New Covert Generating Company LLC,
Petitioner,

v

Covert Township,
Respondent,
and

Van Buren County,
Intervening Respondent.

MICHIGAN TAX TRIBUNAL

MAHS Docket No. 16-001888

Presiding Judge
David B. Marmon

FINAL OPINION AND JUDGMENT

AWARD OF COSTS PURSUANT TO MCR 2.114

INTRODUCTION

Petitioner, New Covert Generating Company LLC, appeals ad valorem property tax assessments levied by Respondents, Covert Township and Van Buren County, against Parcel Nos. 80-07-004-003-03, 80-07-900-084-00, and 80-07-900-084-01 for the 2016 tax year. Patrick McCarthy, Mary Dirkes, Bradley Knickerbocker, and Rodger Kershner, attorneys from Howard & Howard PC, represented Petitioner. M. Brian Knotek, attorney of Knotek Law Office PLC represented Respondent. Jack Van Coevering and Thomas Dillon, attorneys from Foster Swift Collins & Smith PC represented Intervening Respondent.

A hearing on this matter was held on July 16-20 and July 23-25, 2018. Petitioner's witnesses were Robert Herman and Mark Simzyk, appraisers from Duff & Phelps. Respondent's witnesses were Mark Pomykacz, an appraisal review witness,

Tom Sweet, an expert in economic modeling of power and energy plants, Jeff Whipple, engineering consultant, Ira Shavel, energy economist with the Brattle Group, Ann Bulkley, appraiser from Concentric Advisors, Edward Vandervries, County Equalization Director, and Laureen Birdsall, Township Assessor.

Based on the evidence, testimony, and case file, the Tribunal finds that the true cash values ("TCV"), state equalized values ("SEV"), and taxable values ("TV") of the subject property for the 2016 tax years are as follows:

Parcel No.	type	TCV	SEV	TV
80-07-004-003-03	Real ind improved	$16,587,516	$8,293,758	$8,293,758
80-07-900-084-00	Pers ind non-turb	$212,037,696	$106,018,848	$106,018,848
80-07-900-084-01	Pers ind turbine	$248,913,816	$124,456,908	$124,456,908

These values are based upon a total value of $509,500,000 allocated between real and personal property, minus exempt pollution controls valued at $31,960,972 from personal property and then allocated between turbine and non-turbine personal. The taxable values are 50% of true cash value, as the subject transferred in 2015, and any capped value would not apply per MCL 211.27a.

BACKGROUND

This matter is an appeal of a 1,100-megawatt gas fired combined-cycle power plant located in Covert Township, Van Buren County, Michigan. It was originally scheduled to be heard concurrently with Docket No. 12-000248, which settled during

the course of this hearing.[1] This same property was previously appealed in MTT Docket No 410763, which ended in a consent judgment after appellate review, as well as MTT Docket No 399578. The latter decision was affirmed by the Court of Appeals,[2] which affirmed the Tribunal's determination of the true cash value for 2011 as $334,947,600. In that decision, the Tribunal relied exclusively on the cost approach, as the direct capitalization income approach submitted gave wildly different values from year to year.

The present case was also interlocutorily appealed on December 5, 2017, as to the Tribunal's denial of Respondent's Motion to Compel and a denial of one of several Motions for Summary Dispositions filed by Respondent. The Court of Appeals denied the interlocutory appeal, as it was not persuaded of the need for immediate appellate review.[3]

The present docket with 350 docket entries and counting, featured a motion for declaratory relief, which the Tribunal treated as a Motion for Summary Disposition. In that ruling, issued May 9, 2017, the Tribunal set forth its definition of "turbine" under MCL 211.903 and MCL 380.1211. The Tribunal adopted the definition from Merriam-Webster[4] as "a rotary engine actuated by the reaction or impulse or both of a current of fluid (such as water, steam, or air) subject to pressure and [usually] made with a series of curved vanes on a central rotating spindle."

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[1] T7 at 1599-1601. A stipulation settling this matter was eventually sent on January 18, 2019, and a Partial Consent Judgment was entered on that date. Notably, the parties agreed to keep this docket open pending the resolution of motions for costs.
[2] *New Covert Generating Co LLC v Covert Twp*, unpublished per curiam decision of the Court of Appeals issued August 4, 2015 (Docket No 320877).
[3] *New Covert Generating Co LLC v Covert Twp*, Order, Court of Appeals Docket No 314358, decided January 26, 2018.
[4] *Merriam-Webster's Collegiate Dictionary* (11th ed).

Another matter of significance occurring prior to hearing in this matter is the Tribunal's denial of Respondent's Summary Disposition motion filed on October 25, 2017, which contended that Petitioner, the legal owner of the subject, was not a party-in-interest. It is also noteworthy that Respondent requested immediate consideration of this motion, thus giving Petitioner a mere 7 days to respond. On November 14, 2017, the Tribunal awarded costs and attorney fees to Petitioner, and a hearing was eventually held on April 26, 2018 to determine the amount of a proper award. The Tribunal withheld that decision in an Order issued May 14, 2018, until the issuance of this Final Opinion and Judgment deciding the case. Petitioner also requested sanctions in their response to another Motion for Summary Disposition, filed by Respondents on June 15, 2018. In the June 15 motion, Respondents argued for dismissal of Petitioner's case on the very same jurisdictional issue previously denied by the Tribunal and the Court of Appeals in MTT Docket No 320877. The Tribunal denied Respondents' Motion for Summary Disposition, as well as their motion to compel payment of taxes, and placed Petitioner's motion for costs in abeyance until after a hearing on the merits of the appeal.[5]

PETITIONER'S CONTENTIONS

Petitioner contends that the subject's true cash value for 2016, after subtracting $31,960,972 in exempted pollution control property is $408,039,028 to be allocated as follows

Parcel No.	type	TCV	SEV	TV
80-07-004-003-03	Real ind	$14,502,516	$ 7,251,258	$ 7,251,258

[5] The Motions and Orders also involved Docket No 12-000248. The summary disposition arguments covered the Tribunal's jurisdiction in both dockets.

	improved			
80-07-900-084-00	Pers ind non-turb	$295,152,384	$147,576,192	$147,576,192
80-07-900-084-01	Pers ind turbine	$98,384,128	$ 49,192,064	$ 49,192,064

PETITIONER'S ADMITTED EXHIBITS

P01: Duff & Phelps appraisal (dated March 21, 2018).

P06: Duff & Phelps work file. *Portions of this exhibit are being filed under seal (the sealed documents are indicated by a placeholder identifying the name of the document and its page number (s)).*

P20A: 2013 EIA Summary of Overnight Costs.

P20B: J. Whipple November 2017 Memorandum regarding scale factor.

P20C: J. Whipple model comparison chart.

P20D: December 5, 2017 J. Whipple heat rate differential memo.

P39: Assumptions for PJM RTO Capacity Price Analysis. *This exhibit is being filed under seal.*

P47: CAPM Method chapter from "Valuing Machinery and Equipment, the Fundamentals of Appraising Machinery and Technical Assets, " Third Edition.

P49: "Cost of New Entry Estimates for Combustion Turbine and Combined Cycle Plants in PJM" (the "PJM CONE Report").

P50: 2018-2019 Uniform Standards of Professional Appraisal Practice ("USPAP").

P59: 2016 Property Record Cards for New Covert.

P62: Duff & Phelps errata sheet (to March 21, 2018 appraisal).

P79: Robert Herman (Duff & Phelps) tutorial power point slides.

P80: Morgan Stanley inputs to the US model long-term BARRA betas.

P82: "Valuing Machinery and Equipment, the Fundamentals of Appraising Machinery and Technical Assets," Third Edition.

P83: Duff & Phelps Turbine Allocation Methods.

P84: Appraisal by M. Pomykacz of the Byron Nuclear Facility.

P86: The Electricity Market Module of the National Energy Modeling System: Model Documentation 2014.

P87: Side by side comparison of capacity prices in the Concentric original 2016/2017 appraisal.

P88: "The Appraisal of Power Plants," co-authored by Mark Pomykacz.

P91: Duff & Phelps Rebuttal Presentation on Cost Approach.

P92: Duff & Phelps Rebuttal Presentation on the Sales Comparison Approach.

P93: Duff & Phelps Rebuttal Presentation on Income Approach [with page 20 redacted per the Tribunal's ruling.

P94: O&M and Capex Comparison.

P98: Concentric DCF Build-Up Using the D&P Capacity Revenues.

P99: Cost Approach Comparison.

PETITIONER'S WITNESSES

Robert Herman

Petitioner's first witness was Robert Herman. As to his qualifications, Herman testified that he has a BS in Finance and Real Estate from the University of Wisconsin and is a licensed general appraiser in Michigan, Illinois and Indiana. He is a member of the Institute for Professionals in Taxation as well as the International Association of Assessing Officers. He also holds the MAI designation from the Appraisal Institute.[6] He is a Managing Director and leader of the tax services group at Duff & Phelps, ("D&P"). He began his appraisal career in Chicago at Real Estate Analysis Corporation for 16

[6] T2 at 469-470.

years. He later joined Deloitte & Touche and then Standard & Poors. He wound up at Duff & Phelps, ("D&P") when that firm acquired his valuation group.[7] Herman testified to qualifying as an expert witness more than a hundred times in at least a dozen states.[8] He co-authored the D&P Appraisal and principally testified about the Sales Comparison Approach in addition to reconciling the three approaches and allocating the turbine parcel.[9] The Tribunal accepted Herman as an expert in appraisal.[10]

Herman presented a power point presentation on the production of electricity and the electricity market. He described plants that run at 60% of capacity or greater as baseload plants; intermediate load plants run 20% to 60% of their capacity, and plants that run less than 20% of their capacity as "peaker plants."[11] Herman stated that the subject's heat rate for 2015 was approximately 7,600 BTUs.

Herman next discussed various types of ownership of power plants, contrasting public utilities, which are compensated on a cost basis, versus independent power producers like the subject, which are market based.[12] He then discussed two major market operators MISO and PJM. Beginning in mid-2016, Petitioner began selling power in PJM, rather than MISO.[13] Combined cycle plants ran at 61% capacity in the PJM market in 2015.[14]

[7] T2 at 470-472.
[8] T2 at 475.
[9] T8 at 1758.
[10] T2 at 483.
[11] T1 at 18-19.
[12] T1 at 22; P79, slide 18.
[13] T1 at 27.
[14] T1 at 28.

Herman discussed the three sources of revenue that the subject plant will receive. First are the wholesale electricity sales based on day before, real-time auctions. The second source are capacity payments from a capacity auction, and lastly ancillary revenue for providing services related to grid stability.[15]

As to the sales comparison approach, Herman described the criteria used to find comparables. He looked for plants that were stand-alone sales with similar physical characteristics (i.e., gas-fired), similar size and location, close to the valuation date and used by merchant-operators rather than utilities.[16] His sales #1 and #2 were close in time and in Michigan. His sales #3 and #4 were in the PJM market.[17] Herman described the unit of comparison as the kilowatt, went on to narrate his adjustments and describe how he determined a value under this approach.

Herman was asked about the sale of the subject property, and answered as follows:

> [A] quick overview of it, it sold as a portfolio of other properties. So the subject was one of, I think, seven or eight properties that sold. And several of them were in either -- the plants were either located in PJM or NYISO. So there was a big plant in, I think, New York City that sold as part of this.
>
> The subject was about 23 percent of the total capacity that was sold. The only public filing available at the time was just a real estate transfer that showed like $11 million, so that wasn't real probative or helpful in determining what the total plant sold for. But, regardless, there wasn't an individual sale price for the subject plant. That was an aggregate portfolio price. We asked the client for that data, and due to confidentiality reasons, whatever else, they did not provide it to us.[18]

[15] T1 at 43-44.
[16] T2 at 486-87.
[17] T2 at 487-88.
[18] T2 at 507-508.

Herman concluded that the sale price of the subject did not have an impact on his approach because there was not enough information about the sale to come to any conclusions.[19]

Herman testified regarding Sale #3 and its EBITA (Earnings Before Income Taxes, Depreciation, and Amortization) and testified as to the widespread use of this metric.[20] He also testified as to why he did not use Petitioner's response to a request for purchase offer in determining TCV. Herman responded that the RFP was for 2019 or 2020, and so was remote from the valuation date. Moreover, it was not a consummated sale. Herman stated:

> So in this case, though, we're discussing an RFP that was issued in, you know, April or so of – responded to in 2017 talking about a potential purchase of the property in 2019 or 2020. So we're now four to five years away from our date of value. And it's kind of a unilateral proposition. What would you be willing to sell your plant for under certain conditions.
>
> So we didn't give it any weight in our analysis just because it seems a bit far afield relative to the purpose of our analysis here.[21]

Herman next described how he reconciled all three approaches to value. He testified that he put significant weight on the income approaches and cost approach and placed some weight on the sales approach because it corroborated the values reached under the other approaches.[22] After arriving at a value of $440 million, Herman went through his methodology for allocating that value among the parcels, as well as

[19] T2 at 509.
[20] T3 at 519-524.
[21] T3 at 526.
[22] T3 at 528.

accounting for tax exempt pollution controls. He also testified to a methodology to allocate to turbine property if it were to be valued as uninstalled, using Marshall Swift.[23]

On cross, Herman testified that there had been a tolling agreement for sale #3 between the buyer and seller.[24] Sale #1 had adjustments of 300%[25] and Sale #2 had 200% gross adjustments.[26] As to Sale #1, Herman was asked about actions taken by the government which may have forced the sale. Herman testified that he did not believe that the actions affected the price because the property was on the market for a lengthy period of time.[27]

In rebuttal, Herman testified about the sources D&P used in estimating revenue for its income approaches. He testified that IHS Markit forecast is based upon proprietary software that IHS operates and sells to customers. This software looks at the Northern Illinois hub, rather than the Dayton hub. D&P used this software because it is the closest major hub to the subject. Further, D&P used around the clock price because that was provided by IHS Markit. He gave the following explanation for not using hour by hour pricing:

> We did not use an hour-by-hour estimate of price because, quite honestly, I don't have a lot faith that someone can, in the long-run, accurately predict power on an hour-by-hour basis. I think the annual amounts used, based on the history, make sense. We'll talk further about that. We'll rebut that in a second.
>
> But the other thing is we noted that as a check on that, we had the subject's actual power price when it only operated 36 percent back in 2015. And its actual electricity price was around $30.36 a megawatt hour. So you would expect it to be much higher, because if you're only

[23] T3 T 528-541.
[24] T3 at 557-60.
[25] T3 at 561.
[26] T3 at 564.
[27] T3 at 569-571.

> going to enter the market and clear it at the higher peaks when it's more demand, I would have expected that number to be a lot higher.
>
> So I think it was reasonable to use around-the-clock pricing. Especially, again, when you notice -- having the futile task of predicting future hourly pricing -- and, to me, that's kind of precision without accuracy in terms of if we look at a model that picks hourly -- you know, for the next ten years, hourly pricing, it seems a bit much.[28]

Herman testified further that the IHS Markit Pricing model was weighed 45% for the revenue projections. D&P also used information from Intercontinental Exchange, ("ICE") to determine its revenue stream. ICE is a market place for financial futures contracts to determine the price of energy in a specific hub, involving tens of thousands of contracts. From these transactions, ICE produces a price index for both energy and natural gas prices. D&P used the December 2015 forward looking five-year prices for both gas prices and energy. This data was also given 45% weight.[29] The third source of data, which D&P gave 10% weight were AEO Indexed Historical Costs.[30] Herman summarized D&P's reasoning for using the sources it used as follows:

> You know, in summary, again, we're trying to, in effect, mimic what, you know, the people who are buying these plants, what they look at.
>
> They understand forecasts. They understand the pluses and minuses of them, the strengths and weaknesses. And they also look at, but what are actually people doing in the marketplace. So they look at transactions and what -- you know, which is a great indicator of what buyers and sellers think future power prices will be.
>
> So I think both are used. We weighted them, in effect, equally throughout that analysis to predict our energy revenue prices.[31]

[28] T8 at 1762-1763.
[29] T8 at 1765-1766.
[30] T8 at 1766-1767.
[31] T8 at 1767.

Herman also rebutted testimony critical of using around the clock pricing. Part of the critique was that a plant would not run during times it would not be profitable to run. In response, Herman testified that a plant cannot be toggled on and off. Rather, it is likely to run or not run for an 8-hour shift. Herman again testified that the use of hourly forecasted pricing gains precision without accuracy. Around-the-clock pricing on the other hand is known, is publicized and is a good proxy for what he is working with.[32]

Herman described in detail how D&P arrived at its 65% capacity factor. D&P gave significant weight to the 2016/17 budget from the plant owner showing a range of 62%-67%. Herman also looked at historical capacity, noting that the plant operated around 26% the past 5 years in the MISO market, and that combined cycle plants in 2015 ran at 60% in the PJM market.[33] Herman testified that a review of combined cycle PJM plants larger than 800 MW had a lower capacity rate than smaller plants, and support the 65% rate.[34]

Herman also compared the spark spread for the first three years in the D&P appraisal with the one found in Concentric's. Per P93, D&P's spark spread is higher than Concentric's. He also answered that "the silence was deafening" when asked about Respondents' lack of criticism of its fuel prices. As Herman pointed out, fuel prices, which were lower in the first three years in the D&P report are directly related to revenues.[35]

[32] T8 at 1769.
[33] T8 at 1769-1777.
[34] T8 at 1784-1785.
[35] T6 at 1809-1811.

Mark Simzyk

Mark Simzyk has a BS in chemical engineering from the University Iowa and is an accredited senior appraiser of the American Society of Appraisers. He is also a member of the American Institute of Chemical Engineers.[36] He is a Managing Director at D&P and testified to spending significant time appraising complex and mostly energy related properties. He has also presented on various valuation topics over the years.[37] He testified that he performed valuation work for ad valorem tax purposes involving the power generation industry a couple hundred times and has performed valuation work on 50-100 occasions specifically for natural gas-fired combined cycle power plants.[38]

Simzyk testified principally regarding the Income Approach and Cost Approach.[39] He ultimately came to the conclusion that the highest and best use as improved is as an electric generating plant.[40] He testified that the subject is not a utility. Rather, the subject is a merchant generator of electricity, which sells its power to the highest bidder.[41]

In the D&P income capitalization approach, Simzyk testified to using three different techniques, and within one of the techniques, two different assumption profiles were used. For the discounted cash flow ("DCF") he testified that he used a 5-year and a 10-year flow analysis, a direct capitalization methodology, which looks at a normalized

[36] T1 at 84-85.
[37] T1 at 85.
[38] T1 at 86-89.
[39] T1 at 114.
[40] T1 at 122.
[41] T1 at 124.

cash flow for one year.[42] As to using more than one technique under this approach, Simzyk stated:

> So, ultimately, the more you can measure and analyze, hopefully it's going to corroborate and support what you ultimately end up doing. So it's really just another method of checks and balances against everything we've done.[43]

Finally, Simzyk testified to using Guideline Public Company methodology. He described this method as follows:

> A So that is the -- incorporation, if you will, of the market approach as a way to support your income approach. And what that does is, effectively, you look to the market to see what your comparable companies or market transactions are trading for as a multiple of EBITDA.
>
> So you know your total value of your companies or your corporation or what an asset or business sold for if you know what the EBITDA or the Earnings Before Income Taxes, Depreciation, and Amortization is, you can get an implied valuation multiple based on EBITDA.
>
> Q And was this another check on your numbers?
>
> A It is. Well, the beauty of the guideline public company method is that it really -- it's almost completely separate and independent, for the most part. It's really looking at things on a pre-tax basis.
>
> So it takes out of the equation what I like to call the below-the-line adjustments for, you know, the presumed tax structure of a company or your subject or the depreciation profile. It really just looks at things projected on what are we forecasting the earnings to be and what value would you come up with or what would somebody expect it to be based on multiples or -- as on their date of value.[44]

[42] T1 at 134-136.
[43] T1 at 137.
[44] T1 at 137-138

Regarding D&P's discounted cash flows, Simzyk testified that the capacity prices were known for the first three years, which were relied upon for income projections, as well as projections from IHS Markit and Data, as well as other sources.[45]

Simzyk testified that the income approach values both tangible and intangible assets. In order to value only the tangible assets, the intangible assets, such as working capital and goodwill, along with inventory must be removed.[46]

Simzyk was also called to rebut various criticisms set forth in testimony by Respondents witnesses. Regarding criticism of the scale factor used when determining a replacement model and scaling it up from 1 unit to 3 units, he pointed out various economies of scale, including the need for one building rather than three. He pointed out that if using Respondent's scale factor would result in a lower number than what D&P came up with, by $60 million.[47]

Simzyk also responded to criticisms for deducting the MISO switchyard. He noted that the assessor testified that this switchyard was not under appeal and had to be removed from the cost. He described his process for doing so, relying upon a NETL study for a componentized cost breakdown for all assets, which he concluded amounted to 3.74% of replacement costs.[48]

In his determination of remaining useful life and physical depreciation, Simzyk stated:

> And I also mentioned during direct, and then also I think during cross-examination, that it's my philosophy, my belief, that assets of this type that are under -- operated under high pressure, high temperature, sometimes

[45] T1 at 140-141.
[46] T1 at 133-134.
[47] T8 at 1695-97.
[48] T8 at 1699-1700.

> in corrosive or hostile environments, are mandated -- mandated -- they are required to be well-maintained.
>
> And so when you get to a calculation that may show a physical deterioration of greater than 50 percent, you're past the point of diminishing returns. You're probably getting into operating in a nonsafe environment.
>
> So generally speaking, again, we default down. We push the value downwards to reflect, again, the maintenance and the fact that they're mandated -- they're not going to be operating if they're, generally speaking, more than 50 percent physically deteriorated.[49]

As to how he determined 31% depreciation, he testified that it is a weighted number, most heavily weighted by the combustion and steam turbines.[50] Simzyk then went through an article by Mark Pomykacz, which in fact commented on age/life analysis as a common technique to determine physical deterioration for a plant, and that the lifespan of a combined cycle natural gas plant is 35 years. In contrast Concentric assumes a life of 26 years.[51]

Simzyk next addressed the question of double-dipping in calculating functional and economic obsolescence. His first response was, assuming that it is a proper criticism, Concentric is guilty of it as well. As to why it is not a proper criticism, Simzyk set forth the definition of functional obsolescence from *Valuing Machinery and Equipment.* He testified that Concentric determined functional obsolescence by comparing the heat rate of the plant as of valuation day with its heat rate when new. Concentric did not compare the heat rate with that found in the replacement model.[52]

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[49] T8 at 1709-10.
[50] T8 at 1711.
[51] T8 at 1715-16.
[52] T8 1725-27.

Regarding economic obsolescence, Simzyk responded to Pomykacz's criticism testifying that there were four techniques used to quantify this type of obsolescence, and the criticism was pointed at only one of the four techniques. One of the checks on D&P's functional obsolescence was a sale of a brand new plant that went for $743 a kilowatt, where it costs $1,000 per kilowatt to build the plant. This sale involved a new plant with no physical depreciation or functional obsolescence, leaving only economic obsolescence to explain the difference between cost and sale.[53]

Simzyk next discussed criticism regarding D&P's choice of the appropriate replacement plant. D&P used a 2016 plant, while Concentric used a 2013 model. He stated:

> Again, you're -- you're utilizing information that is starting to be a little bit dated when you know and you would have to consider information that's more up to date and more approximate to your valuation date.
>
> And, again, honestly, it doesn't matter. What this translates to, in the selection of the model she did in using, you know, trend factors to bring it to current and a few other items -- absent of all of the adds that went into that, if we just looked at the base cost, on a unit value basis, you only end up with about $1.00 per kilowatt difference in replacement.[54]

Simzyk next criticized the inclusion by Concentric of owner's profit in its cost approach, opining that it is not a cost, and that it is an intangible. He also testified that scaling up the dollar figure associated with it to an 1100-megawatt plant adds over $53 million to the replacement cost. It also cascades through the cost approach as it is included in the percentage of debt that interest during construction is applied to.[55]

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[53] T8 at 1728-32.
[54] T8 at 1733-34.
[55] T8 at 1735-40.

Simzyk also criticized Concentric for including spare parts in cost because they qualify as non-taxable inventory. As to Concentric's use of interest cost during construction, Simzyk pointed out that the plant could be financed using several different debt instruments, and that the interest rate may vary, depending upon who builds it.[56] He further criticized the use of 12% interest during construction, stating:

> I don't -- I don't know if you were that, I guess, financially irresponsible that somebody decided you needed to pay 12 percent over the last couple years on a project like this. I don't know how you'd secure financing, to be honest with you. But 12 percent is just astronomical.[57]

He further testified regarding construction interest:

> A We looked at the opportunity cost differential by calculating the interest you could expect in investing the amount that you would need to construct a plant of this type to determine interest during construction.
>
> Q So what does the opportunity cost represent?
>
> A It is our interpretation of interest during construction.
>
> Q Well, interest to whom?
>
> A Ultimately, a buyer or seller of this facility.
>
> Q So it is the opportunity cost that the buyer is giving up by building the plant.
>
> A That is correct.
>
> Q So instead of the buyer investing in some other equity instrument or putting it in the bank, they were putting their money instead in this plant.
>
> A That is correct.
>
> Q Is that the interest that is relevant when you're building something?

[56] T8 at 1738-40.
[57] T8 at 1746.

A Again, that's my interpretation of it, yes.[58]

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Q How do you account for that cost?

A Again, I'm trying to determine the value of that cost. And I don't think there's much value to interest during construction because it varies from person to person, developer to developer, and it varies widely.[59]

Simzyk went through a chart[60] comparing D&P's cost approach with Concentric's cost approach and testified that with a few modifications, her conclusion would be $475 million rather than $665 million. These values compare to D&P's conclusion under this approach at $423 million.[61]

RESPONDENTS' CONTENTIONS

Respondents contend that the subject's true cash value is the assessment, which should be affirmed. Those values are:

Parcel No.	Type	TCV	SEV	TV
80-07-004-003-03	Real ind improved	$22,369,000	$11,184,500	$11,184,500
80-07-900-084-00	Pers ind non-turb	$38,376,600	$19,188,300	$19,188,300
80-07-900-084-01	Pers ind turbine	$602,267,800	$301,133,900	$301,133,900

The total true cash value on the roll for $663,013,400.

Respondents' appraiser concluded the subject was worth $559,818,488, including exempt property. Allocating this value pursuant to the Tribunal's May 9, 2017 Order, Respondents' appraiser allocated as follows:

Parcel No.	type	TCV	SEV	TV

[58] T8 at 1880.
[59] T8 at 1882-83.
[60] Exhibit P-91.
[61] T8 at 1752.

80-07-004-003-03	Real ind improved	$22,369,000	$11,184,500	$11,184,500
80-07-900-084-00	Pers ind non-turb	$433,182,603	$216,591,301	$216,591,301
80-07-900-084-01	Pers ind turbine	$95,525,377	$47,762,688	$47,762,688

Respondents' appraiser also allocated the values based upon the Tribunal's Final Order and Judgment in MTT Docket No 399578. However, that decision specifically held that its allocation did not take into account MCL 211.903 and MCL 380.1211, which did not go into effect until 2012.

RESPONDENT'S ADMITTED EXHIBITS

R1: Concentric April 2018 Appraisal. *This exhibit is being filed under seal.*

R1A: Concentric confidential workfile. *This exhibit is being filed under seal.*

R1B: Concentric workfile. *Portions of this exhibit are being filed under seal (the sealed documents are indicated by a placeholder identifying the name of the document and its page number (s)).*

R2: Ira Shavel resume

R3: Jeffrey T. Whipple resume

R4: ABB Fall 2015 Midwest Reference Case *This exhibit is being filed under seal.*

R10: PJM State of the Market 2015, Vol. I.

R11: PJM State of the Market 2015, Vol. II.

R25: 2013 EIA Capital Cost Estimates.

R49: Response to DTE RFP. *This exhibit is being filed under seal.*

R56: Duff & Phelps Valuation Handbook.

R80: M. Simzyk deposition transcript. *This exhibit is being filed under seal.*

R81: Duff & Phelps requests for information.

R90: Ira Shavel tutorial power point slides.

RB01: Mark Pomykacz resume.

RB02A: NETL Report [See July 17, 2018 Tr., p 389,11. 11-20]

RB02B2: Federal Appraisal Redacted, p. 2.

RB02B16: Federal Appraisal Redacted, p. 16

RB02B20: Federal Appraisal Redacted, p. 20

RB09: Tom Sweet's CV

RB12: AEO — 2016

RB26: Leidos Report. *This exhibit is being filed under seal.*

RB27: News Article.

RB32: November 14, 2012 Stipulation and Consent Agreement.

RB33: July 29, 2013 News Article.

RB34: Email correspondence with EIA.

RB36: Edward Vander Vries Resume.

RB37: Comparable Sales Comparisons *This exhibit is being filed under seal.*

RB39: BRA resource clearing price.

RB40: Bulkley Opinions of Error in the Duff & Phelps report.

RB41: FERC Order.

RB42: August 24, 2011 PJM CONE study.

RD8: Shavel Demonstration Exhibit.

RD9: Shavel Demonstration Exhibit.

RD10: Shavel Demonstration Exhibit.

RD11: Shavel Demonstration Exhibit.

RESPONDENTS' WITNESSES

Mark Pomykacz

Mark Pomykacz was Respondent's first witness and was called to rebut the D&P appraisal. He testified that he has been an appraiser for 32 years, has a MAI designation from the Appraisal Institute, another designation from the American Society of Appraisers as well as an AI-GRS designation as a reviewer specialist. He is licensed in a dozen states including Michigan. He also testified that he has personally been involved in over 300 power plants. However, this assignment is only his fifth valuation for property tax purposes.[62] He submitted no written review appraisal.[63] Pomykacz concluded that the D&P appraisal was "not credible and not reliable."[64]

Pomykacz's first criticism concerned how D&P determined its income for each of its four income approaches. He stated:

> Each of the approaches requires an estimate for capacity price, capacity factors, and energy price. That information was the same information in all four of the approaches. So they are not independent of one another, and that is probably one of the issues I have -- well, it is the issue I have across all of them, and it is a major issue.[65]

Regarding cost of capital used to determine the discount rate, Pomykacz testified that there were four errors: Beta used, size premium, industry discount and rounding.[66]

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[62] T3 at 660-662.
[63] Respondents attempted to introduce a power point demonstrating the proper values, correcting D&P's alleged faults. The Tribunal disallowed that document per TTR 237 requiring a valuation to be filed and exchanged prior to the prehearing and TTR 255(2) which prohibits a witness from testifying as to value without having previously submitted a valuation signed by that witness. While the Tribunal has authority to waive this requirement, the Tribunal agreed with Petitioner that allowing such evidence at the hearing which was never previously exchanged, and which would be used as yet another valuation by Respondent would constitute "trial by ambush" and be prejudicial.
[64] T3 at 695.
[65] T3 at 697.
[66] T3 at 700.

As to Betas, used in building a cap rate, Pomykacz testified that it is not a standard practice to use them; they are not based on historical data, but judgments which are proprietary. They are used to measure stock volatility and not usually used as part of a discount rate.[67]

Specifically, he testified that D&P did not properly follow the capital asset pricing model, or CAPM. Pomykacz stated:

> Okay. There are standard methods for calculating a CAP -- well, there is one way to calculate a CAPM; it's a recognized formula. And you can move some of the terms around and re-label them a little bit, but basically it's a classic formula that everyone uses.
>
> It basically begins with a safe rate, as I mentioned earlier, the same as in the equity build-up, and there's an adjustment to that for what they call the equity risk premium.
>
> And that information is interesting because it's the same rate in the Duff & Phelps guide to capital Valuation Handbook. There is Duff & Phelps Appraisal Group. There's also another division in that company that publishes a book used for calculating discount rates.
>
> Those first two rates are shown here in the CAPM model, and they come out of the Duff & Phelps Handbook. I don't have any dispute with those, but I think it's important to recognize that there is a standard formula, and Duff & Phelps provides -- Duff & Phelps' publishing side provides a textbook to use to fill in the inputs for that formula, and that Duff & Phelps appraisers have used those inputs for the first two items.[68]

Specifically, Pomykacz testified that D&P failed to use their company's own inputs for its concluded Beta, size premium, industry risk premium, and facility risk premium. As to the Barra Betas, he testified that it is a non-standard use in an appraisal. These numbers are not based on historical data.

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[67] T3 at 706-708.
[68] T3 at 703-704.

As to the size premium used by D&P, Pomykacz stated:

> A Here's the problem with that. You should not look at this from the perspective of the asset you're appraising, but rather the entity -- the type of buyer that would buy that property.[69]
>
> * * *
>
> Q So what would be included in the discount rate is not what is being bought, but who is buying it.
>
> A Exactly, yes.[70]

Pomykacz also declared that there should not be an industry risk premium in a beta for a CAPM formula. He explained that to include that premium accounts twice for industry risk, since it is already taken into account in the industry risk premium and the BARRA Betas.[71] On cross examination however, he conceded that an additional risk premium of 3-5% is acceptable in a CAPM formula, and that the entry he criticized in the D&P report may have been mislabeled.[72]

On the subject of Betas, he testified that the Beta should have been unlevered, and then relevered, and criticized the concluded Beta of 1.23%, which he testified "is outside of the range that should be expected for this kind of answer."[73] He did acknowledge that the D&P Handbook value of .16 takes into account regulated utility power plants which are more or less risk-free.[74] He concluded his critique of the discount rate by testifying that D&P's equity discount rate was 16.7% and he believes that the D&P Handbook would put that rate at 4.5%.[75]

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[69] T3 at 719.
[70] T3 at 721.
[71] T3 at 722-723.
[72] T4 at 849-51.
[73] T3 at 729.
[74] T3 at 731.
[75] T4 at 765.

Pomykacz next critiqued the income calculations used by D&P. He disagreed with the capacity factor of 65%, as well as energy prices because they were based on historical information.[76] He criticized their method for determining income because D&P failed to use a dispatch model, which plant owners regularly use. He also criticized the use of around-the-clock prices, which for a peaking plant is wrong.[77]

Pomykacz next criticized D&P's subtraction of intangibles in arriving at a value through its various income approaches. He stated:

> In this case, I do not see intangibles. And we can run through the list. There is no goodwill in the sense that this is not an Apple company that has a reputation. It is a public utility. Its electrons are as fungible as any others -- I'm sorry, it's not a public utility, it's a provider to a public utility. There's no special relationship to this generator and the public utility who uses the electrons to distribute to customers.
>
> There are no operating synergies that are supposed to be considered here. This is a technology that is fungible. There are many, many gas plants. They are operated the same way throughout the country according to standard practices of engineering and property plant management.
>
> We have not considered and we should not consider any non-compete agreements because this is a property tax setting and we're supposed to use the concept of fee simple, not subject to any special contracts or intangibles in that sense.
>
> We have not considered any PPAs and tolling agreements, which are usually the intangibles that you come across in a power plant appraisal.
>
> There is nothing special about this particular trained and assembled workforce. It is fungible with what you would find in any other natural gas power plant of this type. And, in fact, the staff often trade places over the years and get hired back and forth from these plants. They move around to these plants.

[76] T3 at 740.
[77] T3 at 741-2.

> There are no patents, there are no copyrights, intellectual property that's special to this property.[78]

He went on to testify that 3% is a common business enterprise value for the owners of plants which own multiple businesses and power plants, but that there are no identifiable intangibles for the subject.[79]

On cross examination, he admitted that he found $93 million in intangibles in his appraisal of the Byron Nuclear Facility. He also responded to cross-examination as follows:

> Q Trained and assembled workforce is an intangible, isn't it?
> A Well, that depends on the jurisdiction.
> Q Is it in Michigan?
> A No.
> Q Why?
> A That's -- as I understand the rules in Michigan, it's not.
> Q Really?
> A Yes.
> Q What about a long-term service agreement with a manufacturer of the gas turbines, is that an intangible in Michigan?
> A Agreements can be.
> Q You know there's a long-term service agreement with Mitsubishi for the New Covert facility, correct?
> A Yes.
> Q And there's warranties that are in that agreement, correct?
> A I would imagine there are, yes.
> Q Okay. There's some intangible value there, correct?
> A There may be.
> Q So are you saying that there's no intangible values that should be deducted in this case or that there are?
> A I'm saying that there are no intangible values in this case that need to be deducted.

[78] T4 at 775-76.
[79] T4 at 776.

Q And the reason is why?

A Because when you run down the list, they're conceptually not applicable or we have -- no evidence has been presented that they are applicable. For example, the Mitsubishi --

Q In what you reviewed, right?

A That's correct, yes.

Q Okay. But you know there's a long-term service agreement, correct?

A Yes.

Q You know it has warranties, correct?

A Yes.

Q You know there's a trained and assembled workforce, correct?

A Yes.

Q You know that there's software that's needed to operate this plant, correct?

A Yes.

Q You know there are intangible items at this plant that have value, correct?

A Yes.

Q And you'll see that the Duff & Phelps conclusion was that the intangibles for New Covert are 3 percent of the business enterprise value. That's what they concluded, right?

A Yes.

Q When you did that Byron Nuclear Facility report and determined intangibles, you got pretty darn close to that, didn't you?

A To 3 percent?

Q Yeah.

A I haven't done the calculation. I can do that for you.

Q Would you be surprised if it did?

A I would say it was lucky, yes. I'm not surprised. I don't know. I don't have an opinion.[80]

Next, Pomykacz testified against D&P's deduction for working capital. He stated that based upon how PJM pays, 45 days is too high, since producers are paid within 7 to 14 days. He also argued that because working concept is an accrual concept, it

[80] T4 at 856-58.

doesn't belong because appraisals are done on a cash basis only.[81] On cross, Pomykacz admitted that he took a working capital deduction of about $34 million in his Byron Nuclear Plant appraisal.[82] Pomykacz also pointed out a mathematical error in how D&P calculated its CAPEX expense.[83] However, on cross, Pomykacz came up with the same number.[84]

As to D&P's Cost Approach, Pomykacz testified that the 2016 Annual Energy Outlook, relied upon by D&P to determine the costs for its model replacement would not have been known by the valuation date.[85] He testified that D&P underestimated the name plate capacity, stating that it was 1176 MW rather than 1100 even.[86] He also derided the $41 million deducted by D&P for the MISO switchyard, which is not under appeal, arguing that the costs used to determine the value the MISO switchyard were for switching gear in the plant and not for the separate switchyard. Pomykacz stated:[87]

> Q Assuming there should be a deduction for a switchyard, how does one make that -- determine that amount?
>
> A Well, you are gonna need to cost that up somehow. But I don't know that we should ever make that assumption. First, that's unusual to have a switchyard in a power plant premises, number one. Number two, if you are using one of the standard costs to build a power plant, they are not gonna include a switchyard. So you wouldn't deduct something that's not already included.[88]

[81] T4 at 777-79.
[82] T4 at 868.
[83] T4 at 783-85.
[84] Tr at 885-88.
[85] T4 at 790-91.
[86] On cross, Pomykacz admitted that he never inspected the plant, nor did he ever do any calculations to make that determination. T4 at 889-90.
[87] T4 at 791-94.
[88] T4 at 794.

Pomykacz also criticized D&P for the scale factor used as well as for understating interest expense during construction, arguing that the interest expense should reflect a market rate for borrowing rather than an opportunity cost.

As to depreciation, Pomykacz criticized the low discount rate applied to the difference in efficiency over the course of the DCF as inconsistent with the high discount rate D&P used for calculating present value of income.[89] He also testified that functional obsolescence was counted twice, as it was set out separately and also reflected in the technique used to calculate economic obsolescence. Pomykacz stated:

> Well, maybe I should clarify. They measure the fuel performance in dollars, okay. So they don't measure it in gallons of fuel or something like that. What they've done in economic [obsolescence] is they've gone over and compared the cash flow -- or some level of cash flow after fuel expenses for the subject compared to the market's cash flow or some measure of cash flow after fuel expenses. So their measure of economic performance dollars already reflects the impact of fuel cost dollars. So they've double-counted the fuel cost extra at the subject -- in its functionality.[90]

He also criticized D&P's economic obsolescence for comparing fuel costs to a market where fuel costs are different.[91]

Pomykacz' last criticism of the D&P cost approach concerned the deductions for the PJM (Segreto) switchyard. His opinion is that it should not be deducted, as it was already in place by valuation date, and on a cash basis, should be paid off.[92]

[89] T4 at 802-805
[90] T4 at 808.
[91] T4 at 808-809.
[92] T4 at 810-11.

Pomykacz next testified regarding the D&P sales approach. Regarding the use of the sales approach in general as it applies to power plants, Pomykacz gave the following testimony:

> Q is the sales comparison approach a method that's used to determine the value of a power plant?
>
> A It is either given no weight, which is most of the time, to given almost no weight; very little consideration.
>
> Q And why is that?
>
> A The data is imprecise, incomplete, not comparable. It is -- for example, as we just saw, these things sell with a lot of other assets other than hard assets that we're trying to appraise. The intangibles and the contracts are substantial, and that is not in the public domain. So when you see a sale price for this asset and it includes PPAs or tolling agreements, you can't make an adjustment to that sale appropriately unless you have that tolling agreement or that PPA. They have dramatic impacts on the value of these assets. And they're cash flows, and so they're of value. Even if you have all this data, power plants are not stock. It's not like you get a Chevy off the assembly line, it's going to be fairly close to the next Chevy coming off the assembly line. Power plants are really quite unique from plant to plant, and their locations are quite unique. It's very, very, very hard to get an accurate number from a sales comparison approach. I rarely conclude a value using a sales comparison approach. I don't think I've ever given it substantial weight.[93]

As to Petitioner's Comparable Sale 1 involving the Triton Power Plant in Jackson, Michigan, Pomykacz opined that the plant is too old with a high heat rate; is in the MISO market, rather than PJM, and may have been sold under duress as the Federal Energy Regulatory Commission had barred the sellers from selling electricity.

As to Petitioner's Comparable Sale 2, involving the Renaissance Power Plant in Carson City, Michigan, the plant is also in the MISO market. As to Petitioner's Sales 3 & 4, Pomykacz testified that he appraised both plants, and that both sales had either

[93] T4 at 816-17.

PPAs or tolling agreements that had an impact on the value of both plants. Without analyzing the PPAs, which are confidential, proper adjustments cannot be made.[94]

Tom Sweet

Tom Sweet was called by Respondent as a rebuttal witness and was called to rebut Petitioner's allegation that the economic dispatch software used in Concentric's Income Approach was unreliable.[95] Sweet testified that he works at ABB, which is a company from which Concentric obtained certain data and information for its income approach values. He has worked at ABB for 20 years. Prior to that he worked for Illinois Power. He graduated with a Bachelor's degree in electrical engineering in 1980 and a Master's degree in 1981 from the University of Illinois.[96] Sweet is not an appraiser. Rather, he was qualified as an expert in the analysis of economic modeling of power and energy markets.[97] He testified that one of ABB's software tools PROMOD, a dispatch tool is used by PJM, SPP and MISO.[98]

Regarding forecasts, Sweet stated:

> Well, you know, the markets are extremely dynamic, extremely volatile. We update our forecast every six months. So we obtain information on, you know, the latest estimates of, you know, the status of plant construction, information on what plants might be retiring because of economics or environmental restrictions.[99]

Sweet testified that his company's reference case has a little over 100 subscribers. Sweet named 7 competitors who also produce a reference case.

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[94] T4 at 818-22.
[95] T5 at 970.
[96] T5 at 977-78.
[97] T5 at 980, 982 and 1010-1011.
[98] T5 at 980.
[99] T5 at 985.

On cross examination, Sweet had the following exchange:

Q You agree that you are not an appraiser, right?

A Yes.

Q You agree you can't predict the future, right?

A That's correct.

Q You agree that your forecasts are not always accurate, right?

A That is correct.

Q That people disagree with your assumptions?

A Yes.

Q That things change on a fairly frequent basis?

A Yes. Markets are volatile and assumptions change.

Q Is that, in part, why you do your reviews every six months?

A Yes.

Q So something that you may have predicted today may not be true tomorrow.

A That is -- that is correct.

Q You agree that electricity is a commodity whose price is based on another commodity, right?

A Its price is based on multiple commodities and their interrelationship and other -- other factors.

Q Commodities are volatile, right?

A Yes.

Q And when you are trying to forecast a price of one commodity and it's based on another commodity, that's a pretty difficult thing to do, right?

A True. And that is why we have our models, to try to understand and, you know, explore those dynamics.[100]

Q In most of the cases, it's not -- your forecasts are not accurate based on what the actual results were; isn't that true?

A And that's true with any forecast.[101]

[100] T5 at 1011-12.
[101] T5 at 1014.

Sweet also agreed on cross that he did not see exactly what plants do with his modeling information.[102]

Jeffrey Whipple

Mr. Whipple testified that he is an engineering consultant and has been in private practice for the last 13 years. He received a degree in engineering from Columbia University in 1970 and obtained a MS in aerospace and aeronautics from Princeton. He testified that he started as an intern engineer and retired as chief mechanical engineer at Burns & Roe, where he "was involved with and responsible for design of every . . . kind of power plant you can think of; coal fired, oil-fired, manure fired, garbage fired . . . natural gas-fired."[103] Whipple testified to other experience working with gas turbine combined-cycle plants.[104]

Whipple gave an overview as to how the subject turns gas into electricity and into the grid using combined cycle technology.[105] Next, he described the boundary between the plant and the switchyard as follows:

> So the physical extent of the power plant assets include those lines -- there you go. The structural towers that you affix the lines to so they don't fall down. And then the conductors come down. And what's not very distinct here is there are disconnect switches at ground level there. That's the end -- that's the boundary line between the power-generating plant and the switchyard.[106]

Whipple commented that the presence of a ring bus at the facility indicates a deluxe switchyard.[107]

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[102] T5 at 1022.
[103] T5 at 1029.
[104] T5 at 1030-1033.
[105] T5 at 1035-42.
[106] T5 T 1043.
[107] T5 at 1045-46.

Next, Whipple testified regarding his contribution to Respondents' appraisal. Specifically, he helped with the Cost Approach. He recommended that she use the 2013 EIA Report. As to why he picked 2013 data is because it takes three years or longer to build a plant, and the 2013 EIA report estimates the cost in 2012 dollars.[108] Later on direct, Whipple testified that he took exception to what EIA used as a model. His testimony was:

> Q At the end of the day, did you make a recommendation to her [Bulkley] about what the replacement plant should consist of?
>
> A Yes. I took exception to and disagreed with what EIA used in the model. Their model was based upon advanced natural gas combined-cycle, and it was based on a specific General Electric -- it was based on a General Electric 107H machine.
>
> Now, that is not representative of the kind of plant any real-world developer ever would have picked and built in this time frame. It's the unicorn. It's the mythical plant.
>
> There's only one project example in the United States. It's the Inland Empire project in California. And there's special circumstances. That project -- there are, in fact, two 107H combined-cycles in Inland Empire. It was GE's first project in the United States.
>
> So the transaction was not a normal commercial transaction. GE -- as is normal for all manufacturers, special pricing, GE provided special warranties, even participated in the financing. And there were no other plants, based on that equipment, built after that date.
>
> So, to me, somebody who is in the business, it's a complete mystery why EIA was writing reports based upon a mythical plant that nobody was using.
>
> Now, when a manufacturer such as GE has a stinker that really isn't selling on the market, they don't take out newspaper ads and say, we have a stinker. So it's hard to find a published article that says that.

[108] T5 at 1053.

> But by 2013, GE was beginning to tell the world they were gonna come out with a new machine because they understood the H had issues, including a high cost. And no customers were buying it.
>
> ***
>
> So my comment is, the replacement plant should be -- have the same rated capacity as the New Covert plant, nominal 1,100 megawatts. But in the time frame of making decisions in 2011, 2012, it was my recommendation that an appropriate replacement plant would be a plant very much like New Covert; three side-by-side duplicate units with a total capacity rating of 1,100 megawatts, but just buy the newest -- Mitsubishi has improved the turbine and offered a newer model. So by 2012, instead of buying the original 501Gs, you could buy the new and improved 501GAC.[109]

As to other recommendations, Whipple testified that he told Bulkley not to use a heat rate for a mythical machine, and to replace the GE with a Mitsubishi 400-megawatt 501 GAC and use Mitsubishi's published heat rate.[110] On re-cross, he admitted that he never recommended that particular gas turbine for any developer.[111]

Whipple next testified as to disagreements he had with the D&P appraisal. He criticized D&P's choice of replacement plant (a newer GE model than the one used by Bulkley) and he criticized using 2016 costs when it will take three years to build a plant.[112] He criticized their calculation of heat rate differential as an apples to bananas comparison, as the heat rate advertised by the manufacturer is idealized and not based upon real world usage. He believes the heat rate differential is 5%, whereas D&P determined it is 11%.[113] Whipple also testified that his cost estimates to build a plant is no better than plus or minus 15%.[114] He also estimated a scaling factor of .83.

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[109] T5 at 1073-1075.
[110] T5 at 1078.
[111] T5 at 1150-51.
[112] T5 at 1081.
[113] T5 at 1085-86.
[114] T5 at 1055.

As to the replacement construction model recommended to Concentric for its cost approach, Whipple recommended the GE 107H 400 MW nominal gas turbine combined cycled 1-on-1.[115] As to calculating depreciation, Whipple testified that the plant was lightly used for many years. A better measure of age is its operating hours, which he testified 144,000 hours is the expected life of the turbine. As of the valuation date, the plant had been run approximately 30,000 hours, or approximately 20% of its expected life. Although the subject has a Mitsubishi turbine, Whipple used data from GE because it was readily available, while Mitsubishi is very secretive. He testified that "the fundamentals are the same" between GE and Mitsubishi turbines.[116]

On cross, Whipple admitted that starting and stopping the generator also contributes to wear and tear, and that he did not calculate that portion of physical depreciation.[117]

On the topic of the MISO switchyard, the following testimony from Whipple indicates that it is more extensive than what appears in the appraisal.

> Q When it comes to the replacement cost of a new plant, would that replacement cost or those cost estimates provided by EIA include a switchyard?
>
> A Yes. It's very clear. The EIA makes it clear that their cost estimate includes some amount of monies for what they call a switchyard and, in fact, the transmission link. However, there's almost no detail. They don't provide a separate line item, and it's a very obscure description. But when I read it as an engineer, they basically describe a system with the bare minimum; step up transformer, lines into the switchyard, and a disconnect switch. They don't describe anything, at all, like that switchyard that exactly – actually exists at New Covert. Just fundamentally different.[118]

[115] T5 at 1064.
[116] T5 at 1070.
[117] T5 at 1130.
[118] T5 at 1093.

Whipple elaborated as follows:

> Q The assets that you would consider to be the ring bus, is that included in what you would consider to be the plant switchyard?
>
> A It exists. It's at the plant switchyard.
>
> Q Yeah. And it is beyond the scope of the boundary of what is between what is the plant and what is the switchyard, correct?
>
> A The switchyard is the switchyard. It's outside the plant.
>
> Q Thank you. But the ring bus -- the machinery and equipment that make up the ring bus are not included in the EIA Cost Estimates, correct?
>
> A It's my opinion that the ring bus type switchyard at New Covert is much more extensive and has features not included in the EIA report and cost estimate for the switchyard.[119]

On cross examination, Whipple testified that the plant switch yard costs are in fact listed in the EIA Cost Estimates.[120]

Ira Shavel

Dr. Shavel assisted in the market analysis by developing capacity price projections as well as reviewing the D&P appraisal. He also gave Respondents' introductory power point lecture giving more background for the electricity markets. In his introduction, he described spark spread and heat rate and testified that he is a consultant and energy economist for the Brattle Group in Washington DC, specializing in generation economics, transmission economics, environmental economics, and environmental policy as it relates, primarily, to the electric power industry.[121] He further testified that he has worked in this area for 38 years.

Shavel described two wholesale markets in PJM:

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[119] T5 at 1108-09
[120] T5 at 1120.
[121] T6 at 1165.

> So PJM has two wholesale -- two types of wholesale markets. The primary one is the day-ahead market. As Mr. Herman described, right now – bids are due in 20 minutes -- bids for generators for tomorrow. The day starts at midnight and runs until 11:59 tomorrow evening, p.m. Bids are submitted by 10:30, and by about 1:30 -- I think it's 1:30 -- the schedule comes out that tells generators what they're supposed to do tomorrow based on their bids. Most of the energy is scheduled a day ahead, especially for any type of plant that has any limitations on how quickly it can start, which is most plants.
>
> And that's a financially-binding market. If you receive a commitment, if you bid -- if you bid a cost-based bid -- and in PJM, there's different ways one can offer your capacity.
>
> Most plants, gas plants, will offer to bid in at their cost. And if PJM approves that, that cost-based bidding, they bid in and then they – as they operate over the day, they're guaranteed that they will not lose money. PJM -- if they operate differently than they had planned, it still will not lose money. So the generator gets the bid, it's a financially-binding commitment to operate; PJM, in turn, guarantees that they're not gonna lose money.
>
> And then in real-time, which is happening now for today, it's a detailed balancing every five minutes of supply and demand. And PJM operates another market for deviations between what was expected and what actually happened.[122]

Shavel next testified about economic dispatch, where power plants are stacked up according to their variable costs. He stated that stacking eliminates hours of operation that might otherwise be unprofitable.

Shavel testified as to operating expenses noting that natural gas fuel is its biggest variable cost. Other variable expenses include labor, spare parts, maintenance, and the maintenance agreement with the turbine manufacturer.[123]

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[122] T1 at 55-56.
[123] T1 at 52.

Shavel testified about different zones and constraints inside PJM. ComEd is higher than what's called Rest of RTO; Transmission constraints result in higher capacity prices in ComEd with Northern Illinois than it does in the AEP area.[124] Shavel also testified that he has never seen a capacity factor not supported by economic dispatch analysis.[125] He concluded to a capacity factor of 87%.[126]

On cross examination, Dr. Shavel reluctantly agreed that the capacity price forecasts prepared by him and relied upon by Concentric were off by 30% from actual prices in the first year of his forecast. He also admitted that every year after that the revenues received in his estimate went up all the way through 2030 or 2031.[127] He also stated that things can change more in the future than the near term.[128]

Ann Bulkley

Ms. Bulkley testified that she is a certified general appraiser licensed in Massachusetts, Michigan and New Hampshire.[129] She testified that she has been involved in regulatory analysis, litigation, valuation and a variety of financial and analytical projects related to the energy industry. She also testified that she has worked for buyers and sellers of merchant generating assets and potential investors in merchant generating clients.[130] On voir dire, she conceded that she has only testified once previously as an expert in valuation of electric generating assets.[131]

[124] T6 at 1191.
[125] T6 at 1220-21.
[126] T6 at 1241.
[127] T6 at 1297-1299.
[128] T6 at 1301.
[129] T6 at 1322.
[130] T6 at 1324-1328.
[131] T at 1331.

As to her appraisal, she concluded that the highest and best use is its current use, an electric generating facility.[132] Bulkley used a 15 year DCF analysis ending in 2030, a time which she testified would be the end of the subject's useful life.[133] She testified that the market projections she used for energy and capacity prices were an extraordinary assumption but contended that there is a difference of opinion among appraisers as to whether this is proper under USPAP.[134]

Bulkley concluded to a value $582 Million.[135] That value matched dollar per dollar with her 15-year DCF.[136] As to why she relied upon the income approach she stated:

> So in most of the work that I have done valuing plants for purposes outside of appraisal for advising clients on buy-and-sell transactions, income would be the driver.
>
> And so for that purpose, I relied on income as the final estimate of value supported by … the cost approach, because I do think that that approach stands on its own as another measure of value and is often used for other purposes.[137]

In reaching her conclusion, she further testified that she did not make a reduction for going concern value. She testified that there was no need for working capital because PJM reimburses generators in 7-14 days.[138] Further, there was no need for a skilled workforce because it is all contracted out to third parties.

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[132] T7 at 1382.
[133] T7 at 1384.
[134] T6 at 1349-50.
[135] T7 at 1416.
[136] T7 at 1496.
[137] T7 at 1456.
[138] T7 at 1418.

In calculating revenue, Bulkley testified to a capacity factor of 87.16% for 2016 and similar percentages for 2017 and 2018, all based upon projections[139] As to her discount rate, she testified to an after-tax WACC of 8.23% then loaded with 2.25% for property tax.[140]

On redirect, Bulkley testified that the cost approach she prepared supports the assessed value on the tax roll.[141] She also testified concerning the cost of the PJM switchyard being deducted from the value. She stated:

> As I explained, particularly in a DCF, if you're making an investment in a -- and if the investment has already been made, it's not part of your cash flow.
>
> So I think the example that I used was if you're looking at a coal plant that has had very significant capital retrofits that were done prior to your valuation date, they are not considered in that cash flow value.
>
> So this would be very similar to that. In the coal plant example, those retrofits would be necessary for the plant to operate. And I think the Segreto switchyard would be very similar to that.[142]

The bench asked Bulkley regarding an additional risk premium as to whether one should look at the plant, or the buyer. Bulkley testified that it was proper to look at the buyer.[143]

Edward Vander Vries

Mr. Vander Vries is the Equalization Director for Van Buren County. He testified that he and the assessor used the unit in place method to value the subject, where he took a value from Marshall Swift at $750 per Kilowatt and multiplied it by 1,080,000

[139] T7 at 1392-1393.
[140] T7 at 1414.
[141] T7 at 1605.
[142] T7 at 1606.
[143] T7 at 1610.

Kilowatts (the plant's name plate capacity.) He then multiplied that product by the County Multiplier of 1.45 to establish a replacement cost new of $1,174,500,000. He then concluded that the property incurred 40% depreciation and remained 60% good.[144] Multiplying the cost new by .60 produces a value of $704,700,000. He then allocated that value 97% personal, 3% real, and concluded to a value of $638,000,000 for the personal property.[145] To verify that number, Vander Vries testified that he looked at the sale of the subject in 2008, and at an appraisal for a power plant in Zeeland.

Vander Vries next testified to a sales comparison he had done on the Zeeland plant. Using those sales, he determined that the Zeeland plant at 943 megawatts had a value of $520 million, which supported the true cash value of the subject property. On cross examination, Vander Vries admitted that the sales study he relied on was not prepared for purposes of sales comparison of the subject property.[146] He also admitted that the assessor only saw the sales study after the assessment was placed on the roll.[147] He also testified that his time adjustments were based upon 2 sales of 1 plant. On cross, he admitted that another plant which sold two years later had the same time adjustment as the Zeeland plant.[148] He also used plants that were in different markets, as well as plants sold to public utilities as comparables to the subject.[149]

Laureen Birdsall

[144] T7 at 1636-1640.
[145] T7 a 1643.
[146] T7 at 1663-64.
[147] T7 at 1667.
[148] T7 at 1670.
[149] T7 at 1671-73.

Ms. Birdsall is the Township assessor for Respondent Covert Township. She testified that there were multiple factors in determining the unit in place rate of $750; one factor being that it was in the BS&A unit in place table. She also repeated that she used the County Multiplier of 1.45. She then depreciated this figure by .6 (40% good), then used the architectural multiplier to allocate between real and personal property (97% to personal). As to allocation between turbine and non-turbine, she allocated 95% of the personal property to turbine personal, and the remainder to non-turbine personal.[150]

On cross, she testified that she removed the pollution exemptions off the top before allocating to real and personal property.[151]

FINDINGS OF FACT

1. The property has two industrial personal property parcels and one real property parcel located at 26000 77th Street, Covert Township, Van Buren County, Michigan.[152]

2. The property is improved with a 1,100-megawatt (nameplate capacity) natural gas-fired combined-cycle power generating plant, primarily comprised of three combined-cycle power blocks (each including one gas turbine and generator, one heat recovery steam generator, and one steam turbine and generator) and cooling towers, a water storage tank, and related equipment and improvements.[153]

3. The power plant began commercial operations in 2004.[154]

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[150] T8 at 1683-85.
[151] T8 at 1687.
[152] P01 appraisal at 9, 46; P59 record cards.
[153] P01 at 6-7; R1 at 19.
[154] P01 at 7.

4. Ownership of Petitioner was transferred in 2015 in an acquisition along with six other enterprises.[155]

5. The appraisers for both sides determined the highest and best use of the subject property as improved to be its current use as an electrical-generating plant.[156]

6. The plant is a merchant generator or independent power producer, rather than a utility or a non-utility with power contracts.[157]

7. New Covert's revenues are from: (1) wholesale electricity sales; (2) capacity payments; and (3) ancillary revenues.[158]

8. Fuel is New Covert's largest operating cost, plus costs such as labor, spare parts, and capital expenditures to maintain operations.[159]

9. Prior to June of 2016, Petitioner operated in the MISO market at capacities in the previous 5 years ranging from 16.5% in 2014 to 41.6% in 2012.[160]

10. The MISO market is dominated by regulated utilities, which have close to 90% of the market, and are compensated on a cost basis with approval from the Public Service Commission.[161]

11. The subject plant began operating in the PJM market in mid-2016.[162]

[155] P01 at 45.
[156] T1 at 122, T7 at 1382.
[157] T1 at 124.
[158] T1 at 43-44; P79 overview power point of the US Electricity Industry, at 39.
[159] T1 at 52.
[160] P01 at 45.
[161] T1 at 21-22.
[162] P01 at 44.

12. Both D&P and Concentric employed the same extraordinary assumptions that the value of the land was the same as determined by the assessor at $1,342,800[163] and the value of the five state-certified pollution control exemption assets at $46,320,249.[164]

13. D&P considered and used all three traditional approaches to value.[165]

14. D&P concluded to $450,000,000 using the income approach, $447,000,000 using the sales approach and $423,000,000 using the cost approach.[166]

15. D&P reconciled and weighed each approach to reach a final value of $440,000,000, before allocation and removal of exempt equipment.[167]

16. In reaching the concluded value under each approach, D&P subtracted $58,915,530 “as the present value of the interconnection project (PJM or Segreto switchyard).”[168]

17. From their concluded value of $440,000,000, D&P deducted the present value of pollution control exemptions of $31,960,972 from TCV, resulting in a taxable TCV of $408,000,000.[169]

18. To allocate this value between real and personal property, D&P started with its concluded value of the facility of $440,000,000 and subtracted the land value on the tax roll at $1,342,800 and allocated 97% to personal property and 3% to real property, resulting in personal property worth $425,497,484 and real property allocated at

[163] P01 at 95. Bulkley accepted the real estate value on the roll, which includes the land value. R1 at 100.
[164] P01 at 98; R1 at 101.
[165] P01 at 8.
[166] P01 at 9.
[167] P01 at 97-98.
[168] P01 at 61, 80, and 95. This is also referred to as the Segreto Switchyard.
[169] P01 at 8-9.

$13,159,716. For the real property parcel, D&P added back the land value to value this parcel at $14,502,516. As to the personal property, D&P subtracted the pollution control exemptions of $31,960,972 from the allocated value to conclude to $393,536,512. D&P then determined that 46% of the personal property should be allocated to the turbine, based upon the Tribunal's definition in this matter, and using Marshall Swift costs installed and operational, and determined the TCV of turbine personal property to be $181,026,796 and non-turbine personal is $212,509,716.[170]

19. For its income capitalization approach, D&P used four different techniques; a 5-year DCF, concluding to $438,000,000, a 10-year DCF concluding to $470,000,000 direct capitalization concluding to $432,000,000 and a guideline public company method analysis concluding to $436,000,000. D&P reconciled these methods and concluded to a value of $450,000,000 by the income approach.

20. For its Cost Approach, D&P relied upon the 2016 Annual Energy Outlook published by the Energy Information Agency.

21. The value of the subject placed on the tax roll was $663,013,400.

22. Other than value-overridden record cards, Respondents presented no documentary evidence in support of the assessed value.

23. Respondent's assessor testified that the value was chosen using multipliers found in either Marshall-Swift or its BSA software.

24. The allocations on the roll between turbine and non-turbine were not based upon the Tribunal's definition, found in its May 9, 2017 order defining the definition of turbine

[170] P06 at 1364.

under MCL 211.903 and MCL 380.1211, nor was any explanation ever given as to how this allocation was derived.

25. Concentric Appraisal determined a value of $559,818,488 for the subject property.

26. Concentric relied solely on a 15-year discounted cash flow analysis ("DCF"), which was given 100% weight in the appraisal's reconciliation of approaches.

27. For its 15-year DCF, Concentric made an "extraordinary assumption" that the income projections given to it by The Brattle Group for capacity prices and ABB Group for energy prices were accurate.

28. Respondents' first witness was Mark Pomykacz, MAI who did not submit a written appraisal or review appraisal.

29. Various experts for Respondents conceded that the further out in time that a projection is made, the less likely it is to be accurate.

30. The projections for capacity income varied from reality by 30% in the first three years of the 15-year DCF.

31. D&P determined the value of exempt pollution controls to be $31,960,972 while Concentric determined their value to be $31,110,507.

32. D&P allocated total non-exempt personal property to turbine the turbine parcel at 46%, while Concentric allocated only 18.07% to turbine using the Tribunal's definition.[171]

[171] R01 at 103-104.

33. The Tribunal had previously held that Respondent's Motion for Summary Disposition filed on October 25, 2017 was frivolous and sanctionable under MCR 2.114.

34. The motion subject to sanctions was signed by Intervening Respondent's attorney only, Jack Van Coevering.

35. Respondents' Motion for Summary Disposition filed on June 15, 2018 was signed by both Jack Van Coevering and M. Brian Knotek.

36. Respondent's June 15, 2018 Motion for Summary Disposition was frivolous.

CONCLUSIONS OF LAW

The assessment of real and personal property in Michigan is governed by the constitutional standard that such property shall not be assessed in excess of 50% of its true cash value.[172]

The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes. The legislature shall provide for the determination of true cash value of such property; the proportion of true cash value at which such property shall be uniformly assessed, which shall not . . . exceed 50 percent. . . .[173]

The Michigan Legislature has defined "true cash value" to mean:

> The usual selling price at the place where the property to which the term is applied is at the time of assessment, being the price that could be obtained for the property at private sale, and not at auction sale except as otherwise provided in this section, or at forced sale.[174]

[172] See MCL 211.27a.
[173] Const 1963, art 9, sec 3.
[174] MCL 211.27(1).

The Michigan Supreme Court has determined that "[t]he concepts of 'true cash value' and 'fair market value' . . . are synonymous."[175]

"By provisions of [MCL] 205.737(1) . . . , the Legislature requires the Tax Tribunal to make a finding of true cash value in arriving at its determination of a lawful property assessment."[176] The Tribunal is not bound to accept either of the parties' theories of valuation.[177] "It is the Tax Tribunal's duty to determine which approaches are useful in providing the most accurate valuation under the individual circumstances of each case."[178] In that regard, the Tribunal "may accept one theory and reject the other, it may reject both theories, or it may utilize a combination of both in arriving at its determination."[179]

A proceeding before the Tax Tribunal is original, independent, and de novo.[180] The Tribunal's factual findings must be supported "by competent, material, and substantial evidence."[181] "Substantial evidence must be more than a scintilla of evidence, although it may be substantially less than a preponderance of the evidence."[182]

"The petitioner has the burden of proof in establishing the true cash value of the property."[183] "This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of

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[175] *CAF Investment Co v Michigan State Tax Comm*, 392 Mich 442, 450; 221 NW2d 588 (1974).
[176] *Alhi Dev Co v Orion Twp*, 110 Mich App 764, 767; 314 NW2d 479 (1981).
[177] *Teledyne Continental Motors v Muskegon Twp,* 145 Mich App 749, 754; 378 NW2d 590 (1985).
[178] *Meadowlanes Ltd Dividend Housing Ass'n v Holland,* 437 Mich 473, 485; 473 NW2d 636 (1991).
[179] *Jones & Laughlin Steel Corp v City of Warren*, 193 Mich App 348, 356; 483 NW2d 416 (1992).
[180] MCL 205.735a(2).
[181] *Dow Chemical Co v Dep't of Treasury*, 185 Mich App 458, 462-463; 462 NW2d 765 (1990).
[182] *Jones & Laughlin Steel Corp,* 193 Mich App at 352-353.
[183] MCL 205.737(3).

going forward with the evidence, which may shift to the opposing party."[184] However, "[t]he assessing agency has the burden of proof in establishing the ratio of the average level of assessments in relation to true cash values in the assessment district and the equalization factor that was uniformly applied in the assessment district for the year in question."[185]

The three most common approaches to valuation are the capitalization of income approach, the sales comparison, or market, approach, and the cost-less-depreciation approach.[186] "The market approach is the only valuation method that directly reflects the balance of supply and demand for property in marketplace trading."[187] The Tribunal is under a duty to apply its own expertise to the facts of the case to determine the appropriate method of arriving at the true cash value of the property, utilizing an approach that provides the most accurate valuation under the circumstances.[188] Regardless of the valuation approach employed, the final valuation determined must represent the usual price for which the subject would sell.[189]

Appraisals of gas-fired two stage power plants appear to have almost as many moving parts as the power plants themselves. After eight days of hearing, the Tribunal must weigh the testimony and admitted exhibits, as well as address the arguments set forth by each party in lengthy post-hearing briefs and reply briefs to determine the

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[184] *Jones & Laughlin Steel Corp,* 193 Mich App at 354-355.
[185] MCL 205.737(3).
[186] *Meadowlanes,* 437 Mich at 484-485; *Pantlind Hotel Co v State Tax Comm*, 3 Mich App 170, 176; 141 NW2d 699 (1966), aff'd 380 Mich 390 (1968).
[187] *Jones & Laughlin Steel Corp,* 193 Mich App at 353 (citing *Antisdale v City of Galesburg*, 420 Mich 265; 362 NW2d 632 (1984) at 276 n 1).
[188] *Antisdale,* 420 Mich at 277.
[189] See *Meadowlanes*, 437 Mich at 485.

subject's true cash value, and to allocate assessed and taxable value among the three parcels at issue. Rather than relying upon its appraiser's 527-page appraisal, and her determination of true cash value, Respondents have instead demanded that the Tribunal affirm the assessment. While consisting of six compact overridden pages, the assessment has the additional virtue of setting forth a TCV totaling nearly $112 million higher than the conclusion reached by Respondents' appraiser.

Regarding the assessment, the Tribunal was provided *by Petitioner*, the 6-page record card.[190] Notably, the record card indicates that the 2016 TCV was "Value overridd[en]." It is entirely unclear from this document as to how Respondents arrived at the values totaling over $663 million. It is also a mystery as to how that total was allocated between turbine and non-turbine personal property. That distinction is important, because turbine personal property is taxed at a significantly higher rate than non-turbine.

At hearing, Van Buren County's Equalization Director Edward Vander Vries testified that the property was assessed based upon the unit in place method, which he claims was corroborated by a sales comparison study used to assess a different plant.[191] However, the evidence presented in support of the assessment is completely inadequate to justify its affirmation. The rate per kilowatt, per testimony at hearing by Vander Vries, supposedly came out of the 2003 cost manual (presumably, the STC Cost Manual), which was not placed into evidence. Vander Vries also agreed that he was not aware of a specific person who used that number.[192] Nor did Respondent's

[190] P-59.
[191] T7 at 1631.
[192] T7 at 1662.

Assessor, Laureen Birdsall, clarify why that multiplier was chosen. The County Multiplier of 1.45 used by Respondents to bring 2003 values current also came out of a black box, with no evidence provided to explain or support its derivation.[193]

Vander Vries testified that the sales approach provided to support the assessment was developed to support a different plant within the state, rather than the subject property. In this sales study, Vander Vries admitted that he used regulated utility sales without adjustments as comparables to the subject, and that his time adjustment was based upon two sales of a single power plant, which was also inappropriately used for other sales beyond the dates of the second sale. As to the use of the sales comparison approach to support the assessment, Ann Bulkley, Respondent's own appraiser, rejected this approach because the plants were in a different market, were sold as part of a bundle, or the terms were not publicly disclosed.[194] Respondent's review appraiser, Mark Pomykacz also rejected the market approach, indicating that this approach is seldom, relied upon. The Tribunal agrees with both Bulkley and Pomykacz that the sales comparison approach is unreliable for the reasons both stated. Finally, the allocation between turbine and non-turbine on the tax roll was made without explanation. In short, there was no substantial, competent or material evidence presented that supports the assessment on the tax roll.

Rather than relying upon its own appraiser, Respondents' trial strategy was to bring in a slew of experts to discredit Petitioner's appraisal, and thus leave the Tribunal

[193] County Multipliers are generally used to adjust costs to location, rather than to time. Economic Condition Factors ("ECFs") are generally used to adjust earlier costs to the year at issue. ECFs were not discussed by either Vander Vries or Birdsall, and do not appear on the record cards.
[194] R1 at 92-93.

with the assessment as a default position.[195] Such a strategy ignores long-standing precedent that requires the Tribunal to make an independent determination of value once the burden of going forward has been established. As the Court of Appeals stated in *Jones & Laughlin*:

> The tribunal further erred in failing to make an independent determination of the true cash value of the property. The tribunal apparently believed that no such determination was necessary after it concluded that petitioner had failed to meet its burden of proof and dismissed petitioner's appeal. The tribunal correctly noted that the burden of proof was on petitioner. This burden encompasses two separate concepts: (1) the burden of persuasion, which does not shift during the course of the hearing, and (2) the burden of going forward with the evidence, which may shift to the opposing party. The tribunal's decision, however, seems analogous to the entry of a directed verdict upon the failure of a plaintiff's proofs. To the extent this analogy may be accurate in this case, *the entry of judgment against petitioner for its failure to provide sufficient evidence was erroneous because, while petitioner may not have met its burden of persuasion, it did meet its burden of going forward with evidence.*
>
> *Even if the tribunal had correctly concluded that petitioner's proofs had failed, the tribunal still would be required to make an independent determination of the true cash value of the property. The tribunal may not automatically accept a respondent's assessment, but must make its own findings of fact and arrive at a legally supportable true cash value.*[196]

The Tribunal rejects the idea of directing a verdict against Petitioner, as it presented substantial competent and material evidence to prove its case, which easily clears the low hurdle of the burden of going forward with the evidence. While Petitioner's appraisal, like every other appraisal, is not without flaws, the flaws go to its weight. Accordingly, the Tribunal rejects Respondent's initial theory that the Tribunal

[195] Respondents argue that Petitioner failed to provide "substantial, competent and material evidence." Respondent's Post-hearing Brief, at 1.
[196] *Jones & Laughlin*, 193 Mich App at 354-355 (citations omitted, emphasis added).

must affirm the assessment and direct a verdict as contrary to law, as well as the evidence.

Respondent's back-up position is for the Tribunal to adopt the appraisal performed by its named expert, Ann Bulkley. Bulkley prepared the appraisal with data prepared by Ira Shavel, an economist, and AAB. Bulkley performed a cost approach which she gave zero weight, along with a 15-year discounted cash flow analysis which she weighed at 100%.

The Tribunal concludes that Respondents' apparent lack of faith in the reliability of its own appraisal is justified. First, Concentric solely relies upon a 15-year discounted cash flow. Every income approach relies upon many moving parts. If is fundamental however, that the further out a projection, the more tenuous the results. In contrast, D&P performed a 10-year and 5-year DCF, along with a single year direct capitalization with stabilized income and expenses. D&P also checked those values with a variation of the income approach, using a multiple of EBITA. The shorter outlook and the numerous variations used are inherently more reliable than 1 approach going out 15 years.

It is also noteworthy that Concentric made an extraordinary assumption in the its appraisal that the capacity prices forecast by Brattle and the energy prices forecast by ABB group were accurate.[197] An Extraordinary Assumption is defined under USPAP as follows:

> An assignment-specific assumption as of the effective date regarding uncertain information used in an analysis which, if found to be false, could alter the appraiser's opinions or conclusions.

[197] R01 at 17.

> Comment: Uncertain information might include physical, legal, or economic characteristics of the subject property; or conditions external to the property, such as market conditions or trends; or the integrity of data used in an analysis.[198]
>
> Standards Rule 1-1
> "In developing a real property appraisal, an appraiser **must:**
> (f) Identify any extraordinary assumptions in the assignment;
>
> Comment: An extraordinary assumption may be used in an assignment only if:
> • it is required to properly develop credible opinions and conclusions;
> • the appraiser has a reasonable basis for the extraordinary assumption;
> • use of the extraordinary assumption results in a credible analysis; and
> • the appraiser complies with the disclosure requirements set forth in USPAP for extraordinary assumptions.[199]

Apparently, just as Respondents appeared not to be convinced in the reliability of Concentric, Concentric had doubts about the reliability of these forecasts upon which its entire appraisal is premised. The inherent unreliability of these forecasts was hammered home by Petitioner's counsel on cross-examination, which proved that the capacity prices for the first 3 years of the DCF performed by Respondent were off by 30%. Accordingly, the Tribunal is unable to rely upon Respondent's valuation.

The D&P appraisal relied upon by Petitioner is not without fault. In fact, most of the eight days of hearing were taken up by the issues of reliability of the D&P appraisal. The Tribunal accepts some of these criticisms as valid. First off, the Tribunal agrees with both Bulkley and Pomykacz that the sales approach is not a reliable valuation tool for power plants. As pointed out by Pomykacz, the information is opaque, and there are often intangibles such as tolling agreements and other agreements to which the public

[198] 2018-2019 USPAP, Appraisal Institute, Chicago, page 4.
[199] 2018-2019 USPAP, Chicago, Page 16.

is not privy, and which have a substantial impact on sales price. There is also the problem of determining a sales price, as plants are often sold in bundles, and any price is merely an allocation.

As to the specific sales comparables used by D&P, there are specific problems. While Pomykacz agreed that these may very well be the best comparables available, the price indicated by their sale is unreliable. While D&P were able to find comparables that were sold without a bundle, comparables 1 and 2 operated in the MISO market, rather than the PJM market which is most relevant to the future income of the subject. Further, Sales #1 and #2 had very large gross adjustments of 300% and 200% respectively. Adjustments which are based on an appraiser's judgment, and which are two to three times the size of the sale price are inherently unreliable. Also, as to Sale #1, there is certainly a question of whether it was a sale under duress, as there was a FERC order suspending the seller from selling electricity.[200] As to D&P's Sales 3 & 4, Pomykacz testified that he appraised both plants, and that both sales had either PPAs or tolling agreements that had an impact on the value of both plants. Without analyzing the PPAs, which are confidential, proper adjustments cannot be made. Accordingly, the Tribunal finds that D&P's sales approach is not a reliable indicator of the subject's value.

However, D&P only relied upon their sales approach, which fell between their cost and income approach values, as a further check on reasonableness of those approaches. Accordingly, an unreliable sales approach is not fatal to the reliability of

[200] RB41.

D&P's appraisal, as Herman and Simzyk relied primarily upon the other two approaches to value.

Bulkley performed a cost approach in the Concentric appraisal. However, she declined to put any weight on it, as it was her opinion that market participants would not rely on this approach. The Tribunal disagrees. The alternative for buying a combined cycle gas plant is to build a new one, with the latest and greatest technology. In fact, the Tribunal and the Court of Appeals relied exclusively on this approach in valuing the subject in 2011. Accordingly, the Tribunal will evaluate the cost approach prepared by both Concentric and D&P.

The Cost Approach

The appraisers agreed that the first step in preparing a cost approach is to cost out a hypothetical combined-cycle plant, determine depreciation and obsolescence and add the land value. Bulkley testified that she relied upon the engineering advice of Jeff Whipple. However, the plant she chose was not the model recommended by Whipple. The second issue in choosing the hypothetical replacement is whether to look at a 2012 or 2013 design that could be completed by tax-day, or to choose the most modern plant design known in 2016. The consequence of this decision affects both the cost of construction as well as the amount of functional and economic obsolescence that is present.

Mr. Pomykacz testified that D&P erred in using the 2016 AEO report to pick a model and base its costs, because that data would not have been knowable as of December 31, 2015. To exclude this information as urged by Respondents runs afoul of several principles. First, the use of the model is hypothetical, not real. Second, using

the 2013 model does represent the latest technology known in 2016. Third, the exclusion of evidence available after the valuation date also runs afoul of principles articulated in *Jones & Laughlin*. The Court of Appeals stated:

> The tribunal held: 'A sale that occurs *after* the tax date has little or no bearing on the assessment made prior to the sale.' (Emphasis in original.)
>
> We disagree. Unlike some situations involving assessments of industrial property for which no ready market exists and a hypothetical buyer must be posited, in this case the equipment was actually sold in a commercial transaction, albeit after the tax date. We believe that evidence of the price at which an item of property actually sold is most certainly relevant evidence of its value at an earlier time within the meaning of the term 'relevant evidence.' MRE 401. Although the sale to Youngstown Industrial occurred approximately nine months after the tax date, the lapse in time is important only with respect to the weight that should be given the evidence, not to the relevance of the evidence.[201]

For these reasons, the Tribunal holds that using the 2016 cost data is a more accurate method of determining costs and obsolescence for 2016 than using a 2012 or 2013 model. In any case, the model cost used by D&P is actually $32 million *higher* than model plant used by Concentric.[202]

Respondents also criticized D&P's use of opportunity cost in calculating the cost of financing the hypothetical plant, rather than commercial lending rates, which it put at 12%. This results in a differential in costs of $16 million for D&P versus $62,449,678 for Concentric. Interestingly, the subject was originally built with borrowed funds. However, the Tribunal holds that D&P's interest during construction is more reasonable than Concentric's cost. In so holding, the Tribunal accepts Simzyk's testimony that interest

[201] *Jones & Laughlin*, 193 Mich App at 354.
[202] P99.

can vary wildly based upon who the builder is, rather than based upon what is being built. Valuation based upon ownership runs into problems with uniformity.

The Supreme Court has discussed the meaning of the uniformity clause in a different context. In *Edward Rose Bldg Co v Independence Twp,* the Court stated:

> The Michigan Constitution mandates not only that property must be assessed at a uniform fifty percent of true cash value, but also that the ad valorem taxation itself be uniform.
>
> It is well established that the concept of uniformity requires uniformity not only in the rate of taxation, but also in the mode of assessment. The 'controlling principle is one of equal treatment of similarly situated taxpayers.'
> The uniformity requirement of the Michigan Constitution compels the assignment of values to property upon the basis of the true cash value of the property and not upon the basis of the manner in which it is held.[203]

Similarly, in *Meadowlanes Ltd Div Housing v City of Holland*, the Court stated:

> By placing such great weight on the discounted value of the underlying mortgage note, two identical properties, one built at a time when interest rates are high and the other when interest rates are low will have vastly disparate estimates of value under Allen's approach. Thus, it violates the constitutional mandate of uniformity in real property taxation.[204]

Under the principles articulated in both *Edward Rose* and *Meadowlanes*, the Tribunal holds that Concentric's use of "market interest" at 12% runs afoul of the principle of uniformity. Moreover, the Tribunal has concerns regarding the reasonableness of financing a billion dollar plus project at 12%, when its life-span per Respondent is only 25 years. Accordingly, the Tribunal finds D&P's interest during construction to be more reasonable than interest found in Concentric's cost approach.

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[203] *Edward Rose Blg Co v Independence Twp*, 436 Mich 620, 640; 462 NW2d 325 (1990) (citations omitted).
[204] *Meadowlanes*, 437 Mich at 493.

The parties also differed as to the reasonableness of D&P's determination of physical depreciation. Whipple compared the usage of the plant in MISO as a seldom dispatched peaker plant to a gently used Ford Taurus and urged that the hours used as a percentage of hours of life expectancy were a better metric. Whipple admitted however, that his metric of hours used did not consider the effect of more frequent starts and stops a peaker plant may encounter, which also account for wear and tear, (perhaps akin to stop and go driving). Moreover, as Concentric has a shorter life-span for the subject of 25 years, compared to 35 years for D&P, the Tribunal does not place much weight on this argument. Finally, as to Pomykacz's testimony regarding depreciation and obsolescence, the Tribunal holds that his testimony as a review appraiser in this case conflicts with an actual appraisal he prepared on another plant. His Monday morning quarter-backing in the present case as to what D&P should have done is contradicted by his own actions when he was charged with preparing a written appraisal. Similarly, Pomykacz's critique of overlapping between economic and functional obsolescence is not given much weight for similar reasons. Furthermore, his critique of functional obsolescence is tied to the use of a less modern replacement model than the one used by D&P. As to his criticism of the scale factor used, the Tribunal holds that the factor used by D&P appears reasonable and well supported, in scaling the costs to build a 3-unit generator from costs to build a one-unit generator. The scale factor used was also approved by Respondent's engineer expert, Jeff Whipple.

Another criticism leveled against D&P's cost approach was its exclusion of $41,439,000 for switchyard costs related to the MISO or legacy switchyard. The

Tribunal has carefully reviewed the testimony of Jeff Whipple and holds that the MISO switchyard is not part of the subject property, but costs associated with a switchyard were included in the replacement model, and therefore must be removed. It is noteworthy that Whipple commented on the impressiveness of that switchyard, just outside the boundary of the subject. In other words, the dollar amounts removed from the value of the MISO yard under this approach are possibly understated. Accordingly, in weighing the evidence presented, the Tribunal finds D&P's treatment of the MISO switchyard to be appropriate in this case.

Respondents did point out two flaws in D&P's cost approach, which the Tribunal agrees. First, D&P chose not to include owner's profit in the cost of developing the model. The Tribunal disagrees with D&P. Simply stated, no one would build a plant for free. This principle is also recognized in *The Appraisal of Real Estate*, which specifically lists this as a cost that must be included.[205] That cost, per Exhibit P99 is $53,853,870.

The second area in which the Tribunal agrees with Respondent concerns not only the cost approach, but each approach used by D&P, and that is the subtraction of $58,915,530 as the present value of the Segreto Switchyard, discussed below in detail. Accordingly, the Tribunal recomputes D&P's cost approach to $509,750,000 as follows:[206]

Item	D&P unrevised cost	MTT revised cost
Model Cost	$1,092,007,000	$1,092,007,000
Interest during construction	$16,000,000	$16,000,000
Owner's profit 5% of model cost	0	$54,600,350

[205] *Appraisal of Real Estate*, 14th Ed, Appraisal Institute Chicago, 2013 at 569.
[206] Table based on P01 at 168.

Less MISO switchyard cost	$41,439,000	$41,439,000
Replacement Cost New (rounded)	$1,066,600,000	$1,121,168,350
Physical depreciation (cost x 31%)	$330,646,000	$347,562,188
RCNLD (cost new – phys dep)	$735,954,000	$773,606,161
Functional obsolescence	$95,215,392	$95,215,392
Subtotal	$640,738,608	$678,390,770
Economic obsolescence 25%	$160,184,652	$169,597,692
Subtotal	$480,553,956	$ 508,793,078
+Land value	$1,342,800	$1,342,800
-Present value of Segreto switchyd	$58,915,530	$-0-
Cost indicator of value (rounded)	$423,000,000	**$510,000,000**

This revised indicator of value by the cost approach is much closer to D&P's value by its income approaches, and with the removal of the same Segreto switchyard deduction results in a tight range of values between the two approaches. It is also noteworthy that the cost approach usually renders a higher value than other approaches. The Tribunal's inclusion of owner's profit into D&P's cost approach renders the cost approach value as somewhat higher than the income approach.

The Income Approach

Both D&P and Concentric performed an income approach to value. As noted above, the Tribunal finds Concentric's approach to be less reliable than D&P because it used a 15-year DCF, while D&P used two DCFs, a Direct Capitalization and a guideline public company method analysis. The DCFs used by D&P were 5-year and 10-year. The shorter discount periods are less speculative than the one 15-year DCF performed by Concentric.

Respondents' first area of criticism leveled against D&P's income approach was its use of a 65% capacity factor. A capacity factor is an estimate of the percentage of capacity available by the subject that will be dispatched. Concentric concluded to 87%

capacity. As the subject had only run in MISO as a peaker plant prior to tax date, reviewing prior years' capacity could not have been helpful in determining the future in PJM. Concentric used a dispatch model with hour by hour pricing going forward for the next 15 years. While Respondent's experts opined that power plants used dispatch models to determine capacity, the Tribunal agrees with Robert Herman that forecasting hour to hour demand for 15 years is "a bit much," and is an example of "precision without accuracy."[207] As noted above, the model's inaccuracy was abundantly clear, having been off by 30% in the first 3 years.

D&P relied upon representations from Petitioner as to how they intended to run the plant, as well as on the range of actual capacities of gas-fired plants within PJM. Plant management estimated a capacity between 62% and 67%.[208] Per Herman's testimony, combined cycle plants ran at 61% capacity in the PJM market in 2015.[209] Moreover plants larger than 900 MW such as the subject ran at only 55.44% in 2015.[210] The Tribunal therefore finds D&P's capacity factor to be more reality based than Respondent's capacity factor of 87%. The Tribunal does not find it credible that a power plant which had never run higher than 42.7% and had run at an average of 26% for the previous 5 years would now be run at 87% for the next 5-10 years.[211]

Related to capacity are the revenue forecasts. D&P used three sources for its revenue source projection, HIS Markit used in the Northern Illinois Hub, weighed at 45%, Intercontinental Exchange, which uses actual contracted prices agreed to in the

[207] T8 at 1763
[208] P93 at 5.
[209] P93 at 6.
[210] P93 at 7.
[211] P01 at 65.

Dayton Hub, weighed at 45%, and AEO Indexed Historical Costs, weighed at 10%.[212] Much was made by Respondents that the Northern Illinois Hub had lower prices than the Dayton Hub. However, Respondent's witness Tom Sweet of ABB Ventyx testified that the difference between the hubs in 2-3%.[213] While a small percentage difference in prices can make a significant difference in an income approach, especially one where the numbers are so large, the spark spread used by D&P which is the measure of profitability is in fact significantly *higher* in the first three years.[214] The Tribunal concludes that the projected revenue and expense forecasts relied upon by D&P in their income approaches would lead to a significantly higher value than Concentric's, all things being equal.

Not unexpectedly, all things are not equal between the two appraisals. D&P used a much higher discount rate than Concentric, which contributed to a significantly lower value for the subject. Specifically, Respondents criticized the 2.54% small company size premium and the 3.0% industry (non-systematic risk premium) used to build the rate.

As to the small company premium, Pomykacz and Bulkley criticized D&P for using it in building up the discount rate. Per Pomykacz, this element should be based upon the size of the buyer, rather than upon the asset. Again, such an analysis runs afoul of Michigan's uniformity clause. By applying a risk premium as advocated by Pomykacz and Bulkley as part of the discount rate based upon *who buys, sells or owns* the property rather than *the property itself* will run afoul of Michigan's uniformity

[212] P93 at 3.
[213] T5 at 1000.
[214] P93 at 17.

requirement, as interpreted by our Supreme Court. As discussed above, the Supreme Court in *Edward Rose* and in *Meadowlanes* cautioned against determining the value of an asset depending upon who owns it. Accordingly, the Tribunal holds that the small business premium was appropriately applied in the discount rate's build-up.

As to the discount rate's 3.0% industry risk premium in cost of equity build-up, the issue was raised as to whether or not D&P followed the CAPM formula. The CAPM formula is set forth in *Valuing Machinery and Equipment*:[215]

E(Ri) = Rf + ß(RPm) + RP
Where:
E(Ri) = Investor's required return on equity for the subject property
Rf = Risk-free rate as of the valuation date
ß = Beta of the industry based on comparative stocks
RPm = Market risk premium
RP = Additional risk premium
Table 5.7. The capital asset pricing model.

The Tribunal finds that D&P followed the formula found in this treatise, which clearly requires an additional risk premium. Accordingly, the Tribunal accepts D&P's discount rate, which considers the added risk of a merchant plant electricity producer. D&P concluded to a true cash value under this method of $450,000,000.

In reaching this result, D&P subtracted out intangibles, which Respondents contend is error. The Tribunal disagrees with Respondents. While it is true that electricity is a fungible commodity, intangibles and other non-taxable assets such as spare parts are required to run the plant. Most significantly, there is a service contract and warranty through Mitsubishi for the turbines, the terms of which are confidential.

[215] *Valuing Machinery and Equipment, the Fundamentals of Appraising Machinery and Technical Assets*, 3rd Ed American Society of Appraisers, Reston, VA 2011 at 131. This treatise was admitted into evidence as P82.

There is also customized software, emissions permits, fuel supply contracts and a PJM interconnection agreement. Mark Pomykacz testified that 3% is a common business enterprise value, and he in fact used 3% for business value in appraising a power plant. Accordingly, the Tribunal finds Respondents' criticism of this value to be unwarranted and accepts 3% reduction for business value as a legitimate factor in determining the value of the subject property.

The conclusion under the reconciliation of each of D&P's income approaches subtracts the value of the PJM/Segreto switchyard of $58,915,530 to reach $450,000,000. As with D&P's cost approach and market approach, the Tribunal holds that this subtraction is not appropriate in valuing the subject. While the expenditure of money to build this off-site switchyard is necessary to enter the more lucrative PJM market, the Tribunal is not convinced that this expenditure should be deducted from the value of tangible assets. First, the moneys expended to build the Segreto switchyard, which is not the subject of this appeal, were already expended prior to the valuation date. Second, Petitioner has pointed to no authority or learned treatise advising such a deduction. Third, the assignment calls for valuing the "usual selling price" of real and personal property. The expenditure of nearly $60 million may be an appropriate deduction for some purpose from the entity but is not "usual." Further, the Tribunal holds that it is not an appropriate deduction in determining the value of land, building machinery and equipment. Accordingly, as with the cost approach, the Tribunal will add $59 million to Petitioner's reconciled conclusion of value under the income approach, to arrive at a conclusion of value under this approach of $509,000,000.

Reconciliation of Approaches

With the modifications made to both D&P's income and cost approaches, the values are relatively speaking, close. Under the cost approach as modified, the Tribunal concluded to a value of $510,000,000. Under the income approach as modified, the value is $509,000,000. While a difference of a million dollars is more than spare change, it amounts to a paltry 0.2% difference between the approaches. Giving each approach equal weight, the Tribunal holds that the subject's true cash value for 2016 of all the land, building and personal property is $509,500,000. While this figure is significantly less than what Respondents assessed and appraised, it is significantly more than the Tribunal concluded to in 2011 of $334,947,600. The increase in value can be explained by the significant decrease in the price of natural gas, and the transition of the subject out of MISO and into the PJM market place.

Allocation

The first step is to allocate the value of $509,500,000 between real and personal property. D&P's methodology concluded that the allocation between real property and personal property is 97% to 3% real property net of land.[216] Accordingly, the agreed upon land value of $1,342,800 is subtracted from $509,500,000 resulting in an allocable true cash value of $508,157,200. Taking 3% of this figure results in a product of $15,244,716 for real property. Adding back the land value to this figure results in a value for the real estate parcel of $16,587,516.

[216] See P01 at 182-184.

To value the personal property parcels, taking 97% of true cash value for the whole not including land produces a result of $492,912,484. Alternatively, the TCV of real property can be subtracted from $509,500,000 and produce the same result.

Next, the state-certified pollution control exemptions of $31,960,972 must be subtracted from the value of the personal property.[217] $492,912,484 - $31,960,972 renders a result of $460,951,512, the TCV of non-exempt personal property. That is the sum which must be allocated between the turbine parcel and the non-turbine parcel. D&P concluded that 57% of TCV goes to the turbine-generator package, and 80% of that package is associated with the turbine. 80% of 57% is 46% rounded. Taking 46% of $460,951,512 results in a TCV for the turbine parcel of $212,037,696. The balance of non-exempt personal property is $248,913,816.

D&P also concluded to a different allocation between turbine and non-turbine, based upon respective costs uninstalled. However, MCL 211.27(1) states in relevant part, "(1) As used in this act, 'true cash value' means the usual selling price *at the place* where the property to which the term is applied is *at the time of assessment* . . . ."[218] As the turbines were in fact installed at the time of assessment, the allocation should take that into account. Valuing the turbine as installed is also consistent with the STC assessor's manual, which costs equipment as delivered and installed. For the same reason, Concentric's allocation of 18.07% to turbine costs is rejected.

Determination of 2.114 Sanctions from November 15, 2017 Order

[217] Concentric's conclusion as to the value of pollution control equipment was slightly less at 43.97%. which it developed using its cost approach, which it gave zero weight to in reconciliation.
[218] *Id*. (emphasis added).

On November 14, 2017, the Tribunal, per former Chair Steven Lasher found that costs were appropriate in response to a frivolous motion for summary disposition, pursuant to MCR 2.114(E), where a document is signed in violation of the court rule. Pursuant the Tribunal's Order, Petitioner's counsel filed a Bill of Costs on December 5, 2017 totaling $25,375.50. Respondents applied for leave to appeal to the Michigan Court of Appeals on this Order, as well as the Order denying Summary Disposition. After the Court of Appeals denied leave, Respondents filed objections to Petitioner's Bill of Costs on February 12, 2018. A hearing on the Bill of Costs was scheduled, rescheduled and finally held on April 26, 2018. The Tribunal issued an Order Withholding Decision Regarding Attorney Fees on May 14, 2018 to avoid any appearance of impropriety or partiality prior to the scheduled hearing, and to avoid further delays and additional interlocutory appeals. As the hearing on the tax appeal is concluded, the Tribunal must now issue its determination on the award of attorney fees.

Petitioner filed a Bill of Costs, Respondents filed objections, Petitioner filed a Reply Brief. The following exhibits were presented at hearing:

Cost Exhibit 1 Wezner curriculum vitae

Cost Exhibit 2 Motion Practice document

Cost Exhibit 3 November invoice

Cost Exhibit 4 December invoice

Cost Exhibit 5 Page 14 of November invoice

Cost Exhibit 6 Rodger Kershner bio

Cost Exhibit 7 Patrick McCarthy bio

Cost Exhibit 8 Bradley Knickerbocker bio

Cost Exhibit 9 Mary Dirkes bio

Cost Exhibit 10 2017 Economics of Law Practice report

Cost Exhibit 11 Billing rate summary report

As part of his opening statement during the April 26th cost hearing, Patrick McCarthy stated:

> Let's talk about the motion. The motion for summary disposition on the real party in interest. It was filed on October 25th, 2017. Including exhibits, it was 236 pages. It requested immediate consideration, requiring a response within seven days, which we did on November 1. Our response was, with exhibits, 82 pages. But that wasn't the only thing going on at the time, Your Honor.
>
> ***
>
> So I tell you all of that because, again, within a week's time, we are dealing with six things related to this case. Six motion papers that had to be filed within a week's time.
>
> Now, you know, I know Judge Lasher found this frivolous, the motion frivolous; but this was a serious motion for our client, Your Honor. They're seeking to dismiss our appeals from 2012 to 2015 plus the 2016 tax year. According to the Respondents, if they're dismissed, that results in 40 to $50 million in tax liability.
>
> ***
>
> I'm sure you read the motion. The motion in terms of what probably should have been the dispositive facts probably should have taken up a half a page. But there were eight other pages that are weaving partial facts, some false facts, untrue facts, with the intent to show that my client is bad, they had bad motives, they shouldn't be trusted.
>
> Now, none of that was true; but, on the motion to sink and to knock out all of our appeals, we had to respond to each and every one of those things; and we did.[219]

[219] CT at 6-8.

McCarthy went on to enumerate the factors found in *Smith v Khouri*,[220] and under the rules of Professional Responsibility,[221] and to point out each factor. To summarize, McCarthy stated:

1. The professional standing and experience of the attorneys. The attorneys involved are all equity partners of Howard & Howard.
2. The skill, time, and labor involved. Described in bills and Miss Wezner's testimony.[222]
3. The amount in question and results achieved. Amount in question is $40 to $50 million.[223]
4. The difficulty of this case. "[T]his is a fairly complex case involving a power plant."[224] Although conceptually the same as a typical property tax case, the fact that it is a power plant makes it more difficult to put together.[225]
5. Expenses incurred. $600 were incurred in Westlaw research charges. Petitioner indicated they are "taking this off the table".[226]
6. The nature and length of professional relationships with the client. Howard & Howard has represented New Covert Generating Company for "about a decade."[227]

[220] *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008),
[221] MRPC 1.5
[222] CT at 12.
[223] CT at 12.
[224] CT at 12.
[225] CT at 12.
[226] CT at 13.
[227] CT at 13.

7. The likelihood, if apparent to the client, that acceptance of the particular employment will preclude other employment by the lawyer. Client was aware that attorneys were working on six motions, with immediate consideration requested, to be completed within seven days.[228]
8. Fees customarily charged in the area (locality rule for fees).
9. Time limitations imposed by client or circumstances. Respondent requested immediate consideration of motion for summary disposition.[229] Six motions seeking immediate consideration within a week.[230]
10. Hourly or contingency fee basis. Hourly fees were charged.[231]

After applying these factors, the revised demand for costs is $25,357.[232]

On behalf of Intervening Respondent, Laura Genovich set forth its objections to Petitioner's Bill of Costs:

> [T]here are two sides to every story on why we had a flurry of motions at this particular time in the case.
>
> But I also raise that to say that, if you're staffing your litigation file and you have some procedural motions like a motion to extend time or to compel discovery, and you have a dispositive motion that you say you take very seriously, why are you delegating the dispositive motion to the attorney who has never worked on the file? Who has to spend seven hours getting caught up on the background, who then is going to spend more than 36 hours actually doing the drafting?[233]
>
> ***
>
> There's a question there on why you would put an attorney on it who, at least to our knowledge, was new to the file. And we gather that because

[228] CT at 13
[229] CT at 6.
[230] CT at 7.
[231] CT at 16.
[232] CT at 17.
[233] CT at 19.

> we hadn't seen her name before, and she spent seven hours learning the background of the case.
>
> Among other things, it was 6.7 hours on October 26th conferring with the other attorneys who also billed their time on the background of the case and then 36.1 hours drafting the brief, which then apparently had to be reviewed by four other attorneys on the case.
>
> Now, if their client is willing to pay for that kind of work, that's great for them; but that's not the standard that the Tribunal applies. The question is whether that was reasonable or whether those hours were in part redundant or excessive. We're obviously not seeking zero fees here, but we're seeking a reasonable reduction of the number of hours worked on that matter.[234]

Brian Knotek, attorney for Respondent, urged the Tribunal to rescind its Order granting cost and attorney fees, arguing that the facts were not completely black and white.

The only witness was Michelle Wezner. Michelle Wezner, a partner at Howard & Howard, PLLC, wrote the brief and incurred most of the time. Other Howard & Howard, PLLC attorneys who charged time to the file included Patrick McCarthy (commercial litigator), Rodger Kershner (senior attorney, of counsel), Brad Knickerbocker (property tax expert), and Mary Dirkes (commercial litigator).

Wezner testified to the hours of each partner as well as their billing rates. The following table sets forth that information:

Name	Hours	Rate	Total
Rodger Kershner – of counsel	3.9	$525	$ 2,047.50
Brad Knickerbocker – equity partner	8.5	$430	$ 3,655.00
Patrick McCarthy – equity partner	3.3	$450	$ 1,485.00

[234] CT at 19-20.

Mary Dirkes – equity partner	1.9	$425	$ 807.50
Michelle Wezner – equity partner	42.4	$415	$17,596.00
Totals	60.0		$25,591.00

Conclusions of Law

It has been the practice of the Tribunal to award sanctions only where there has been egregious conduct. Such conduct is relatively uncommon before the Tribunal. It is also true that the amount in controversy in the present case, combined with Docket No 12-000248, is extraordinarily large, and calls for zealous advocacy. However, rules of civility, as well as Michigan's Court Rules and case law require that lines be drawn concerning as to how zealous advocacy can be. MCR 2.114(D) -(F) state as follows:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> > (1) he or she has read the document;
> >
> > (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
> >
> > (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

> (F) Sanctions for Frivolous Claims and Defenses. In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.

The Court of Appeals has held that MCR 2.114 applies to proceedings in the Michigan Tax Tribunal. In *Lanzo Construction v Southfield*,[235] the Court of Appeals found that this court rule applies to the Tribunal:

> The purpose of imposing sanctions under MCR 2.114, however, is to 'deter parties and attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose.' Nothing in TTR 205.1145 or any other Tax Tribunal Rule addresses sanctions. Therefore, because no applicable Tax Tribunal Rule exists regarding sanctions, MCR 2.114 applies to proceedings before the Tax Tribunal. Accordingly, because the Tax Tribunal found that petitioner's petition and motion for reconsideration were filed in violation of MCR 2.114(D), the Tax Tribunal erred when it failed to sanction petitioner, its counsel, or both.[236]

Interestingly, while the Court of Appeals points out that the purpose of deterrence, the rule itself prohibits the imposition of punitive damages.

The Court of Appeals also pointed out the mandatory nature of determining sanctions:

> Because MCR 2.114(E) states that a court 'shall impose' sanctions on a party, its counsel, or both, if it finds that MCR 2.114 was violated, a court has no discretion in determining whether sanctions should be imposed. When MCR 2.114 is violated, the imposition of sanctions is mandatory.[237]

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[235] *Lanzo Construction v Southfield*, unpublished per curiam opinion of the Court of Appeals entered June 28, 2007 (Docket No 268567). While unpublished, the Tribunal finds this to be the only appellate case discussing sanctions in the Tribunal, and further, finds its logic to be persuasive.
[236] *Id*. at 1 (citations omitted).
[237] *Id*.

The Michigan Supreme Court has also made it clear that an award of attorney fees pursuant to a rejection of a case evaluation must be reasonable in terms of time billed and rate billed.[238]

There are several facts which stand out in the present case. First, the manner in which Intervening Respondent's counsel conducted litigation in this case, as well as in Docket No. 12-000248 calls into question whether the motions were "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[239] The fact that at various times, Respondents filed six separate motions for summary disposition (three separate motions with identical motions filed in Docket No. 12-000248), as well as interlocutory appeals indicates an improper purpose. Further, the cluster of motion activity in October, combined with the request under Tribunal rules for immediate consideration requiring a response in seven days, calls into question whether an improper purpose was behind the filing.[240]

As to the October 25, 2017 motion, the Tribunal is aware that the signatory has filed numerous motions for summary disposition on behalf of Respondents in other tax appeals concerning "a party-in-interest" under *Spartan Stores v City of Grand Rapids*.[241] Not only is counsel familiar with that case, he has repeatedly taken the opposite tack from what he took in the present case, urging that only the title-holder to a property is a

[238] *Smith v Khouri*, 481 Mich 519; 751 NW2d 572 (2008).
[239] MCR 2.114(D)(3).
[240] Because of this case, the Tribunal no longer grants immediate consideration for motions for Summary Disposition where the moving party has weeks to prepare such a motion and the non-moving party has seven days to respond.
[241] *Spartan Stores v City of Grand Rapids,*307 Mich App 565; 861 NW2d 357 (2014).

party in interest.[242] In the present case, he argues that the title holder is not a party in interest, in direct contravention of the holding in *Spartan Stores*.

Further, in the brief in support, counsel did his best through both allegations of fact and innuendo to put Petitioner in a bad light. While such characterizations are allowable and perhaps common in the course of zealous representation, the purpose of the motion appears to be to poison the well at hearing, rather than to win on the merits of the motion.

As to Petitioner's Bill, it is true that the hourly billing rates for all concerned are at well above the 75th percentile, and in some cases, above the 95th percentile.[243] The Tribunal also finds that the Khouri factors as set forth by Patrick McCarthy above, all point to the justification of these high rates. Particularly important is the amount of money at stake, the time pressure, the experience and standing of the attorneys at Howard & Howard, and the fact that a very limited number of attorneys are qualified or experienced in property tax appeals of power generation plants. Accordingly, the Tribunal accepts the billing rates, high as they are, as reasonable in this case.

However, the Tribunal also finds that the matter raised in this specific motion is rather pedestrian. Even conceding that Petitioner's counsel had no choice but to rebut the extraneous elements in Respondent's Motion, the Tribunal finds that the 42.4 hours of time billed by Michelle Wezner is excessive. One of the reasons that an attorney can justify a high hourly rate is that their expertise allows them to spend less time to

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[242] See *Shopko Prop SPE v Escanaba*, COA # 336892, MTT # 15-001735; *Shopko Prop v Houghton*, 336890, MTT # 15-001722. Van Coevering was also the attorney of record for Petitioner in *Spartan Stores*.

[243] See Cost Exhibit 10, 2017 Economics of Law active Attorney Income and Billing Rate Summary Report, published by the State Bar of Michigan, at 4.

complete tasks. The Tribunal has no doubt that Wezner is a talented attorney experienced in brief writing. However, she testified that she was not familiar with the facts in this case and had to make herself familiar with the applicable law. The 6.7 hours pointed out by Genovich underscore this concern, and also suggest some redundancy in billing. Further, some of the required research into the record could have been performed by a lower-priced associate. Based upon the undersigned's 38 years of experience, the Tribunal holds that a more reasonable amount of time would be 24 billable hours from Wezner.

The Tribunal accepts the hours billed by Kershner, Knickerbocker, McCarthy and Dirkes, as their familiarity with this matter and input would be necessary and does not appear to be unreasonable. Accordingly, reducing Wezner's hours from 42.5 to 24 hours, the following table sets forth the Tribunal's holding as to reasonable attorney fees:

Name	Hours	Rate	Total
Rodger Kershner – of counsel	3.9	$525	$ 2,047.50
Brad Knickerbocker – equity partner	8.5	$430	$ 3,655.00
Patrick McCarthy – equity partner	3.3	$450	$ 1,485.00
Mary Dirkes – equity partner	1.9	$425	$ 807.50
Michelle Wezner – equity partner	**24**	**$415**	**$ 9,960**
Totals	60.0		**$17,955**

As with the allocations required in determining the TCV of each parcel, the Tribunal must also allocate this amount over dockets. The identical work and brief was

filed in both this case as well as in Docket No 12-000248. Therefore, 50% of the award falls onto this docket, and 50% falls under Docket No 12-000248. While that matter has settled, the parties stipulated to the Tribunal retaining jurisdiction under it has ruled on this cost motion, as well as the cost motion filed in conjunction with Respondents' Motion for Summary Disposition on June 15, 2018. Accordingly, the Tribunal awards to Petitioner's counsel as sanctions under MCR 2.114 against Jack Van Coevering who signed the offending October 25, 2017 Motion the amount of $8,977.50.

Sanctions Under MCR 2.114 Regarding June 15, 2018 Motion

On July 13, 2018, the Tribunal placed into abeyance Petitioner's request for sanctions against Respondents' counsel for the filing of Summary Disposition Motions in this docket, as well as Docket No 12-000248 on June 15, 2018, one month before the commencement of what was scheduled to be a two-week hearing. Petitioner stated:

> Respondents should be sanctioned for refiling essentially the same motion, making the same arguments, that Respondent Township previously filed with the Tribunal in MTT Docket No. 399578 (Judge Lasher) involving the 2010 and 2011 tax years (the "2010-11 Case").' The Tribunal flatly rejected the Respondents' claims **…** as did the Court of Appeals in *New Covert Generating Co v Covert Twp,* No. 320877, … The Michigan Supreme Court then denied leave to appeal on March 29, 2016 . . . . In other words, whether by virtue of collateral estoppel or several previous well-reasoned opinions, Respondents know that their Motion lacks merit.
>
> Further, if Respondents actually believed that their Motion had merit, presumably they would not have waited until mere weeks before trial to file it, and presumably they would not have expended significant taxpayer dollars litigating a case that could have been dispensed with at the outset. Simply put, Respondents know their Motion is frivolous.

The Tribunal agrees with Petitioner. Respondents' motions were nearly identical to motions filed in the previous case and not unexpectedly, were resolved in the same

fashion. Arguably, the summary disposition issue was precluded by doctrines of res judicata, collateral estoppel, or law of the case.

Further, Respondents failed to acknowledge that this exact same issue was decided by the Tribunal as well as the Court of Appeals. Had Respondents made that acknowledgement and urged the prior decisions to be overruled as wrongly decided, they might avoid a finding of sanctionable behavior under MCR 2.114(D) or (F). Their failure to sight the previous decision, however, leads the Tribunal to the conclusion that Respondents' last Motion for Summary Disposition was frivolous, and imposed for an improper purpose. Having so ruled, the Tribunal is obligated to impose the sanction of reasonable attorney fees under MCR 2.114 against the signatories of that motion. Accordingly, Petitioner's counsel shall submit a Bill of Costs consistent with the Tribunal's ruling as to sanctions. Respondents shall file their objections within 14 days.

The Tribunal finds, based upon the Findings of Fact and the Conclusions of Law set forth herein, the subject property's TCV, SEV, and TV for the tax year(s) at issue are as stated in the Introduction section above.

JUDGMENT

IT IS ORDERED that the property's state equalized and taxable values for the tax year(s) at issue are MODIFIED as set forth in the Introduction section of this Final Opinion and Judgment.

IT IS FURTHER ORDERED that the officer charged with maintaining the assessment rolls for the tax years at issue shall correct or cause the assessment rolls to be corrected to reflect the property's true cash and taxable values as finally shown in this Final Opinion and Judgment within 20 days of the entry of the Final Opinion and

Judgment, subject to the processes of equalization. See MCL 205.755. To the extent that the final level of assessment for a given year has not yet been determined and published, the assessment rolls shall be corrected once the final level is published or becomes known.

IT IS FURTHER ORDERED that the officer charged with collecting or refunding the affected taxes shall collect taxes and any applicable interest or issue a refund within 28 days of entry of this Final Opinion and Judgment. If a refund is warranted, it shall include a proportionate share of any property tax administration fees paid and penalty and interest paid on delinquent taxes. The refund shall also separately indicate the amount of the taxes, fees, penalties, and interest being refunded. A sum determined by the Tribunal to have been unlawfully paid shall bear interest from the date of payment to the date of judgment, and the judgment shall bear interest to the date of its payment. A sum determined by the Tribunal to have been underpaid shall not bear interest for any time period prior to 28 days after the issuance of this Final Opinion and Judgment. Pursuant to MCL 205.737, interest shall accrue (i) after December 31, 2009, at the rate of 1.23% for calendar year 2010, (ii) after December 31, 2010, at the rate of 1.12% for calendar year 2011, (iii) after December 31, 2011, through June 30, 2012, at the rate of 1.09%, (iv) after June 30, 2012, through June 30, 2016, at the rate of 4.25%, (v) after June 30, 2016, through December 31, 2016, at the rate of 4.40%, (vi) after December 31, 2016, through June 30, 2017, at the rate of 4.50%, (vii) after June 30, 2017, through December 31, 2017, at the rate of 4.70%, (viii) after December 31, 2017, through June 30, 2018, at the rate of 5.15%, (ix) after June 30, 2018, through December

31, 2018, at the rate of 5.41%, and (x) after December 31, 2018 through June 30, 2019, at the rate of 5.9%.

IT IS FURTHER ORDERED that pursuant to this Order, Jack Van Coevering, the signatory of the October 25, 2017 Motion for Summary Disposition deemed frivolous and imposed for an improper purpose shall pay to Petitioner's counsel the sum of **$8,977.50**, said sum being 50% of the total award of **$17,955**, which includes fees incurred on both this docket and docket No 12-000248 within 28 days.

IT IS FURTHER ORDERED that Petitioner shall submit a reasonable bill of costs and attorney fees as to Respondents' June 15, 2018 Motion for Summary Disposition consistent with this Order within 14 days, and that Respondents shall file their objections within 14 days of the filing of the bill of costs.

With the exception of costs imposed regarding the June 15, 2018 Motion for Summary Disposition, this Final Opinion and Judgment resolves all pending claims in this matter and closes this case.

APPEAL RIGHTS

If you disagree with the final decision in this case, you may file a motion for reconsideration with the Tribunal or a claim of appeal with the Michigan Court of Appeals.

A Motion for reconsideration must be filed with the required filing fee within 21 days from the date of entry of the final decision.[244] Because the final decision closes the case, the motion cannot be filed through the Tribunal's web-based e-filing system; it

[244] See TTR 261 and 257.

must be filed by mail or personal service. The fee for the filing of such motions is $50.00 in the Entire Tribunal and $25.00 in the Small Claims Division, unless the Small Claims decision relates to the valuation of property and the property had a principal residence exemption of at least 50% at the time the petition was filed or the decision relates to the grant or denial of a poverty exemption and, if so, there is no filing fee.[245] A copy of the motion must be served on the opposing party by mail or personal service or by email if the opposing party agrees to electronic service, and proof demonstrating that service must be submitted with the motion.[246] Responses to motions for reconsideration are prohibited and there are no oral arguments unless otherwise ordered by the Tribunal.[247]

A claim of appeal must be filed with the appropriate filing fee. If the claim is filed within 21 days of the entry of the final decision, it is an "appeal by right." If the claim is filed more than 21 days after the entry of the final decision, it is an "appeal by leave."[248] A copy of the claim must be filed with the Tribunal with the filing fee required for certification of the record on appeal.[249] The fee for certification is $100.00 in both the Entire Tribunal and the Small Claims Division, unless no Small Claims fee is required.[250]

By David B. Marmon

Entered: February 8, 2019

[245] See TTR 217 and 267.
[246] See TTR 261 and 225.
[247] See TTR 261 and 257.
[248] See MCL 205.753 and MCR 7.204.
[249] See TTR 213.
[250] See TTR 217 and 267.