure to do so precludes it from amplifying its claims on appeal.** See *Ohio Edison Co. v. Tracy* (Interim Order, May 21, 1999), BTA No. 1997-K-32, unreported. Cf. *DeWeese v. Zaino,* 100 Ohio St.3d 324, 2003-Ohio-6502. A review of the documents filed by appellant with the commissioner fails to reveal that the aforementioned claim was asserted by appellant during the proceedings before the commissioner.

(Emphasis added.) *American Fiber Systems*, at 5-6.

Thus, for this well-established jurisdictional reason, AFS' collateral-estoppel ground for challenging the Commissioner's final determination was properly dismissed by the BTA. *BTA Decision and Order* at 8, AFS Br. Appx. 8. Moreover, even if AFS had conferred jurisdiction upon the BTA to consider the issue, for several substantive reasons AFS' collateral estoppel claim would be unavailing, as we set forth in the following proposition of law.

<u>Proposition of Law No. 4</u>:
An assessment determination by the Tax Commissioner to partially exclude a taxpayer's personal property from taxation for the 2003 tax year does not collaterally estop the Commissioner from assessing that property as wholly taxable for the following 2004 tax year, particularly when the Commissioner's taxation of such property for the 2004 tax year results from a comprehensive audit practice applied to similarly situated taxpayers, as well as to that taxpayer.

AFS erroneously argues that under the doctrine of collateral estoppel the Commissioner's failure to have assessed the true value of its "unlit" fiber-optic inventory for the 2003 tax year bars the Commissioner from assessing such property for the 2004 tax year at issue. Had AFS raised this issue in its petition for reassessment or in writing at any time during the Commissioner's consideration of the petition, the Commissioner would have an opportunity to address that issue. Thus, on appeal, the BTA would have been conferred with jurisdiction to review the Commissioner's ruling on that issue. But even if AFS had conferred jurisdiction on the BTA to consider AFS' collateral-estoppel claim, for several substantive reasons, the BTA reasonably and lawfully rejected that contention.

First, the collateral-estoppel doctrine should not apply here because this Court has long held that, among other essential requirements, collateral estoppel requires an "identity of issues," and that such "identify of issues" is not present when, as here, different tax years are involved. *Hubbard Press v. Tracy* (1993), 67 Ohio St.3d 564, 565 (citing *Limbach v. Hooven & Allison Co.* (1984), 466 U.S. 353; and *Commr. of Internal Revenue v. Sunnen* (1948), 333 U.S. 591); *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision* (1998), 81 Ohio St.3d 58, 66.

The Ohio Supreme Court's decision in *Hubbard Press* is highly instructive for it spells out this established principle using the most direct and concrete of language. Namely, the Court rejected the contention by the taxpayer-owner of a printing business that its previous successful litigation in seeking real-property and personal-property tax exemption for its printing operations for the 1951 tax year (and for which it received exemption for all subsequent tax years through 1982) collaterally estopped the Tax Commissioner from denying the exemption for the 1983 tax year therein at issue. The Court did so, as follows:

In *Am. Soc. for Metals v. Limbach* (1991), 59 Ohio St.3d 38, 39, 569 N.E.2d 1065, 1066, we attempted to resolve all doubts about the applicability of collateral estoppel:

> "The basic elements that must exist before the doctrine can be applied * * * are: (1) an administrative proceeding of a judicial nature, (2) an identity of the parties, and (3) **an identity of the issues**."

The BTA identified correctly the essential elements of collateral estoppel. There was a hearing before the BTA in 1950 at which the Tax Commissioner and Hubbard were parties. **<u>However, it is obvious that the issue now before us involves tax year 1983, and whatever proceedings took place in the 1950 hearing did not concern tax year 1983. Thus, collateral estoppel does not apply</u>.** *Limbach v. Hooven & Allison Co.* (1984), 466 U.S. 353, 104 S.Ct. 1837, 80 L.Ed.2d 356; *Commr. of Internal Revenue v. Sunnen* (1948), 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898; see, also, *State ex rel. Westchester Estates, Inc. v. Bacon* (1980), 61 Ohio St.2d 42, 15 O.O.3d 53, 399 N.E.2d 81, paragraph two of the syllabus. In *Hooven & Allison*, supra, 466 U.S. at 362, 104 S.Ct. at 1843, 80 L.Ed.2d at 364-365, the United States Supreme Court, in discussing collateral estoppel, stated: "The parties, the tax, and the goods imported and their containers are the same. * * * Collateral-estoppel concepts, therefore, might have an initial appeal." The court then concluded:

> "**The years involved in this tax case, however, are not the same tax years at issue** in *Hooven I* [*Hooven & Allison Co. v. Evatt* (1945), 324 U.S. 652, 65 S.Ct. 870, 89 L.Ed. 1252]. Because of this, *Commissioner v. Sunnen*, supra, is pertinent and, indeed, is controlling. * * * **An earlier decision * * *, involving the same facts, questions, and parties but different tax years, was held not to be conclusive under the doctrine of collateral estoppel** * * *."

(Emphasis and underlining added.) *Hubbard Press* at 565 (quoting *Am. Society for Metals*; and *Sunnen*).

More recently, this Court reiterated this established principle. *TBC Westlake*, 81 Ohio St.3d at 66 (citing to *Hubbard Press*). The *Westlake* Court held that a stipulation of real property value entered into at the BTA hearing for the 1992 tax year did not collaterally estop the BTA from determining the true value for the property for the 1993 tax year at a different amount. Id. Thus, under *Hubbard Press* and *TBC Westlake,* for this reason alone, the BTA properly rejected AFS' collateral-estoppel claim.

Moreover, a second ground for substantively rejecting AFS' collateral estoppel claim applies as well. The 2003 tax year determination by the Commissioner to exclude from the taxable value of AFS' personal property the value of unlit strands of fiber optic cable fails to meet another of the essential requirements of collateral estoppel. Specifically, the Tax Commissioner's final determination for the 2003 tax year on that issue was not made pursuant to "an administrative proceeding of a judicial nature" within the meaning of *American Society for Metals,* and *Hubbard Press,* supra.

As the BTA noted in its decision below, for the 2003 tax year, the excludability from personal property taxation of AFS' unlit dark fiber inventory was simply not at issue. *BTA Decision and Order* at 8, AFS. Br. Appx. 8. Thus, AFS cannot rely on the BTA's decision concerning the 2003 tax year to support its collateral-estoppel claim. To be sure, if, for the 2003 tax year, the BTA had itself addressed and resolved a contested issue as to whether the Commissioner acted reasonably and lawfully in excluding the true value of the unlit strands of fiber optic cable, then the "administrative proceedings of a judicial nature" requirement would have been met. But the

BTA did no such thing. The BTA did not address in any way the reasonableness or lawfulness of the Commissioner's exclusion of value for any unlit fiber optic cable strands.

Thus, AFS must rely on the novel assertion that the Commissioner's assessment review for the 2003 tax year constitutes an "administrative proceedings of a judicial nature." Neither this Court nor the BTA has ever recognized the Commissioner's administrative proceedings to satisfy the "administrative proceeding of a judicial nature" element of collateral estoppel. Indeed, the Commissioner has never sought such characterization of his administrative determinations for collateral estoppel purposes.

Considering the Commissioner's administrative review of his own assessments as "judicial in nature" overlooks the informal nature of the Commissioner's fact-finding, the frequent lack of any attorney representation of the taxpayer, and the more formal evidentiary process available to the parties at the BTA on appeal from the Commissioner's findings.

Moreover, his Court has expressly recognized that, to meet the "judicial nature" requirement, the proceeding must provide adequate opportunity for the parties to introduce evidence. *Superior's Brand v. Lindley* (1980), 62 Ohio St.2d 133, 135-136. Yet, in the Commissioner's administrative proceedings, taxpayers are not afforded the right to subpoena and cross-examine witnesses or to conduct other discovery. Rather, that opportunity is afforded only on appeal to the BTA.

If the Commissioner's determinations for prior tax periods suddenly were to be given collateral-estoppel effect for subsequent tax periods, the consequences of each facet of each administrative determination would be far greater than at present -- for taxpayers and taxing authorities alike.

Finally, for a third reason, AFS' collateral-estoppel claim is substantively erroneous. It ignores that the Commissioner's final determination for the 2004 tax year at issue resulted from the Commissioner's legal and administrative personnel's review of the applicable law. Based on this review, the Commissioner developed a comprehensive administrative practice that is reflected in the present case.

In fact, the Commissioner's comprehensive administrative practice is reflected in another final determination issued by the Commissioner on the same November 30, 2005 date that the Commissioner issued his final determination to AFS. See *In Re City Signal Communications, Inc.* (Nov. 30, 2005), Tax Commissioner Case No. 05-01185, unreported, T.C. Br. Appx. 8-10. Thus, by rejecting AFS' partial exclusion claim here, the Commissioner treated AFS the same as AFS' similarly situated telecommunications company competitors engaged in holding dark fiber inventory for lease to others.

CONCLUSION

For all the above reasons, the BTA's affirmance of the Commissioner's final determination should be affirmed.

Respectfully submitted,

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OHIO BOARD OF TAX APPEALS

American Fiber Systems, Inc.,	)	CASE NO. 2004-K-1222
	)	
Appellant,	)	(PUBLIC UTILITY PERSONAL PROPERTY TAX)
	)	
vs.	)	
	)	DECISION AND ORDER
William W. Wilkins, Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

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Entered September 16, 2005

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

Through its appeal filed with this board on November 8, 2004, appellant, American Fiber Systems, Inc., challenges a final determination issued by the Tax Commissioner on September 15, 2004. In his determination, the commissioner granted in part and denied in part appellant's petition for reassessment in which it objected to a public utility personal property tax assessment issued for tax year 2003. We now consider this matter upon appellant's notice of appeal, the statutory transcript ("S.T.") certified by the Tax

Commissioner pursuant to R.C. 5717.02, the evidence presented at a hearing convened before this board, and the post-hearing briefs of counsel.

Following the filing of appellant's 2003 annual report as an interexchange telecommunications company, the Tax Commissioner issued an assessment which reflected an increase in the taxable value of appellant's property. Appellant subsequently filed a petition for reassessment, asserting that the total taxable value of its property should be reduced from $1,323,740 to $156,200. The commissioner granted a reduction, but only to the extent of $943,000, which comported with that amount of fiber optic wire which was "unlit" and not used in appellant's business. In reaching this conclusion, the commissioner dispensed with the issues raised by appellant in the following manner:

> "Within Ohio, the petitioner operates a communications network in Cuyahoga County. This network consists of a forty-one mile optic loop and other network equipment. The fiber loop contains 288 strands of fiber, bundled together. The bundle of fiber runs through one conduit throughout the forty-one mile loop. The petitioner states that only 36 of the 288 strands have ever been lit, and that the remaining 252 strands have never been lit.
>
> "The petitioner contends that the assessed taxable value should be reduced from $1,323,740 to $156,200, a reduction of $1,167,540, to compensate for the unused and unlit fiber optic cable on its books. This contention is well taken in part.
>
> "In a telephone conversation, the petitioner stated that the total network cost of $5,439,057 is comprised of approximately $3,275,000 for installation of the one conduit pipe that traverses the entire 41 mile fiber loop, $406,000 for poles for the above-ground part of the fiber loop, $1,758,057 for fiber costs, and $38,000 for monitoring equipment. The petitioner is requesting an 87.5% reduction in the value of all of its personal property due to its primarily unlit fiber optic cable system. While the petitioner can be granted a reduction in the value of its fiber cable due to the unlit fiber in its system, the fact that it has unlit

fiber does not reduce the value of all of its other equipment besides its fiber. The fiber that has been lit uses the conduit pipe, the above-ground poles, and the monitoring system. As the lit fiber uses these components, the components are considered used in business pursuant to R.C. 5701.08. However, the petitioner has shown that 252 of its 288 fibers, or 87.5%, have never been lit, are not used in business and therefore the value of the fiber assessed, $1,758,057.00, shall be reduced by 87.5% to reflect this."[1] S.T. 1-2.

Although appellant agrees with that aspect of the commissioner's ruling that its unlit fibers are not "used in business" and, as a result, are not to subject to tax, through multiple specifications of error, appellant asserts that the taxable value of the remainder of its property, i.e., conduit pipe, above-ground poles, and computer monitoring system, should be reduced on a pro rata basis to correlate with the unlit, i.e., unused, fiber optic wire within its network. In addition, appellant claims the commissioner's refusal to make such an adjustment results in a violation of rights guaranteed by the Ohio and United States Constitutions.

We first dispense with appellant's constitutional challenges by pointing out that the Board of Tax Appeals is a statutorily created quasi-judicial administrative agency, which lacks jurisdiction to declare a statute unconstitutional. *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, paragraph one of the syllabus; *Herric v. Kosydar* (1975), 44 Ohio St. 2d 128, 130; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 8; *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, paragraph one of the syllabus. As discussed in *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197-198, the court

[1] In addition to the adjustment accorded the total taxable value of appellant's fiber optic cable, the commissioner also redistributed appellant's taxable property from the Berea taxing district, in which it was originally reported, to ten other districts on a prorated basis consistent with the fiber optic mileage located within each district.

agreed with this board's conclusion that we are equally without jurisdiction to consider whether a statute has been applied in an unconstitutional manner. See, also, *GTE North, Inc. v. Zaino*, 96 Ohio St.3d 9, 2002-Ohio-2984. Given our inability to grant the relief requested, we must decline to rule upon the constitutional arguments which appellant has advanced within its notice of appeal.

In considering the remainder of appellant's arguments, we refer to the court's decision in *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215, in which it held that "when an assessment is contested, the taxpayer has the burden '*** to show in what manner and to what extent ***' the commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect." Id. Subsequently, in *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the court succinctly set forth the standard which this board is to use in conducting our review:

> "Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. ***" Id. at 124. (Citation omitted.)

See, also, *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66, paragraph one of the syllabus; *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 499, 2003-Ohio-2149, ¶26.

Appellant asserts that the taxable value of its property should be reduced by a percentage commensurate with the amount of unlit fiber optic wire which was removed from the assessment. However, the property to which such claim is directed, i.e., poles, conduits, computer systems equipment, etc., unlike its unlit fibers, is indeed used by appellant in conducting its business. Whether such equipment supports a single fiber optic wire or multiple wires, it is used in appellant's business and is therefore subject to taxation. R.C. 5701.08. See, generally, *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369.

At hearing before this board, appellant also presented evidence in support of an argument that it should not be liable for personal property tax involving certain "make ready" costs incurred as part of the development of its network. For example, appellant's director of project management testified that as a condition for obtaining a permit to install fiber optic wire through the city of Shaker Heights, it was required to install two additional circuit lines which were unnecessary to its system. The commissioner questions this board's ability to consider this claim as it was neither raised when the matter was pending before him or in appellant's notice of appeal. We agree.

R.C. 5727.47 provides the manner by which a public utility may challenge an assessment issued to it:

> "If a public utility objects to any assessment certified to it pursuant to such sections, it may file with the commissioner *** a written petition for reassessment . *** The petition 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."

Consistent with case law interpreting similar statutory mandates, see, e.g., *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, a taxpayer has an obligation to raise issues justifying the relief requested at the earliest stage of proceedings, and a failure to do so precludes it from amplifying its claims on appeal. See *Ohio Edison Co. v.* Tracy (Interim Order, May 21, 1999), BTA No. 1997-K-322, unreported. Cf. *DeWeese v. Zaino*, 100 Ohio St.3d 324, 2003-Ohio-6502. A review of the documents filed by appellant with the commissioner fails to reveal that the aforementioned claim was asserted by appellant during the proceedings before the commissioner.

Further, these issues were not specified as error by appellant in its notice of appeal. R.C. 5717.02, which sets forth the statutory prerequisites for pursuing an appeal to this board, provides that "[s]uch appeals shall be taken by filing a notice of appeal with the board ***. *** The notice of appeal shall have attached thereto *** a true copy of the notice sent by the commissioner *** and shall also specify the errors complained of ***." Appellant's failure to specify error in its notice of appeal precludes this board from considering it. See, e.g., *Ellwood Engineered Castings Co. v. Zaino*, 98 Ohio St.3d424, 2003-Ohio-1812; *Kern v. Tracy* (1995), 72 Ohio St.3d 347, 349; *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134.

Nevertheless, even if we were to find we have jurisdiction over these late-raised claims, we would be unable to conclude that appellant has sufficiently supported the costs attributable to such claims. For example, rather than delineating the costs incurred in deploying the specific aspects of its fiber optic network to which it now objects, appellant's witness testified:

> "Q. Okay. We talked about your having to run these two extra conduit lines through the Shaker Heights portion of the loop. Did that increase the cost of construction of the loop in that particular section.
>
> "A. Yes, it did.
>
> "Q. Okay. And is there any way for you to calculate what that additional cost was?
>
> "A. Well, just based on experience, I'm figuring about 30 percent. We have to still bore pits, we had to increase the size

> of the cutter head and we had to do another process, which would be the reaming. So I'm figuring about 30 percent. That's our general rule of thumb." H.R. at 29-30.

Such generalities, incapable of independent verification, are simply an insufficient basis for this board to find error and order modification. *Alcan Aluminum Corp.*, supra.

Based upon the foregoing, to the extent they are within this board's jurisdiction, appellant's specifications of error are not well taken and they are therefore overruled. It is therefore the order of this board that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

ohiosearchkeybta

Ohio Department of TAXATION
Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: NOV 30 2005

City Signal Communications, Inc.
ATTN: Tax Department
2134 West Laburnum Avenue
Richmond, VA 23227

Re: Case No. 05-01185
Public Utility Property Tax
Cuyahoga, Lake and Lucas Counties
Tax Year: 2004

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5727.47 contesting a public utility property tax assessment. The petitioner built fiber rings in Cuyahoga, Lake and Lucas Counties. The petitioner was acquired by Cavalier Telephone of Virginia as of December 31, 2004, twelve months after the December 31, 2003 listing date at issue herein.

In its April 27, 2005 and September 13, 2005 letters to the hearing officer, the petitioner's representative described its operations in detail. Approximately 90% of the petitioner's fiber is above ground. It built the fiber rings in order to either lease the fiber to users, or provide the fiber to customers under indefeasible right to use (IRU) agreements. A lease arrangement involves a stream of payments for the use of the fiber, while an IRU requires a single up-front payment. Most of its fiber strands were not leased or under an IRU during the period at issue, but were held in inventory.

As stated in the petitioner's representative's September 13, 2005 letter to the Department of Taxation, City Signal did not provide telecommunication services, and under its business model had no intention to do such. As provided in its September 13, 2005 letter, the petitioner has stated that its sole business was leasing fiber, or providing fiber to customers under IRU agreements. City Signal did not light the leased fiber. Its customers were responsible for lighting the fiber. Also, City Signal did not provide the electronic and optronic equipment needed to light the fiber. Its customers were responsible for obtaining such equipment. City Signal's customers needed to make their own arrangements to connect the fiber being leased with outside carriers or telecommunication networks.

The petitioner did not request a hearing. However, after the petition was received, the hearing officer discussed the case several times with the petitioner's tax representative via telephone. Also, the hearing officer sent two letters to the petitioner's tax representative requesting additional information, and in response to these letters, the representative sent the requested information.

The petitioner contends that it should not be required to pay public utility property tax on the fiber which it has not leased, arguing that this fiber is "dark fiber" that is exempt from taxation. This contention is not well taken.

In the above-cited letters, the petitioner's business model is explained as being to lease fiber to telecommunication service providers and others, or provide fiber under IRU agreements. These third party lessees control when they want to light the fiber and use it in their telecommunications endeavors. Thus, the petitioner built the fiber rings in order to lease them to outside parties.

R.C.5701.08 defines "used in business", in pertinent part:

> (A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state. [Emphasis added.]

As described in R.C. 5701.08, property is used in business when it is "employed or utilized with ordinary or special operations", or when "held as means or instruments for carrying on the business". In the instant case, the petitioner held the completed fiber for lease, and the fiber was used in its "ordinary operations" as property available for lease. Also, the petitioner's inventory of fiber is necessary in order for the petitioner to carry out its leasing business. For without fiber available for leasing, the petitioner would have no property to lease, and could not fulfill any upcoming lease arrangements.

In its petition, the petitioner argues that its unleased fiber is exempt from taxation as "dark fiber". However, in the petitioner's business of leasing fiber, such unlit fiber held in inventory is used in its business as inventory awaiting leasing.

In *United Telephone v. Tracy* (1999), 84 Ohio St. 3d 506, the taxpayer was a telephone company providing telephone service to its customers. The Ohio Supreme Court held that the taxpayer did not owe tax on its "dead pairs", those pairs of fiber or wire contained within a telephone cable that are not connected to either a main distribution frame or to a customer's drop line. However, the facts in the instant case are much different from those in *United Telephone.* In *United Telephone, supra*, the taxpayer was a telephone company providing telephone service to its customers, while in the case at hand the petitioner is not providing telephone service, but is merely in business to construct and lease fiber lines. The dead pairs in *United Telephone* are not "used" in the business of providing telephone service to United's customers because they are not "capable of operation" in United's own plant. By contrast, in the instant case the unlit fiber is an inventory item held for lease to customers. The petitioner never intended for its fiber to become part of its physical plant, but rather intended for others to light and use the fiber. The petitioner's business is leasing fiber, and the unlit fiber is used in business as being held for lease. In the case at hand, the fiber at issue has the character of a type of inventory that is used in business by being held for use by other entities.

Thus, the petitioner is merely a lessor of property, while the taxpayer in *United Telephone*, by providing its customers with a dial tone and the right to use its telecommunications system, is providing services to its customers. Therefore, the petitioner, as a lessor of property to its customers, operates a much different business than the taxpayer in *United Telephone*, which is a service provider.

In *United Telephone*, *supra*, the "dead pairs" were not in operation or capable of operation on the tax listing date "in the business for which acquired" pursuant to R.C. 5701.08(A). The same is not true of the unlit fiber in the instant case, since "the business for which" the unlit fiber was "acquired" was precisely to be held out for lease by third parties. Under R.C. 5701.08(A), the fiber held is "stored or kept on hand as material, parts, products, or merchandise", as well as "held as means or instruments for carrying on the business".

In its petition for reassessment, the petitioner also contends that the cost of its "sold fiber" should be removed from the assessment. This contention is not well taken. As explained above, the petitioner is not selling its fiber, but leasing it to customers, or leasing it under an IRU, and thus retaining title to and ownership of the fiber. Thus, the leased fiber is still owned by the petitioner and is subject to the public utility property tax.

Accordingly, the assessment is affirmed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNTY AUDITORS, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

William W. Wilkins

William W. Wilkins
Tax Commissioner

Cincinnati Bell Telephone Company, Appellant, vs. Thomas M. **Zaino,** Tax Commissioner of Ohio, Appellee.

CASE **NOS. 2003-K-765;** 2003-K-**1612** (PUBLIC UTILITY PERSONAL PROPERTY TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

2005 Ohio Tax LEXIS 753

June 10, **2005,** Entered

[*1]

APPEARANCES:

For the Appellant -- Frost Brown Todd LLC, Christopher DeLuca, 2200 PNC Center, 201 East Fifth Street, **Cincinnati,** Ohio 45202

For the Appellee -- Jim Petro, Attorney General of Ohio, Robert C. Maier, Assistant Attorney General, State Office Tower-16<th> Floor, 30 East Broad Street, Columbus, Ohio 43215

OPINION:
DECISION AND ORDER

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

Through separate appeals filed with this board on **June** 19 and October 31, 2003, appellant, **Cincinnati Bell Telephone** Company, challenges two final determinations issued by the Tax Commissioner on April 23 and September 4, 2003, respectively. In these determinations, the commissioner denied appellant's petitions for reassessment and affirmed public utility personal property tax assessments previously issued to appellant for tax years 2000, 2001 and 2002. We now proceed to consider this matter upon appellant's notices of appeal, the statutory transcripts ("S.T.") certified by the Tax Commissioner pursuant to R.C. 5717.02, the evidence presented at a hearing convened before this board, n1 and the post-hearing briefs of counsel.

n1 In addition to the documentary evidence offered at hearing by the parties, appellant presented the testimony of several witnesses: Donald V. Daniels, appellant's vice president of marketing; Dennis P. Hinkel, senior vice president of appellant's network and operations organization; Lawrence K. Vanston, president of Technology Futures, Inc. ("TFI"); Ray L. Hodges, a senior consultant with TFI; Randy Hartman, senior manager in the tax department of **Cincinnati Bell,** Inc., appellant's parent company; and Richard K. Ellsworth, a director in the valuation group of Deloitte & Touche. **[*2]**

Appellant constitutes a "**telephone** company" as defined by Ohio statute n2 and for each of the tax years in issue filed annual reports with the Ohio Department of Taxation in which it listed the value of its personal property. Subsequently, the Tax

Commissioner issued assessments for each of the years, reflecting increases in the taxable values of appellant's property in the amounts of $ 218,442,010, $ 211,183,300, and $ 203,878,000, respectively. Appellant then filed petitions for reassessment through which it requested that the commissioner reassess and reduce the taxable values of its property. Through final determinations dated April 23, and September 4, 2003, appellant's petitions were denied and the assessments were affirmed as originally issued.

n2 R.C. 5727.01(D)(2) defines a "**telephone** company" as any person "primarily engaged in the business of providing local exchange **telephone** service, excluding cellular radio service, in this state[.]"

Appellant has appealed to this board, n3 specifying the following as error:
"2.The determination of taxable values by the Commissioner denies CBT equal protection under the law in violation of the United States Constitution and **[*3]** the Ohio Constitution. Under current Ohio Revised Code § 5727.111, CBT is required to compute the true value' of property acquired prior to 1994 at 88% of its net taxable cost. In contrast, certain companies which may acquire similar or even identical equipment in constructing and/or operating a telecommunications network are taxed at 25 percent of their net taxable cost. This represents a disparity of listing percentages between similarly situated taxpayers. The discriminatory treatment afforded in assessing CBT's public utility property value violates the Equal Protection Clauses of both the Ohio and the United States Constitutions and is therefore unconstitutional. All of CBT's property should be assessed at the 25% rate afforded its similarly situated competitors.

"* * *

"4. The Commissioner's determination of value for CBT's general plant property does not represent the true value of such property. The Commissioner valued CBT's general plant property by utilizing a 7.5-year class life. The Commissioner defines general plant property as property used in the general operations including such assets as garage work equipment, furniture, office equipment, general purpose computers, **[*4]** and more. For CBT, the majority of the taxable property in this category is general purpose computers, such as personal computers. The Commissioner's determination to value these assets utilizing a 7.5-year class life and 15% residual value is erroneous because such depreciation schedule fails to consider the rapid decline in value inherent in such property. In order to accurately reflect the true value of its general plant assets, CBT should be entitled to utilize a Class I true value schedule with a 15% residual value. n4

"5. The Commissioner's determination that CBT must use a 7.5-year class life and 15% residual value while general business taxpayers are entitled to value identical property under the Class II life schedule violates the equal protection requirements of the United States Constitution and the Ohio Constitution. It is unlawful for the Commissioner to value identical property (e.g. personal computers) differently solely by the overall activities of the business.

"6. The Commissioner erred in determining the valuation of CBT's central office and information plant assets by utilizing a 7.5-year class life and 15% residual value. The majority of CBT's assets within **[*5]** these categories consist of digital switching equipment and circuit equipment. The Commissioner's determination fails to take into account the functional obsolescence inherent in such property due to the rapid technological advances occurring with respect to such telecommunications equipment. The true value of this property is correctly reflected through the use of the Class I true value schedule with a 15% residual value. n5

"7. The Commissioner erred in determining the valuation of CBT's cable and wire facilities by using a 15-year class life true value schedule. The majority of CBT's assets within this category consists of aerial, underground, and buried cable. This cable consists of both copper twisted pairs and fiber optic cable. The Commissioner's determination fails to take into account the functional obsolescence with respect to both the copper and fiber optic cabling. Rapid technological advances with respect to such cabling results in a decline in the true value of CBT's property at a much faster rate than reflected in the Commissioner's calculation of true value. The true value of this property is accurately reflected through the use of the Class III true value schedule **[*6]** with a 15% residual value. n6

"* * *

"9. The Commissioner erred in issuing a preliminary assessment certificate for 2000 and 2001 [and 2002] with respect to various items of equipment permanently mounted to CBT's vehicles. CBT's vehicles contain various items of equipment that are permanently mounted. R.C. 4503.04 provides that taxes at the rates set forth in that section are in lieu of all taxes on or with respect to the ownership of such motor vehicles. In computing the vehicle weight for purposes of assessing a license tax under R.C. 4503.02, the additional equipment added to the vehicle is included in the computation, and therefore an assessment is levied on this equipment as a motor vehicle. Imposing tax with respect to equipment added to motor vehicles under R.C. 5701, of which the same equipment is used in determining the taxable weight of vehicles for computation of the license tax under R.C. 4503.04 or R.C. 4503.042 results in double taxation of the same property. This directly conflicts with the provisions of R.C. 4503.04 which states that taxes at such rates provided in this section are in lieu of all taxes on or with respect to the ownership of such motor vehicles.' **[*7]** Thus, it is unlawful for the Commissioner to assess any additional tax with respect to such property, and CBT objects to the inclusion of motor vehicle equipment its [sic] its personal property tax assessment."

n3 Appellant's notices of appeal are substantially similar, with pertinent differences being noted. Because they set forth general background information and do not, in and of themselves, claim error in the commissioner's determinations, we have not quoted paragraphs one, three, and eight of appellant's notice of appeal in **BTA** No. **2003-K-765,** and paragraphs one, three, and nine of appellant's notice of appeal in **BTA** No. 2003-K-**1612.**
n4 In its notice of appeal in **BTA** No. 2003-K-**1612,** appellant modified its claim, asserting that: "In order to accurately reflect the true value of its general plant assets, CBT should be entitled to utilize the new valuation schedule for Stand-Alone computers as specified in the Ohio Department of Taxation news release dated 2-14-03." Id. at paragraph 5. However, no evidence or arguments specific to this claim has been pursued by appellant.
n5 In its notice of appeal in **BTA** No. 2003-K-**1612,** appellant also included the following: "The Commissioner also errors [sic] in failing to take into consideration the declining value of equipment based upon competition in the telecommunication industry. The true value of this property is correctly reflected through the use of an Average Remaining Life of 4 years and 5 years for Circuit Equipment and Switching

Equipment, respectively." Id. at paragraph 7. **[*8]**

n6 Again, appellant's notice of appeal in **BTA** No. 2003-K-**1612** varied slightly, citing increased industry competition as a factor negatively impacting the value of its property and further that: "The true value of this property is accurately reflected through the use of an Average Remaining Life of 4.1 years for metallic cable, and 7.8 years for non-metallic cable." Id. at paragraph 8.

Additionally, in **BTA** No. 2003-K-**1612**, appellant included the following specifications of error n7:

"4. The Commissioner's determination of value for CBT's equipment does not represent the true value of such property. The Commissioner valued CBT's equipment as equal to [the] cost of such property less annual allowances as prescribed by the Commissioner. The Commissioner's valuation fails to take into account the technological nature of the equipment used in connection with CBT's business and the rapid decline inherent in such property. CBT has provided a property valuation study prepared by Technology Futures, Inc. and Deloitte & Touche (Valuation Study). The Valuation Study sets forth competent evidence of probative value regarding the true value of the equipment, which takes into account the **[*9]** specific information regarding the taxpayer's industry, including, the technological changes and advances occurring in that industry and the impact those changes have on the true value of CBT's equipment.

"* * *

"11. CBT owns and utilizes certain telecommunications switching equipment in connection with its business. The switching equipment is specifically designed and used to hold and process telecommunications signals in connection with CBT's business."

n7 In its post-hearing brief, appellant advised this board of its intention to withdraw paragraph twelve of its specifications of error in **BTA** No. 2003-K-**1612.** Id. at 37.

Consistent with its notices of appeal and its post-hearing briefs, appellant's arguments may generally be separated into three distinct categories. First, appellant asserts that the rate at which its personal property is taxed is disproportionate to that of its competition, thereby resulting in violations of the Equal Protection Clauses of the Ohio and United States Constitutions. Second, appellant argues that the method typically applied by the Tax Commissioner in determining the value of depreciable business property reported by **telephone** companies **[*10]** does not accurately reflect the value of appellant's property due to increased market competition, dramatic technological advances, and an absence of a resale market. Finally, appellant claims that the commissioner erred in taxing certain equipment attached to its motor vehicles which are used by appellant in delivering telecommunications services to the public.

We first address appellant's challenge regarding the constitutionality of the assessment rates made applicable to it by virtue of R.C. 5727.111(B). Appellant asserts that the rate at which its property is taxed results in a violation of constitutional rights guaranteed it because its property is taxed at a higher rate than that applicable to similar, or even identical, property reported by other taxpayers, including those with which appellant operates in direct competition. n8 However, this board is without jurisdiction to rule upon the merits of appellant's constitutional claims.

n8 Former R.C. 5727.111(B) provided that **telephone** companies' taxable property which first became subject to tax in Ohio in 1995 and thereafter would be assessed at a rate of twenty-five percent of true value, while property first subject to taxation prior to 1995 would continue to be assessed at eighty-eight percent of true value. It is the latter property to which appellant's constitutional claims relate. Although not in issue for the years involved in the present appeals, it is noted that the taxable rates applicable to this category of property, as a result of amendments effected by Am.Sub.H.B. 95, effective September 26, 2003, continues to decrease on an annual basis for tax years **2005,** 2006, and 2007 until the last year when such property, regardless of when it first became taxable, is assessed at a rate of twenty-five percent of true value. **[*11]**

In *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, the Supreme Court of Ohio commented upon the limited nature of the board's role involving constitutional challenges:
"The **BTA** understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The **BTA** determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the **BTA** not only receives evidence in this type of case, but must weigh the evidence and determine the facts necessary for the court's review of the constitutional questions. Since the **BTA** did not make findings of fact, the commissioner asserts that we should remand the case for the **BTA** to comply.

"In *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St. 3d 229, * * * paragraph three of the syllabus, we held:

"'The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence **[*12]** concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (*Bd. of Edn. of South-Western City Schools v. Kinney* [1986], 24 Ohio St.3d 184, * * * construed.)'

"We explained the process, 35 Ohio St.3d at 232 * * *:

"'When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"'To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the **BTA** be that forum. The **BTA** is statutorily created to receive evidence in its role as factfinder.'

"Under *Cleveland Gear*, the **BTA** need only receive evidence for us to make the constitutional finding. This is because the **BTA** accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have a limited ability to receive evidence. Thus, the **BTA** receives evidence **[*13]** at its hearing, but we determine the facts necessary to resolve the constitutional question." Id. at 197-198. (Parallel citations omitted.)

See, also, *GTE North, Inc. v. **Zaino***, 96 Ohio St.3d 9, 2002-Ohio-2984.

While the parties were accorded an opportunity to develop the evidentiary record necessary for further appellate review of appellant's constitutional claims and have presented arguments relating to such claims, given our inability to grant the relief requested, we must overrule the arguments which appellant has advanced.

As we proceed to review the remainder of appellant's arguments, we note the applicable standard by which such review is to be conducted. In *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the Supreme Court held:
"Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the **BTA** to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. * * *" Id. at 124. **[*14]** (Citation omitted.)

It is therefore the burden of a taxpayer challenging a finding of the commissioner to rebut this presumption by establishing a clear right to the relief requested. It must further demonstrate in what manner and to what extent the Tax Commissioner's determination is in error. *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138; *Ohio Fast Freight, Inc. v. Porterfield* (1968), 29 Ohio St.2d 69; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Appellant maintains that the assessments issued by the commissioner for the years in issue result in an overvaluation of its property. In this context, appellant identified several factors negatively impacting the value of its property and offered evidence in support of the reduced values claimed. Among the factors cited by appellant is the increased competition which it has experienced since 1996 following congressional passage of the federal Telecommunications Act of 1996. n9 Due to its existence in the local **telephone** market at the time of congressional passage of the Telecommunications Act of 1996, it is **[*15]** considered an incumbent local exchange carrier ("ILEC"), as opposed to a competitive local exchange carrier ("CLEC"). According to appellant, inherent in its designation as an ILEC are certain service obligations not imposed upon new entrants to its market, which has an overall effect of placing it at a competitive disadvantage.

n9 In *AT&T Communications of Ohio, Inc. v. Pub. Util. Comm.* (2000), 88 Ohio St.3d 549, the court succinctly described the purpose and effect of the Telecommunications Act of 1996:
"In 1996, Congress passed the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56, 61, which was designed, in part, to erode the monopolistic nature of the local **telephone** service industry by obligating the current providers of local phone service to facilitate the entry of competing companies into local **telephone** service markets across the country. Specifically, the 1996 Act forces an incumbent LEC (1) to permit a requesting new entrant in the incumbent LEC's local market to interconnect with the incumbent LEC's existing local network and thereby use the incumbent LEC's network to compete with the incumbent LEC in providing local **telephone** services (interconnection); (2) to provide its competing telecommunications carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell to its

competing telecommunications carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its customers at retail rates in order to allow the competing carriers to resell the service. Sections 251(c)(2), (3), and (4), Title 47, U.S. Code. The Ohio General Assembly expressly sanctioned the commission's exercise of authority under the 1996 Act. See R.C. 4905.04(B)." Id. at 551-552, fn. 6.

See, also, ***Cincinnati Bell*** *Tel. Co. v. Pub. Util. Comm.* (2001), 92 Ohio St.3d 177, 178. **[*16]**

Appellant continues, noting that it has experienced direct competition in several aspects of its operations. For example, it directly competes with both "resale" companies, which purchase **telephone** access at wholesale rates and then resell such services to end consumers, and "facilities-based" companies, which have built their own **telephone** service facilities within appellant's market. Exemplifying the competitive disadvantage in which it finds itself, appellant's senior vice president of network and operations organization elaborated upon the distinction between appellant and facilities-based companies. He indicated that appellant is still required, by existing governmental regulations, to make **telephone** service access available to all potential customers within its market. However, newer entrants to the **telephone** service market are not subject to such regulations. In doing so, such providers can be more selective in the deployment of a network and build facilities in a more efficient manner, targeting specific high density users within smaller geographic areas.

Appellant also cites technological advancements as having dramatically impacted the value of its property. As background, **[*17]** appellant first explained the origins of its operations and the nature of its equipment. Although it now offers voice and data access, including Internet access and high speed broadband, appellant's network was originally constructed to provide traditional voice-only communication services to residential and business customers located in the **Cincinnati** metropolitan area. With regard to the "traditional" **telephone** services appellant offers, the "intelligence" behind appellant's network remains the circuit switches which are used to provide a variety of voice-type services to its customers. These switches contain the information and logic necessary for call origination, routing, termination, and custom calling features such as call-waiting, caller ID, and voice messaging. When a call is made, circuit switches recognize the digits dialed and route the call over the network, using a dedicated path between the caller and the recipient. That portion of appellant's network that interconnects its circuit switches is referred to as its inner office network, while the connection from a circuit switch to the end user is considered the outside plant network. Appellant's outside plant network **[*18]** is comprised of a feeder network and a distribution network, the former being located closest to the circuit switch, such as in a neighborhood or business park locale, and the latter providing the connection feeder to the end user.

Originally, all **telephone** calls were transmitted over twisted pairs of copper wire. However, beginning in the 1980s, appellant began deploying fiber optic cable within its network, which allowed for increased capacity. By 1997, all of appellant's central offices, or main switches, were connected to the network by fiber optic cable, and within two years after that, approximately twenty-five percent of the access lines between appellant's central offices and distribution lines were similarly wired. While it continues to extend fiber optic cabling closer to the end user, particularly due to increased customer demand for data transmission in addition to voice communications, appellant still installs copper wire pairs into residential neighborhoods. Although appellant believes it installs more wire pairs than will be needed in the future, because such pairs are part of a larger, buried cable, any wire pairs determined to be unnecessary are simply abandoned in **[*19]** place due to the excess costs which would be incurred to effect their removal.

Appellant proceeded to then compare the "foundation" of its network system to those providers with which it competes that have more recently entered the telecommunications industry. In doing so, appellant noted the recent shift from the use of circuit switching technologies to "packet-based" technologies. Unlike traditional circuit switches, which were designed to provide reliable voice communications and involved a dedicated line for transmissions, packet-based technologies are designed to transmit "packets" of data, which results in expanded capacity. In addition, packet switches are less costly to install, replace, and upgrade than circuit switches. As a result, appellant has experienced a decline in market prices for circuit switches, with its used switches essentially being sold for scrap value.

Alternate types of technologies used in the industry have likewise impacted appellant's business operatiosn. During the "infancy" of widespread consumer demand for Internet access, appellant experienced a significant growth in secondary **telephone** access lines since customers accessing the Internet were required **[*20]** to commit their **telephone** lines for the length of their connection. However, newer technologies, e.g., cable access, not only offered significantly increased connection speeds, but do not utilize a voice channel on existing **telephone** lines. As a result, primary **telephone** lines become available for use regardless of a customer's connection to the Internet, resulting in a decline in the number of secondary lines.

Cable providers have also begun a "crossover" process, emerging as **telephone** service competitors. In doing so, they offer **telephone** access services comparable to those provided by appellant via cable by virtue of "Voice Over Internet Protocol" ("VOIP"), or IP telephony. Through this technology, **telephone** calls are transmitted over a data network such as the Internet. Also affecting both secondary and primary **telephone** line acquisitions are customer shifts to wireless **telephone** service. Due to the increased reliability of the service and the mobility which results, appellant anticipates more consumers will consider using wireless **telephone** service exclusively.

In an effort to demonstrate the extent to which its property has been overvalued by the Tax Commissioner, appellant **[*21]** presented the testimony of and valuation study prepared by Ray L. Hodges, a senior consultant with Technology Futures, Inc. ("TFI"). According to its president, Lawrence Vanston, TFI is a research and consulting firm which specializes in technology forecasting. TFI's efforts are typically aimed at attempting to forecast the nature of the impact new technology will have upon a particular industry and how quickly such technology will be adopted, allowing market participants, as well as governmental entities, to engage in effective strategic planning.

In the TFI study, Hodges reviewed specific categories of appellant's plant and equipment, i.e., switching equipment, circuit equipment, aerial and buried metallic cable, and non-metallic cable, n10 and concluded that they should be depreciated at faster rates with lower floor values than applicable under the rates prescribed by the commissioner. Applying the resulting rates to the net cost of assets within these categories, the TFI study ultimately expressed values for each category for each of the years in issue.

n10 The TFI study discloses that: "This report develops Percent Good Tables and provides an opinion of and value for major categories of telecommunications plant for **Cincinnati Bell Telephone** (CBT). CBT has over $ 1.8 billion in telecommunications plant in service. The major network categories, the subject of this report, comprise 58% of this investment. These categories are switching (19%), circuit equipment (17%), and cable (22%) [the latter being subdivided into aerial metallic cable, buried metallic cable and non-metallic, i.e., fiber optic, cable]." Ex. A at 1. The "percent good tables" set forth the percentages to be applied against the original costs of assets in order to reflect the depreciated values of such assets. **[*22]**

Before addressing the sufficiency of the evidence offered by appellant in support of its claim, it is first appropriate to review the method generally applicable in determining the value of public utility property. Pursuant to R.C. 5727.08, public utilities are required to annually file reports with the Tax Commissioner which will enable him to "make any assessment or apportionment required under this chapter." R.C. 5727.10 imposes a duty upon the commissioner to annually determine the "true value in money" of all such property required to be assessed. n11 In determining the value of a public utility's property, the commissioner is guided not only by the information contained within the utility's annual report, but also by "such other evidence and rules as will enable him to make these determinations." Id.

n11 Pertinent in this instance, the property which is to be assessed by the commissioner pursuant to R.C. 5727.10 is identified in R.C. 5727.06 as follows: "(A) Except as otherwise provided by law, the following constitutes the taxable property of a public utility or interexchange telecommunications company that shall be assessed by the tax commissioner:

"* * *

"(3) In the case of all other public utilities and interexchange telecommunications companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and:

"(a) Owned by the public utility or interexchange telecommunications company; or

"(b) Leased by the public utility or interexchange telecommunications company under a sale and leaseback transaction."
[*23]

R.C. 5727.11 prescribes the specific method to be employed by the commissioner in valuing public utility property, providing in relevant part:
"(A) Except as otherwise provided in this section, the true value of all taxable property required by division (A)(2) or (3) of section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation."

In furtherance of the preceding mandate, the commissioner has published instructions for use by public utilities in filing their annual tax reports, entitled "Guidelines for Filing Ohio Public Utility Tax Reports," which details the valuation procedures and assessment methods to be employed. See Ex. 4. Consistent with R.C. 5727.11(A), these guidelines reiterate the legislative mandate that unless it is found that true value will not result, the commissioner **[*24]** is to determine the value of public utility property utilizing the statutorily prescribed cost-based method of valuation.

The standard process as described by the Tax Commissioner in the referenced publication is as follows:
"The valuation method applicable to most taxable property of a public utility or interexchange telecommunications company is set forth in Section 5727.11(B). n12 It is similar to the 302 computation' used by general taxpayers in determining the true value of their taxable property. Under this method, the true value is determined by taking the cost of the property less composite annual allowances prescribed by the Tax Commissioner. If application of this method does not result in the determination of true value of the taxable property, the Tax Commissioner may use another method of valuation.

"A table of ten useful lives ranging from five to fifty years and the composite annual allowances for each is included in this publication. A letter and number has been assigned to each useful life: Class C-5 for a five-year useful life, Class C-10 for a ten-year useful life, etc. The annual allowances are expressed as percents good and decrease with the age of **[*25]** the property. The minimum percent good for taxable property in any class is 15%. The true value is determined by multiplying the cost of taxable property for each year by the applicable percent good.

'""One or more property groups have been established for each public utility and interexchange telecommunications class. Each property group contains properties that have integrated functions. The Tax Commissioner has assigned a class life to each property group. The class life represents a composite of the various useful lives of properties in the group. **In general, segregation of short-lived property for the purpose of using a different class life is not permitted.** A listing of the property groups for each class of public utility and interexchange telecommunications company together with a description of the properties in each group and the class life is included in this publication.

"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." Id. at 2. (Emphasis sic.)

n12 Pursuant to Am.Sub.S.B. 3, 148 Ohio Laws, Part IV, 8083, the portion of former R.C. 5727.11(B) previously quoted within this decision was relettered and reflected in paragraph (A) of that statute. **[*26]**

The valuation of property owned by **telephone** companies is broken down into four major categories and valued as follows:

Central Office & Information Plant n13	Class C-10 -- 10 years n14
Cable & Wire Plant n15	Class C-20 -- 20 years n16
General Plant n17	Class C-10 -- 10 years
Other Taxable Property	Cost or net book value

n13 The commissioner's guidelines, which rely upon account references contained within the Code of Federal Regulations, Telecommunications, Title 47, Parts 20 to 39, offer the following examples of items included within central office and information plant accounts: central office, analog electronic, digital electronic, electromechanical switching equipment, operating systems, central office transmission equipment, station apparatus, customer premises wiring, large private branch exchanges, public **telephone** terminal equipment, and other terminal equipment. Id. at 15.

n14 Class C-10 indicates that such property has a useful life expectancy of at least 7.5 but less than 12.5 years. Id. at 8.

n15 Cable and wire plant account examples include cable and wire facilities, poles, aerial cable, underground cable, buried cable, submarine cable, deep sea cable, intrabuilding network cable, aerial wire, and conduit systems. Id. at 15.

n16 Class C-20 indicates that such property has a useful life expectancy of at least 17.5 but less than 22.5 years. Id. at 8.

n17 The general plant examples offered include motor vehicles, aircraft, special purpose vehicles, garage work equipment, buildings classified as personal property, furniture, office equipment, general purpose computers, amortizable tangible assets, capital leases, leasehold improvements, and intangibles. Id. at 15.

[*27]
In each instance, the floor, or lowest "percent good," reflected for property which continues to be used in business at and beyond the last year for the particular class of property is fifteen percent. Id. at 8.

As indicated within the introductory portion of the instructions, the composite annual allowances prescribed by the commissioner for use by public utilities in valuing their taxable property is similar in purpose and effect to the "302 computation" used by general business taxpayers. See, generally, R.C. 5711.18. In the context of the 302 computation, the Supreme Court in *Snider v. Limbach* (1989), 44 Ohio St. 3d 200, 201, recognized that "it is impractical for the commissioner to personally value all personal property in Ohio; thus, she may resort to a predetermined formula to ascertain value." Thus, the purpose of utilizing a "predetermined formula" for valuation is "to promote industry-wide uniformity in determining the true value of depreciable property used in business." *Monsanto Co. v. Lindley* (1978), 56 Ohio St. 2d 59, 62. In *PPG Industries v. Kosydar* (1981), 65 Ohio St. 2d 80, **[*28]** the court elaborated, stating that "this directive [i.e., the 302 computation] has been approved by this court as a practical, reasonable and lawful method and device to achieve uniform valuation of plant equipment in Ohio by prescribing annual depreciation rates in lieu of book depreciation for Ohio personal property tax purposes."

In *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71, the Supreme Court accepted the 302 computation as a prima facie means by which to determine true value. While recognizing that the 302 computation provides a generally effective means for determining value, the court has repeatedly held that a valuation directive issued by the commissioner should not be applied where it is affirmatively demonstrated by a taxpayer that the true value will not result due to the existence of "special or unusual circumstances" or because rigid application would be inappropriate. See, also, *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300; *Monsanto*, supra; *Towmotor Corp. v. Lindley* (1981), 66 Ohio St.2d 53; *Campbell Soup Co. v. Tracy* (2000), 88 Ohio St.3d 473; **[*29]** *RPS, Inc. v. Tracy* (Oct. 30, 1998), **BTA** No. 1996-M-1209, unreported, at 15 ("To successfully challenge the values assessed by the Commissioner, the appellant must bring forth competent and probative evidence of the value of its listed property. * * * There are three acceptable methods of meeting this burden. [An appellant] may offer direct evidence of the personalty's true value. * * * Alternatively, [an appellant] may prove the special circumstances exist or that the use of the 302 computation produces an unjust or unreasonable result. * * *").

The preceding reasoning appears equally applicable, in large measure, when determining the value of public utility property. Recognizing the difficulty inherent in requiring the commissioner to personally value all public utility property within Ohio, it is reasonable that a predetermined formula be developed and applied. However, as with the 302 computation, a statutorily authorized method of valuation should not be applied when true value will not result.

In *Texas E. Transm. Corp. v. Tracy* (1997), 78 Ohio St.3d 83, the court concluded that the appellant, a natural gas pipeline transmission company, could **[*30]** rely upon an appraisal in order to prove the value of its property. In doing so, the court expressly held that a statutorily prescribed method of valuation should not be used to the exclusion of evidence which demonstrates that another method will more accurately result in true value:

"Although R.C. 5727.11 identifies the cost-based method of valuation as a means of assessing true value, the General Assembly has not restricted the commissioner's use of alternate valuation methods. In fact, in these statutes, the General Assembly specifically states that the commissioner may use another method of valuation' and that he may consider other evidence' to determine true value. n18 Contrary to the commissioner's assertion, in deciding true value, the **BTA** need not adhere to the cost-based statutory method of valuation.

"* * *

"The ultimate goal imposed by R.C. 5727.10 clearly is to determine the *true value* of the property taxed. *R.H. Macy Co., Inc. v. Schneider* (1964), 176 Ohio St. 94, 97 * * *. If the statutory method does not yield true value, then another method of valuation may be used, whether or not there are special or unusual circumstances. **[*31]** Although a statute may provide a prima facie estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value. *Monsanto Co. v. Lindley* (1978), 56 Ohio St.2d 59, 61, 10 O.O.3d 113, 114 * * *; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300 * * *." Id. at 85-86. (Emphasis sic and parallel citations omitted.)

n18 In *Texas E. Transm.*, the taxpayer's appraiser employed a "unit-appraisal method," in which he used commonly accepted appraisal techniques to express an opinion of value for the property in issue. In this regard, the court succinctly described the analysis and results as follows:
"Under this method, the value of the unit is first determined. Then, the value of the properties being appraised is determined by measuring their contribution to the unit. Since TET's interstate pipeline systems operate as an integrated group of properties that work together to provide a service, Tegarden testified that the unit-appraisal method is the proper valuation procedure to be applied. He explained that due to the very nature of a natural gasline property, it is more appropriate to value the property as a unit rather than to value the individual components separately. In addition, he pointed out that TET's rates, earnings and accounting methods are regulated as a unit by the Federal Energy Regulatory Commission.

"Using the unit-appraisal method, Tegarden first valued the entire transmission system as a whole by using a cost-approach analysis, an income-approach analysis, and a stock-and-debt-approach analysis. In giving greatest weight to the income approach, Tegarden arrived at a total system value of $ 1,425,000,000. Next, Tegarden apportioned 8.14 percent of the unit value to Ohio, which resulted in a valuation of $ 115,995,000 for TET's Ohio property." Id. at 84.

[*32]
See, also, *MCI Telecommunications Corp. v. Limbach* (Sept. 20, 1990), Franklin App. No. 89AP-870, unreported ("There are two ways in which the taxpayer may contest the commissioner's valuation. The taxpayer may either offer direct evidence of the property's true value or the taxpayer may offer evidence that the applicable rate of depreciation does not accurately measure the property's true value, either because special or unusual circumstances exist or because a rigid application of the directive will create an unjust or unreasonable result.").

Initially, the parties express disagreement as to whether or not appellant is first obligated to prove the existence of "special and unusual circumstances." In this context, reference is made to the following language in *Texas E. Transm.*:
"The commissioner also argues that in order to apply alternate valuation methods, there must be a showing of special or unusual circumstances.' The commissioner's reference to special or unusual circumstances' stems from language found in his 302' directive for determination of depreciation rates for general personal property. However, the words special or unusual circumstances' do not **[*33]** appear in R.C. 5727.11 and are not a prerequisite for using an alternate valuation method where appellees are contesting true value rather than depreciation rates." Id. at 86.

The commissioner concedes that where "direct evidence" of value is offered, such as an appraisal like that relied upon in *Texas E. Transm.*, a public utility need not demonstrate the existence of special and unusual circumstances in order to deviate from booked costs less prescribed allowances. However, the commissioner argues that the TFI study offered is not an "alternate valuation method" for valuing appellant's property, but instead merely proposes accelerated depreciation rates compared to those prescribed by the commissioner. Therefore, the commissioner insists that appellant is not relieved of its obligation to prove special and unusual circumstances exist. In response, appellant asserts that the commissioner's position overemphasizes the labeling of its evidence. It maintains that regardless of the name attributed to the analysis set forth in the TFI study, the result is the same in that it demonstrates that the true value of appellant's property is other than that which results from strict application **[*34]** of the cost-based valuation method less the commissioner's prescribed allowances.

Upon review of appellant's valuation study, we agree with the commissioner that it is not an alternate method of valuing property as was presented in *Texas E. Transm.* The valuation evidence presented in that case was an appraisal which had been prepared by an individual holding the designations of Member of the Appraisal Institute and Certified Assessment Evaluator from the International Assessing Officers. In order to derive the opinion of value which he ultimately expressed for the property in his unit-appraisal, he employed approaches often considered in the appraisal of property, i.e., a cost approach, an income approach, and a stock and debt analysis. In this instance, the TFI study is not an alternate valuation method, e.g., an appraisal, but is instead an effort to demonstrate that the depreciation schedules generally applicable to appellant's property fail to adequately account for the competitive and technological changes which are currently impacting the telecommunications industry. Given the nature of appellant's evidence, we consider it appropriate to proceed to address whether appellant **[*35]** has demonstrated the existence of special and unusual circumstances.

Initially, the commissioner posits that the evidence upon which appellant relies itself demonstrates that appellant is in the same position, with its property subject to the same rates, as other **telephone** companies in Ohio. Referring to the testimony of appellant's witnesses and the valuation study which is based upon national trends experienced within the telecommunications industry as a whole, the commissioner maintains special and unusual circumstances cannot be found to exist.

Although appellant argues it should not be required to show it is different from the remainder of its industry, n19 such is the fundamental nature of proving the existence of "special and unusual circumstances." As previously noted, the purpose of the commissioner's prescribed allowances is to promote industry-wide uniformity in determining the true value of depreciable property used in business. Cf. *Monsanto*, supra; *Jacob B. Sweeney Equipment Trust v. Limbach* (1991), 74 Ohio App.3d 82, 86; *Mid-Ohio Chemical Co., Inc. v. Limbach* (Feb. 17, 1987), Fayette App. **[*36]** No. CA86-04-002, unreported ("The general goal of Ohio's personal property tax scheme is to tax personal property located in this state which is used in business at established rates based on its true value. Since such property is subject to deterioration, depreciation is allowed. However, depreciation rates chosen by individual taxpayers may vary, even within a single industry. In order to promote industry-wide uniformity in determining the true value of depreciable property used in business, the tax commissioner established composite annual allowances in what is commonly known as his 302' directive.").

n19 Appellant also suggests that the commissioner's prescribed depreciation rates should be considered questionable given the fact that several other telecommunications companies currently have appeals pending through which similar challenges are being made. However, we are not persuaded that merely because other taxpayers may be challenging the applicability of the commissioner's prescribed rates to their property, a blanket rejection of the industry-wide depreciation rates developed by the commissioner is justified. Instead, consistent with our rejection of a similar argument advanced in *Philips Electronics North Am. Corp. v. Tracy* (**June** 28, 1996), **BTA** No. 1993-K-825, unreported, at 16-17, fn. 2, we find it appropriate to review each case in the context of the particular evidence presented. **[*37]**

Special and unusual circumstances have been found to exist when a taxpayer clearly demonstrates its property is subject to conditions atypical within the industry, often exemplified by unusual or unanticipated operating environments, extreme use, obsolescence, unusually high disposal rates, poor production flows, or excess manpower. See, e.g., *Defiance Precision Products, Inc. v. Tracy* (Apr. 3, 1998), **BTA** No. 1995-T-564, unreported (equipment operated at abnormally high speeds for extended periods of time not common within the industry); *Philips Electronics North American Corp. v. Tracy* (**June** 28, 1996), **BTA** No. 1993-K-825, unreported (the taxpayer, which was the only remaining entity within the television tube manufacturing industry still using a dry phosphorus application process, demonstrated its equipment was used in an area of poor ventilation and subjected to continuous use, extreme heat and product weight, and caustic chemicals); *Dayton Walther Corp. v. Limbach* (Aug. 24, 1990), **BTA** No. 1988-J-190, unreported (equipment operated almost continuously and subjected to extreme product weights, high speeds, and corrosive substances); *AmeriData Control Corp. v. Limbach* **[*38]** (**Jun.** 29, 1990), **BTA** No. 1987-A-1102, unreported (televisions supplied to hospitals received heavy use and were disposed of in unusually shorter time periods); *Sun Chemical Corp. v. Limbach* (Apr. 21, 1989), **BTA Nos.** 1986-A-157, et seq., unreported (equipment subjected to caustic chemicals and continuous operations, with evidence demonstrating such use was different from other chemical plants in Ohio).

While several of the preceding cases highlight the hostile conditions under which manufacturing equipment may be operated, they stand for the general proposition that "special and unusual circumstances" constitute conditions not generally experienced by others within the industry. As this board recently noted in *Aloca, Inc. v. **Zaino*** (Oct. 22, 2004), **BTA** No. 1999-G-1401, unreported, at 17, appeal pending Sup. Ct. No. 04-1953:
"Alcoa must prove that the special or unusual circumstances surrounding the use of its equipment are not experienced generally throughout the industry or that its equipment was subjected to conditions not planned for when the equipment was originally purchased. Alcoa has not presented sufficient evidence to establish that the experience of Alcoa at Cleveland **[*39]** Works, in its forgings for the aerospace business, was special or unusual when compared to the rest of the industry. Indeed, the appellant acknowledges that other large forgers experienced the same decline and left the aerospace industry."). Id. at 17.

A review of appellant's evidence reveals that it has not demonstrated that special and unusual circumstances exist. Indeed, as asserted by the commissioner, the evidence offered by appellant suggests that the factors impacting the value of its property similarly affect others within its industry. While the providers with whom appellant competes may be unique to its market, appellant's evidence demonstrates that it is far from alone regarding the competitive forces with which it must deal and the impact technological progress is generally having upon participants in the telecommunications industry.

However, as the court emphasized in *Texas E. Transm.*, and in numerous cases involving challenges to the applicability of the 302 computation, where a party demonstrates through competent and probative evidence that application of the commissioner's prescribed rates creates an unjust or unreasonable result, reliance upon the statutory **[*40]** method is inappropriate and must give way to more reliable evidence of value. See, e.g., *Centerior Fuel Corp. v. Tracy* (2001), 90 Ohio St.3d 540; *PPG Industries*, supra; *Towmotor*, supra.

In *W.L. Harper*, supra, the court rejected the notion that the existence of special and unusual circumstances is the only basis which would justify deviation from the commissioner's valuation directives:
"In other words, the thesis of the Department of Taxation is that its directive must be applied regardless of any evidence as to what the actual life of equipment is, that the directive is, like the law of the Medes and the Persians, rigid and undeviating, and that any evidence as to realities is without probative force unless it shows special or unusual circumstances or conditions of use.'

"It is our opinion that such an application of the directive is in many cases and in the present ones unreasonable.

"We are fully in accord with the use of a directive in the ascertainment of the true value of personal property, but in our opinion the Board of Tax Appeals is required **[*41]** to ascertain from the evidence before it whether in a particular case the application of such a directive will produce an unreasonable result.

"In the present cases the evidence of appellants presented a question whether the application of a 10 per cent depreciation rate is reasonable, and the Board of Tax Appeals must consider the evidence before it and, in making a determination, attempt to arrive at the truth rather than to rigidly apply the directive in spite of any evidence.

"Our conclusion is that it is proper to ascertain the true value of construction equipment by the use of proper directives, but that such directives must be applied so that they are subject to adjustment not only in the case of special or unusual circumstances or conditions of use, as provided in the directive under consideration herein, but also to adjustment in all cases where the evidence shows that a rigid application will result in injustice." Id. at 304-306.

With this in mind, we now consider the probative value of appellant's evidence. The TFI study finds that appellant's property has been, and will continue to be, impacted significantly by increased competitive forces **[*42]** arising from several sources, rapid technological change occurring within the telecommunications industry, the growth of the Internet, and, in some instances, anticipated mortality factors. With respect to each category of property reviewed, the nature and extent of these factors was elaborated upon. n20

n20 Appellant also called as a witness Richard Ellsworth, a director of the valuation group at Deloitte & Touche, who indicated that the approach utilized in the TFI study was the preferred method for valuing assets like those in issue in the present appeals.

In estimating the rates at which appellant's property would effectively be displaced, the TFI study indicated that various other publications, studies, and models had been relied upon. Among those apparently most heavily relied upon was a recent publication in a series of forecasting studies undertaken by TFI for incumbents within the telecommunications industry entitled "Transforming the Local Exchange Network." Apparently periodically updated, this study forecasts the impact new technology and increased competition has upon existing businesses and technology. Reliance is also placed upon the Fisher-Pry and Gompertz models, **[*43]** the former apparently used to predict the rate at which businesses engage in technology substitution while the latter is apparently used to predict the rate at which consumers begin adopting newer technologies.

Ultimately, based upon its review of the telecommunications industry, the market in which appellant operates, and expectations regarding the changes likely to impact both, the TFI study recommends percent good schedules similar in style to those prescribed by the commissioner. Different, however, is the fact that these proposed schedules address individual assets within the composite groups reflected within the commissioner's prescribed allowances and the rates and time periods at which such assets should be depreciated. With respect to switching and circuit equipment, for all three years, the TFI study recommends a ten-year life span with a five percent floor being reached in the last year, while underground metallic cable, aerial metallic cable, buried metallic cable, and non-metallic cable are ascribed a fifteen-year life span with a floor value at or near zero.

As noted throughout our decision, the thrust of the TFI study is that, for the specific assets considered, increased **[*44]** competition, technological advancements, and consumer expectations and demands warrant a faster rate of depreciation than that provided for by the commissioner. In reviewing appellant's evidence, we are persuaded that the telecommunications industry, as a whole, is undergoing continuing and dynamic change. Clearly, since 1996, appellant and other ILECs, and indeed all market participants, have experienced increased and varied competition. Similarly, as is the case in most industries, technological advancements have resulted in the elimination, modification, or enhancement of many preexisting forms of technology.

However, we are not convinced that the manner by which appellant attempts to account for the impact of such factors results in an accurate and reliable representation of true value or, for that matter, that application of the rates prescribed by the commissioner will necessarily create an unjust or unreasonable result. Although the TFI study references certain historical and market data unique to appellant, it is heavily weighted to account for events anticipated to occur generally within the telecommunications industry in the future. Because it is premised upon conjecture **[*45]** regarding future events, its conclusions are incapable of objective verification. Where, as here, there exists little or no historical data to effectively test the validity of the numerous assumptions made, errors can easily occur regarding the timing and impact the cited factors may have upon the value of appellant's property.

For example, much of the replacement technology to which reference is made was newly emerging near the years in question and continues, even today, to be at a stage of relative infancy. In the absence of historical data, the actual impact of newer technology upon the value of appellant's property, which it continues to use and, in many instances, deploy within its network, is difficult to measure. Equally unpredictable, despite representations otherwise, are consumer demands and transitions among technologies. While TFI represents that the Fisher-Pry model can be an effective device for making such evaluations, it still requires supposition not immediately capable of confirmation. Along similar lines, we question TFI's ability to effectively predict the extent to which increased competition will impact the value of appellant's property. Suggested by the numerous **[*46]** acquisitions and failures which have occurred within the telecommunications industry during the past several years, even market participants experience difficulty accurately anticipating the effects of competition. Accordingly, while the forecasting studies and models relied upon within the TFI study may be useful to appellant in the development of its long-range business plans, we do not find it a reliable means by which to determine the value of appellant's property for the specific tax listing dates in issues in these appeals.

We also find unsupported and unreasonable the suggestion that appellant's assets would be rendered valueless after a certain number of years despite their continued use with appellant's network. In *Wheeling Steel*, supra, the court considered a manufacturer's claim that once certain assets reached twenty years of age, despite the fact such assets continued to be used in its production line, they should be accorded no value. Expressly rejecting such a position, the court held that "where personal property is still used in the business of manufacturing it must be returned at its true value in money even though 100 percent depreciation **[*47]** is claimed by the taxpayer as depreciated book value or otherwise." Id. at paragraph four of the syllabus. Although personal property may have a limited resale value, until scrapped or abandoned, it retains value in the hands of the taxpayer who continues to benefit from its use. See, e.g., *BOC Group, Inc. v. Limbach* (**June** 30, 1989), **BTA** No. 1985-G-679, unreported; *Col -- X Corp. v. Lindley* (Dec. 16, 1982), **BTA** No. 1980-B-236, unreported; *AMF Tuboscope, Inc. v. Lindley* (July 1, 1982), **BTA** No. 1980-A-383, unreported; *Westinghouse Electric Corp. v. Lindley* (Feb. 8, 1980), **BTA Nos.** F-953, et seq., unreported, affirmed (1980), 64 Ohio St.2d 31. Although appellant's salvage data was apparently reviewed and found to be an inappropriate means by which to measure residual value, see *Campbell Soup*, supra, it appears the projected floor values were again the result of reliance upon the previously referenced forecasting studies and models. Further, the property which the TFI study would deem valueless involves assets which appellant continues to deploy in its network.

This board is accorded wide discretion in weighing **[*48]** the evidence and judging the credibility of the witnesses brought before us. *Zukowski v. Franklin Cty. Bd. of Revision* (1994), 70 Ohio St.3d 503, 504. Further, we are not required to accept the opinion of valuation fixed by any expert or witness. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13, paragraph two of the syllabus. In considering the evidence before us, we are unable to conclude that appellant has met its burden of proving, with competent and probative evidence, that application of the commissioner's prescribed rates will result in its property be valued at other than true value.

Finally, we address appellant's argument that personal property tax was erroneously assessed on items which it claims are permanently mounted on its motor vehicles used to deliver telecommunications services to its customers. n21 Although Ohio imposes a personal property tax on tangible personal property located and used in business in this state, R.C. 5709.01, there exist limited statutory exceptions and exemptions which exclude certain property from taxation. Among the property expressly excluded from the definition **[*49]** of taxable property is that set forth in R.C. 5701.03(A): "'Personal property' does not include * * * motor vehicles registered by the owner thereof * * *."

n21 Appellant maintains that its vehicles, as well as the equipment attached thereto, are already subject to tax as a result of the annual licensure fee it pays on its individual commercial vehicles. R.C. 4503.02 ("An annual license tax is hereby levied upon the operation of motor vehicles on the public roads or highways * * *."). Pursuant to R.C. 4503.042, the amount of the annual license tax is based upon "gross vehicle weight," defined by R.C. 4501.01(JJ) as "the unladen weight of the vehicle fully equipped plus the maximum weight of the load to be carried on the vehicle." Since no distinction is made within the preceding definition as to whether or not the equipment attached to appellant's vehicles is considered separate personal property or inherently part of the vehicle, as discussed above, the license tax paid on such vehicles was necessarily paid on such equipment.

In *Parisi Transportation Co. v. Wilkins*, 102 Ohio St.3d 278, 2004-Ohio-2952, the Supreme Court held that refrigeration **[*50]** units built into the taxpayer's semitrailers were an inherent part of the vehicle for which no personal property tax was owed. In reaching this conclusion, the court was guided by a test employed by the Montgomery County Court of Appeals in *State ex rel. Tejan v. Lutz* (1934), 31 Ohio N.P. (N.S.) 473 n22:
"First, does the apparatus become an integral n23 part of the truck and form an addition to its structure so that it may be regarded as a part of the truck, itself?

"Second, whether permanent or detachable, is it *per se* truck equipment?

"Third, does its use indicate it to be functioning as part of the truck for truck uses, or as machinery, in itself, for its special use and results?

"Fourth, does it carry the truck load, or assist in doing so, or does it merely become an object transported?" Id. at 512.

n22 In *Tejan, supra*, after reviewing the legislative history regarding the motor vehicle registration and the determination of the annual license tax, the court considered whether certain equipment, apparatus, and machinery which was placed on motor vehicles was part of the taxable truck weight for purposes of registration and assessment of the license tax under former G.C. 6293. **[*51]**

n23 The court relied upon the dictionary to define what is meant by the term "integral": "1a: of, relating to, or serving to form a whole: essential to completeness: organically joined or linked." Id. at 281, quoting Webster's Third New International Dictionary (1986) 1173.

In *Parisi*, the court elaborated upon these questions, adapted them to more accurately reflect the inquiry necessary for the particular items the taxability of which was in issue, and reviewed the evidentiary record which had been developed in order make its ultimate determination. However, in the instant appeals, the record is substantially inferior to that developed in *Parisi*. The only information regarding the equipment in issue, beyond the assertions made by appellant through written argument, n24 consists of the following findings made by the commissioner in his final determinations:

"The petitioner owns a fleet of trucks that it utilizes in its business. These trucks are commercial cars' as that term is defined in R.C. 4501.01(J), n25 and are required to be licensed pursuant to R.C. 4503.02. The petitioner is required to pay a license tax on each vehicle. However, mounted on the petitioner's **[*52]** trucks are various items of equipment such as generators (providing ventilation and heat, compressed air, low pressure humidity-free air, and power), power ladders, aerial lifts, earth boring machines, digger derricks, trenchers, specialized racks and storage units." **BTA** No. **2003-K-765,** S.T. at 3; **BTA** No. 2003-K-**1612,** S.T. at 5.

n24 By way of post-hearing brief, appellant asserts that: (a) the equipment in issue is permanently installed into its vehicles before the vehicles are put into service; (b) the equipment is specially designed to be used only with its vehicles and could not be used in a stand-alone fashion; and (c) the sole purpose for such equipment is to allow appellant to maintain and repair its plant and equipment. However, no evidence was presented which would support these claims. Although appellant makes reference to a portion of the statutory transcript, see **BTA** No. **2003-K-765,** S.T. at 31, the document identified is simply a memorandum which appellant filed in support of its petition for reassessment. Likewise, the schedule attached thereto is of no evidentiary value as it merely ascribes dollar values to aspects of appellant's claim.

n25 R.C. 4501.02(J) provides: "'Commercial car' or truck' means any motor vehicle that has motor power and is designed and used for carrying merchandise or freight, or that is used as a commercial tractor." **[*53]**

Although accorded an opportunity to do so, appellant elected to present no additional evidence regarding its motor vehicles and the equipment claimed to have become inherently part of such vehicles following attachment. See H.R. Vol. II, at 175-176. Mere assertions made by counsel do not rise to the level of evidence upon which this board can rely. See, e.g., *Exchange Bldgs. IV & V, L.P. v. Franklin Cty. Bd. of Revision* (1998), 82 Ohio St.3d 297, 299; *Rite Aid of Ohio, Inc. v. Cuyahoga Cty. Bd. of Revision* (Jan. 15, 1999), **BTA** No. 1997-K-1253, unreported. Given the absence of evidence regarding such equipment, we cannot conclude that appellant has met its burden of proof. Accordingly, we reject appellant's arguments relating to this issue.

Based upon the foregoing, appellant's specifications of error are not well taken and they are therefore overruled. It is the order of this board that the final determinations of the Tax Commissioner must be, and hereby are, affirmed.

§ 5701.08. "Used in business" and "business" defined

As used in Title LVII [57] of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise. Machinery and equipment classifiable upon completion as personal property while under construction or installation to become part of a new or existing plant or other facility is not considered to be "used" by the owner of such plant or other facility within the meaning of "used in business" until such machinery and equipment is installed and in operation or capable of operation in the business for which acquired. Agricultural products in storage in a grain elevator, a warehouse, or a place of storage which products are subject to control of the United States government and are to be shipped on order of the United States government are not used in business in this state.

(B) Merchandise or agricultural products shipped from outside this state and held in this state in a warehouse or a place of storage without further manufacturing or processing and for storage only and for shipment outside this state are not used in business in this state. Such property qualifies for this exception if division (B)(1) or (2) of this section applies:

(1) During any period that a person owns such property in this state:

(a) The property is to be shipped from a warehouse or place of storage in this state to the owner of the property or persons other than customers at locations outside this state for use, processing, or sale; or

(b) The property is located in public or private warehousing facilities in this state which are not subject to the control of or under the supervision of the owner of the property or manned by its employees and from which the property is to be shipped to any person, including a customer, outside this state.

(2) During the first twenty-four calendar months that a person first owns such property in this state, the property is held in a warehouse or place of storage in this state located within one mile of the closest boundary of an airport, and is shipped to any person, including a customer, outside this state.

For the purposes of division (B)(2) of this section, "airport" means any airport, as defined in division (C) of section 4561.01 of the Revised Code, which is approved by the department of transportation under section 4561.11 of the Revised Code to be used for commercial purposes, is regularly served by only one air carrier authorized to do so under 14 C.F.R., and is not a public airport as defined in 49 U.S.C. Appx. 2202(a)(17) as existing on the effective date of this amendment.

(3) For property that may meet the condition for the exception provided in division (B)(2) of this section, if it is not known at the conclusion of a reporting period whether the property yet qualifies for such exception, the owner of such

property shall return it for taxation. If it is later determined that the returned property does so qualify, the owner may apply for a final assessment and refund on the property as provided in section 5711.26 of the Revised Code.

(C) Leased property used by the lessee exclusively for agricultural purposes and new or used machinery and equipment and accessories therefor that are designed and built for agricultural use and owned by a merchant as defined in section 5711.15 of the Revised Code are not considered to be "used" within the meaning of "used in business."

(D) Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(E) "Business" includes all enterprises, except agriculture, conducted for gain, profit, or income and extends to personal service occupations.

ORC Ann. 5709.01 (2008)

§ 5709.01. Taxable property entered on general tax list and duplicate

(A) All real property in this state is subject to taxation, except only such as is expressly exempted therefrom.

(B) Except as provided by division (C) of this section or otherwise expressly exempted from taxation:

(1) All personal property located and used in business in this state, and all domestic animals kept in this state and not used in agriculture are subject to taxation, regardless of the residence of the owners thereof.

(2) All ships, vessels, and boats, and all shares and interests therein, defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21 of the Revised Code, are subject to taxation.

(C) The following property of the kinds mentioned in division (B) of this section shall be exempt from taxation:

(1) Unmanufactured tobacco to the extent of the value, or amounts, of any unpaid nonrecourse loans thereon granted by the United States government or any agency thereof.

(2) Spirituous liquor, as defined in division (B)(5) of section 4301.01 of the Revised Code, that is stored in warehouses in this state pursuant to an agreement with the division of liquor control.

(3) Except as otherwise provided in section 5711.27 of the Revised Code, all other such property if the aggregate taxable value thereof required to be listed by the taxpayer under Chapter 5711. of the Revised Code does not exceed ten thousand dollars.

(a) If the taxable value of such property exceeds ten thousand dollars only such property having an aggregate taxable value of ten thousand dollars shall be exempt.

(b) If such property is located in more than one taxing district as defined in section 5711.01 of the Revised Code, the exemption of ten thousand dollars shall be applied as follows:

(i) The taxable value of such property in the district having the greatest amount of such value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(ii) If the exemption has not been fully utilized under division (C)(3)(b)(i) of this section, the value in the district having the second greatest value shall be reduced until the exemption has been fully utilized or the value has been reduced to zero, whichever occurs first;

(iii) If the exemption has not been fully utilized under division (C)(3)(b)(ii) of this section, further reductions shall be made, in repeated steps which include property in districts having declining values, until the exemption has been fully utilized.

(D) All property mentioned as taxable in this section shall be entered on the general tax list and duplicate of taxable property.

§ 5727.06. Taxable property of public utility, interexchange telecommunications company, or public utility property lessor

(A) Except as otherwise provided by law, the following constitutes the taxable property of a public utility, interexchange telecommunications company, or public utility property lessor that shall be assessed by the tax commissioner:

(1) For tax years before tax year 2006:

(a) In the case of a railroad company, all real property and tangible personal property owned or operated by the railroad company in this state on the thirty-first day of December of the preceding year;

(b) In the case of a water transportation company, all tangible personal property, except watercraft, owned or operated by the water transportation company in this state on the thirty-first day of December of the preceding year and all watercraft owned or operated by the water transportation company in this state during the preceding calendar year;

(c) In the case of all other public utilities and interexchange telecommunications companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and:

(i) Owned by the public utility or interexchange telecommunications company; or

(ii) Leased by the public utility or interexchange telecommunications company under a sale and leaseback transaction.

(2) For tax years 2006, 2007, and 2008:

(a) In the case of a railroad company, all real property used in railroad operations and tangible personal property owned or operated by the railroad company in this state on the thirty-first day of December of the preceding year;

(b) In the case of a water transportation company, all tangible personal property, except watercraft, owned or operated by the water transportation company in this state on the thirty-first day of December of the preceding year and all watercraft owned or operated by the water transportation company in this state during the preceding calendar year;

(c) In the case of all other public utilities except telephone and telegraph companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and either owned by the public utility or leased by the public utility under a sale and leaseback transaction.

(3) For tax year 2009 and each tax year thereafter:

(a) In the case of a railroad company, all real property used in railroad operations and tangible personal property owned or operated by the railroad company in this state on the thirty-first day of December of the preceding year;

(b) In the case of a water transportation company, all tangible personal property, except watercraft, owned or operated by the water transportation company in this state on the thirty-first day of December of the preceding year and all watercraft owned or operated by the water transportation company in this state during the preceding calendar year;

(c) In the case of all other public utilities except telephone and telegraph companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and either owned by the public utility or leased by the public utility under a sale and leaseback transaction;

(d) In the case of a public utility property lessor, all personal property that on the thirty-first day of December of the preceding year was both located in this state and leased, in other than a sale and leaseback transaction, to a public utility other than a railroad, telephone, telegraph, or water transportation company. The assessment rate used under section 5727.111 [5727.11.1] of the Revised Code shall be based on the assessment rate that would apply if the public utility owned the property.

(4) For tax years 2005 and 2006, in the case of telephone, telegraph, or interexchange telecommunications companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and either owned by the telephone, telegraph, or interexchange telecommunications company or leased by the telephone, telegraph, or interexchange telecommunications company under a sale and leaseback transaction.

(5) (a) For tax year 2007 and thereafter, in the case of telephone, telegraph, or interexchange telecommunications companies, all tangible personal property shall be listed and assessed for taxation under Chapter 5711. of the Revised Code, but the tangible personal property shall be valued in accordance with this chapter using the composite annual allowances and other valuation procedures prescribed under section 5727.11 of the Revised Code by the tax commissioner for such property for tax year 2006, notwithstanding any section of Chapter 5711. of the Revised Code to the contrary.

(b) A telephone, telegraph, or interexchange telecommunications company subject to division (A)(5)(a) of this section shall file a combined return with the tax commissioner in accordance with section 5711.13 of the Revised Code even if the company has tangible personal property in only one county. Such a company also is subject to the issuance of a preliminary assessment certificate by the tax commissioner under section 5711.25 of the Revised Code. Such a company is not required to file a county supplemental return under section 5711.131 [5711.13.1] of the Revised Code.

(B) This division applies to tax years before tax year 2007.

In the case of an interexchange telecommunications company, all taxable property shall be subject to the provisions of this chapter and shall be valued by the commissioner in accordance with division (A) of section 5727.11 of the Revised Code. A person described by this division shall file the report required by section 5727.08 of the Revised Code. Persons described in this division shall not be considered taxpayers, as defined in division (B) of section 5711.01 of the Revised

Code, and shall not be required to file a return and list their taxable property under any provision of Chapter 5711. of the Revised Code.

(C) The lien of the state for taxes levied each year on the real and personal property of public utilities and interexchange telecommunications companies and on the personal property of public utility property lessors shall attach thereto on the thirty-first day of December of the preceding year.

(D) Property that is required by division (A)(3)(b) of this section to be assessed by the tax commissioner under this chapter shall not be listed by the owner of the property under Chapter 5711. of the Revised Code.

(E) The ten-thousand-dollar exemption provided for in division (C)(3) of section 5709.01 of the Revised Code does not apply to any personal property that is valued under this chapter.

(F) The tax commissioner may adopt rules governing the listing of the taxable property of public utilities and interexchange telecommunications companies and the determination of true value.

ORC Ann. 5727.08 (2008)

§ 5727.08. Annual report to commissioner; penalty

On or before the first day of March, annually, each public utility and interexchange telecommunications company, and, for tax years 2009 and thereafter, each public utility property lessor, shall file a report with the tax commissioner, on a form prescribed by the tax commissioner. The report shall include such information as the tax commissioner requires to enable the tax commissioner to make any assessment or apportionment required under this chapter.

The report shall be signed by either the owner of the public utility, interexchange telecommunications company, or public utility property lessor or the president, secretary, treasurer, or another duly authorized person.

If such a public utility, interexchange telecommunications company, or lessor fails to file the report on or before the first day of March, or the date it is due under an extension allowed pursuant to section 5727.48 of the Revised Code, or fails to accurately report all taxable property, the tax commissioner may impose a penalty of up to fifty per cent of the taxable value of the property that was not timely or accurately reported. However, if such a public utility, company, or lessor files, within sixty days after the first day of March or the extended due date, the report or an amended report and discloses all items of taxable property that are required by this chapter to be reported, the penalty shall not be more than five per cent of the taxable value that was not timely or accurately reported. The penalty shall be added to and considered a part of the total taxable value of the property that was not timely or accurately reported, and may be abated in whole or in part by the tax commissioner pursuant to a petition for reassessment filed under section 5727.47 of the Revised Code.

ORC Ann. 5727.11 (2008)

§ 5727.11. Methods of valuation

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

(B) (1) Except as provided in division (B)(2) of this section, the true value of current gas stored underground is the cost of that gas shown on the books and records of the public utility on the thirty-first day of December of the preceding year.

(2) For tax year 2001 and thereafter, the true value of current gas stored underground is the quotient obtained by dividing (a) the average value of the current gas stored underground, which shall be determined by adding the value of the gas on hand at the end of each calendar month in the calendar year preceding the tax year, or, if applicable, the last day of business of each month for a partial month, divided by (b) the total number of months the natural gas company was in business during the calendar year prior to the beginning of the tax year. With the approval of the tax commissioner, a natural gas company may use a date other than the end of a calendar month to value its current gas stored underground.

(C) The true value of noncurrent gas stored underground is thirty-five per cent of the cost of that gas shown on the books and records of the public utility on the thirty-first day of December of the preceding year.

(D) (1) Except as provided in division (D)(2) of this section, the true value of the production equipment of an electric company and the true value of all taxable property of a rural electric company is the equipment's or property's cost as capitalized on the company's books and records less fifty per cent of that cost as an allowance for depreciation and obsolescence.

(2) The true value of the production equipment of an electric company or rural electric company purchased, transferred, or placed into service after the effective date of this amendment is the purchase price of the equipment as capitalized on the company's books and records less composite annual allowances as prescribed by the tax commissioner.

(E) The true value of taxable property, except property of a railroad company, required by section 5727.06 of the Revised Code to be assessed by the tax commissioner shall not include the allowance for funds used during construction or interest during construction that has been capitalized on the public utility's books and records as part of the total cost of the taxable property. This division shall not apply to the taxable property of an electric company or a rural electric company, excluding transmission and distribution property, first placed into service after December 31, 2000, or to the taxable property a person purchases, which includes transfers, if that property was used in business by the seller prior to the purchase.

(F) The true value of watercraft owned or operated by a water transportation company shall be determined by multiplying the true value of the watercraft as determined under division (A) of this section by a fraction, the numerator of which is the number of revenue-earning miles traveled by the watercraft in the waters of this state and the denominator of which is the number of revenue-earning miles traveled by the watercraft in all waters.

(G) The cost of property subject to a sale and leaseback transaction is the cost of the property as capitalized on the books and records of the public utility owning the property immediately prior to the sale and leaseback transaction.

(H) The cost as capitalized on the books and records of a public utility includes amounts capitalized that represent regulatory assets, if such amounts previously were included on the company's books and records as capitalized costs of taxable personal property.

(I) Any change in the composite annual allowances as prescribed by the commissioner on a prospective basis shall not be admissible in any judicial or administrative action or proceeding as evidence of value with regard to prior years' taxes. Information about the business, property, or transactions of any taxpayer obtained by the commissioner for the purpose of adopting or modifying the composite annual allowances shall not be subject to discovery or disclosure.

ORC Ann. 5727.111 (2008)

§ 5727.111. Assessment at percentages of true value

The taxable property of each public utility, except a railroad company, and of each interexchange telecommunications company shall be assessed at the following percentages of true value:

(A) Fifty per cent in the case of the taxable transmission and distribution property of a rural electric company, and twenty-five per cent for all its other taxable property;

(B) In the case of a telephone or telegraph company, twenty-five per cent for taxable property first subject to taxation in this state for tax year 1995 or thereafter for tax years before tax year 2007, and pursuant to division (H) of section 5711.22 of the Revised Code for tax year 2007 and thereafter, and the following for all other taxable property:

(1) For tax years prior to 2005, eighty-eight per cent;

(2) For tax year 2005, sixty-seven per cent;

(3) For tax year 2006, forty-six per cent;

(4) For tax year 2007 and thereafter, pursuant to division (H) of section 5711.22 of the Revised Code.

(C) Twenty-five per cent in the case of a natural gas company.

(D) Eighty-eight per cent in the case of a pipe-line, water-works, or heating company;

(E) (1) For tax year 2005, eighty-eight per cent in the case of the taxable transmission and distribution property of an electric company, and twenty-five per cent for all its other taxable property;

(2) For tax year 2006 and each tax year thereafter, eighty-five per cent in the case of the taxable transmission and distribution property of an electric company, and twenty-four per cent for all its other taxable property.

(F) (1) Twenty-five per cent in the case of an interexchange telecommunications company for tax years before tax year 2007;

(2) Pursuant to division (H) of section 5711.22 of the Revised Code for tax year 2007 and thereafter.

(G) Twenty-five per cent in the case of a water transportation company.

ORC Ann. 5727.47 (2008)

§ 5727.47. Mailing of assessment to utility; petition for reassessment

(A) Notice of each assessment certified pursuant to section 5727.23 or 5727.38 of the Revised Code shall be mailed to the public utility, and its mailing shall be prima-facie evidence of its receipt by the public utility to which it is addressed. With the notice, the tax commissioner shall provide instructions on how to petition for reassessment and request a hearing on the petition. If a public utility objects to any assessment certified to it pursuant to such sections, it may file with the commissioner, either personally or by certified mail, within sixty days after the mailing of the notice of assessment a written petition for reassessment signed by the utility's authorized agent having knowledge of the facts. If the petition is filed by certified mail, the date of the United States postmark placed on the sender's receipt by the postal employee to whom the petition is presented shall be treated as the date of filing. The petition 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 the case of a petition seeking a reduction in taxable value filed with respect to an assessment issued under section 5727.23 of the Revised Code, the petitioner shall state in the petition the total amount of reduction in taxable value sought by the petitioner. If the petitioner objects to the percentage of true value at which taxable property is assessed by the commissioner, the petitioner shall state in the petition the total amount of reduction in taxable value sought both with and without regard to the objection pertaining to the percentage of true value at which its taxable property is assessed. If a petitioner objects to the commissioner's apportionment of the taxable value of the petitioner's taxable property, the petitioner shall distinctly state in the petition that the petitioner objects to the commissioner's apportionment, and, within forty-five days after filing the petition for reassessment, shall submit the petitioner's proposed apportionment of the taxable value of its taxable property among taxing districts. If a petitioner that objects to the commissioner's apportionment fails to state its objections to that apportionment in its petition for reassessment or fails to submit its proposed apportionment within forty-five days after filing the petition for reassessment, the commissioner shall dismiss the petitioner's objection to the commissioner's apportionment, and the taxable value of the petitioner's taxable property, subject to any adjustment to taxable value pursuant to the petition or appeal, shall be apportioned in the manner used by the commissioner in the preliminary or amended preliminary assessment issued under section 5727.23 of the Revised Code.

If an additional objection seeking a reduction in taxable value in excess of the reduction stated in the original petition is properly and timely raised with respect to an assessment issued under section 5727.23 of the Revised Code, the petitioner shall state the total amount of the reduction in taxable value sought in the additional objection both with and without regard to any reduction in taxable value pertaining to the percentage of true value at which taxable property is assessed. If a petitioner fails to state the reduction in taxable value sought in the original petition or in additional objections properly raised after the petition is filed, the commissioner shall notify the petitioner of the failure by certified mail. If the petitioner fails to notify the commissioner in writing of the reduction in taxable value sought in the petition or in an additional objection within thirty days after receiving the commissioner's notice, the commissioner shall dismiss the petition or the additional objection in which that reduction is sought.

(B) (1) Subject to divisions (B)(2) and (3) of this section, a public utility filing a petition for reassessment regarding an assessment issued under section 5727.23 or 5727.38 of the Revised Code shall pay the tax with respect to the assessment objected to as required by law. The acceptance of any tax payment by the treasurer of state or any county treasurer shall not prejudice any claim for taxes on final determination by the commissioner or final decision by the board of tax appeals or any court.

(2) If a public utility properly and timely files a petition for reassessment regarding an assessment issued under section 5727.23 of the Revised Code, the petitioner shall pay the tax as prescribed by divisions (B)(2)(a), (b), and (c) of this section:

(a) If the petitioner does not object to the commissioner's apportionment of the taxable value of the petitioner's taxable property, the petitioner is not required to pay the part of the tax otherwise due on the taxable value that the petitioner seeks to have reduced, subject to division (B)(2)(c) of this section.

(b) If the petitioner objects to the commissioner's apportionment of the taxable value of the petitioner's taxable property, the petitioner is not required to pay the tax otherwise due on the part of the taxable value apportioned to any taxing district that the petitioner objects to, subject to division (B)(2)(c) of this section. If, pursuant to division (A) of this section, the petitioner has, in a proper and timely manner, apportioned taxable value to a taxing district to which the commissioner did not apportion the petitioner's taxable value, the petitioner shall pay the tax due on the taxable value that the petitioner has apportioned to the taxing district, subject to division (B)(2)(c) of this section.

(c) If a petitioner objects to the percentage of true value at which taxable property is assessed by the commissioner, the petitioner shall pay the tax due on the basis of the percentage of true value at which the public utility's taxable property is assessed by the commissioner. In any case, the petitioner's payment of tax shall not be less than the amount of tax due based on the taxable value reflected on the last appeal notice issued by the commissioner under division (C) of this section. Until the county auditor receives notification under division (E) of this section and proceeds under section 5727.471 [5727.47.1] of the Revised Code to issue any refund that is found to be due, the county auditor shall not issue a refund for any increase in the reduction in taxable value that is sought by a petitioner later than forty-five days after the petitioner files the original petition as required under division (A) of this section.

(3) Any part of the tax that, under division (B)(2)(a) or (b) of this section, is not paid shall be collected upon receipt of the notification as provided in section 5727.471 [5727.47.1] of the Revised Code with interest thereon computed in the same manner as interest is computed under division (E) of section 5715.19 of the Revised Code, subject to any correction of the assessment by the commissioner under division (E) of this section or the final judgment of the board of tax appeals or a court to which the board's final judgment is appealed. The penalty imposed under section 323.121 [323.12.1] of the Revised Code shall apply only to the unpaid portion of the tax if the petitioner's tax payment is less than the amount of tax due based on the taxable value reflected on the last appeal notice issued by the commissioner under division (C) of this section.

(C) Upon receipt of a properly filed petition for reassessment, the tax commissioner shall notify the treasurer of state or the auditor of each county to which the assessment objected to has been certified. In the case of a petition with respect to an assessment issued under section 5727.23 of the Revised Code, the commissioner shall issue an appeal notice within thirty days after receiving the amount of the taxable value reduction and apportionment changes sought by the petitioner in the original petition or in any additional objections properly and timely raised by the petitioner. The appeal notice shall indicate the amount of the reduction in taxable value sought in the petition or in the additional objections and the extent to which the reduction in taxable value and any change in apportionment requested by the petitioner would affect the commissioner's apportionment of the taxable value among taxing districts in the county as shown in the assessment. If a petitioner is seeking a reduction in taxable value on the basis of a lower percentage of true value than the percentage at which the commissioner assessed the petitioner's taxable property, the appeal notice shall indicate the reduction in taxable value sought by the petitioner without regard to the reduction sought on the basis of the lower percentage and shall indicate that the petitioner is required to pay tax on the reduced taxable value determined without regard to the reduction sought on the basis of a lower percentage of true value, as provided under division (B)(2)(c) of this section. The appeal notice shall include a statement that the reduced taxable value and the apportionment indicated in the notice are not final and are subject to adjustment by the commissioner or by the board of tax appeals or a court on appeal. If the commissioner finds an error in the appeal notice, the commissioner may amend the notice, but the notice is only for informational and tax payment purposes; the notice is not subject to appeal by any person. The commissioner also shall mail a copy of the appeal notice to the petitioner. Upon the request of a taxing authority, the county auditor may disclose to the taxing authority the extent to which a reduction in taxable value sought by a petitioner would affect the apportionment of taxable value to the taxing district or districts under the taxing authority's jurisdiction, but such a disclosure does not constitute a notice required by law to be given for the purpose of section 5717.02 of the Revised Code.

(D) If the petitioner requests a hearing on the petition, the tax commissioner shall assign a time and place for the hearing on the petition and notify the petitioner of such time and place, but the commissioner may continue the hearing from time to time as necessary.

(E) The tax commissioner may make corrections to the assessment as the commissioner finds proper. The commissioner shall serve a copy of the commissioner's final determination on the petitioner in the manner provided in section 5703.37 of the Revised Code. The commissioner's decision in the matter shall be final, subject to appeal under section 5717.02 of the Revised Code. The commissioner also shall transmit a copy of the final determination to the treasurer of state or applicable county auditor. In the absence of any further appeal, or when a decision of the board of tax appeals or of any court to which the decision has been appealed becomes final, the commissioner shall notify the public utility and, as appropriate, the treasurer of state who shall proceed under section 5727.42 of the Revised Code, or the applicable county auditor who shall proceed under section 5727.471 [5727.47.1] of the Revised Code.

The notification made under this division is not subject to further appeal.

(F) On appeal, no adjustment shall be made in the tax commissioner's assessment issued under section 5727.23 of the Revised Code that reduces the taxable value of a petitioner's taxable property by an amount that exceeds the reduction sought by the petitioner in its petition for reassessment or in any additional objections properly and timely raised after the petition is filed with the commissioner.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellee was sent by regular U.S. mail to Todd W. Sleggs, Sleggs, Danzinger & Gill Co., LPA, 820 West Superior Avenue, Suite 400, Cleveland, Ohio 44113, counsel for appellant, on this 17th day of November, 2008.

BARTON A. HUBBARD
Assistant Attorney General