

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

v.

TOWN OF LONDONDERRY

Docket Nos. 1230-81 and 2084-82

DECISION

Following pre hearing conferences held on June 25, 1986 and September 15, 1986 in the above entitled and other cases, a hearing was held as scheduled on September 15, 16, 17, 18 and October 1, 1987. Memoranda of Law and Requests for Findings of Fact and Rulings of Law were filed on November 17 and 18, 1987.

The Taxpayer was represented by Eaton W. Tarbell, Jr., Esquire and Margaret H. Nelson, Esquire.

The Town was represented by Richard F. Upton, Esquire and Barton L. Mayer, Esquire.

The hearing, duly scheduled, was held per the Notice of the Hearing on the Merits of August 6, 1987, which notified the parties in the above entitled and other cases that:

"As stated in the Board's Order of November 26, 1986, as modified by the Board's Order of March 19, 1987, the Board will first hear all the parties on the common issues. The common issues are:

1. PSC's status as a regulated public utility.
2. The nature and effect of public utility regulation.
3. A description of PSC's electrical generation, transmission and distribution system.
4. PSC's bookkeeping procedures and any appropriate adjustments thereto.
5. Testimony, to the extent any is required, on the appropriate methods of valuation for regulated public utility property.

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The evidence heard on the common issues will apply to all the subject cases. All defendants wishing to conduct cross examination or present evidence on the common issues must do so at the Londonderry hearing. The evidence on the common issues taken during the Londonderry case will be incorporated in all the other subject cases and no additional evidence on the common issues will be heard subsequent to the Londonderry hearing. Immediately following the presentation of evidence on the common issues the Board will hear all remaining evidence and arguments to be presented in the Londonderry case."

The Taxpayer appeals, pursuant to RSA 76:16-a, the assessments of \$8,719,050 placed on its property for the 1981 and 1982 tax years.

The Public Service Company of New Hampshire (hereafter PSNH) v. Londonderry cases, Docket Nos. 1230-81 and 2084-82 for tax years 1981 and 1982 were consolidated by agreement of the Taxpayer and the Town.

The Taxpayer and the Town stipulated PSNH timely filed inventories for the tax years in question, 1981 and 1982; PSNH had timely filed petitions for abatements with the Board of Selectmen in both of those years and timely filed petitions for abatement with the Board of Tax and Land Appeals or its predecessor Board of Taxation for the tax years 1981 and 1982. The Taxpayer and the Town also stipulated PSNH submitted sufficient inventories to meet the requirements of the statute in both 1981 and 1982.

The Taxpayer and the Town stipulated that December 31 may be used as a proxy for the following April 1, with respect to matters drawn from the companies books and records for both years 1981 and 1982.

Thirdly, the Taxpayer and the Town stipulated that the equalization ratios established by the State of New Hampshire Department of Revenue Administration are 38 percent for 1981 and 36 percent for 1982.

The Taxpayer and the Town also stipulated the highest and best use of all of the taxable property, other than the land, is as a regulated public utility property as used in the years in questions 1981 and 1982.

The Taxpayer and the Town also stipulated the only issue for the Board to determine was the fair market value of the subject property as of April 1, 1981, and April 1, 1982.

The Taxpayer and the Town did not stipulate as to the highest and best use or the fair market value of the land.

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THE PARTIES' POSITIONS ON THE COMMON ISSUES

1) The Taxpayer and the Town agreed PSNH was a regulated public utility for the tax years in question.

2) The Taxpayers position as to the nature and affect of public utility regulation was PSNH is subject to regulation by the Federal Energy Regulatory Commission (FERC) and the New Hampshire Public Utilities Commission (PUC). The FERC and the PUC limit PSNH's earnings based upon a rate base comprised principally of the original cost less depreciation, or net book cost, of the assets devoted to the public service. The PUC must approve any sale or transfer of PSNH's public utility property and determine what portion of the purchase price, if any, the purchasing utility will be allowed to include in its rate base. The FERC must approve the purchase and determine the amount of the purchase price to be included in the rate base for any public utility subject to its jurisdiction.

The Taxpayer argued both the FERC and the PUC have long-standing policies which allow a purchasing utility to only include in its rate base the net book cost of the assets in the hands of the selling utility. These policies which are similar to the regulatory policies of many other jurisdictions including Massachusetts, Maine and Vermont, were developed in order to prevent artificial padding of utility rate bases by transfers among utility companies. Since utility customers pay for the use of public utility properties through their rates, the FERC and the PUC have recognized that it would be inequitable to allow an increase in utility rates as a result of transfers of property absent on usual circumstances where a purchasing utility can demonstrate a direct benefit to the customers by allowing the excess of the purchase price over net book cost in its rate base.

The Taxpayer argued during the period 1971-1981, the PUC authorized only two transfers at above net book cost and allowed the purchaser to include the excess above the sellers net book cost in its rate base. All other transfers (some 14 in number) approved were at the sellers net book cost. Even in the two cases, which allowed transfers at above net book cost, purchase prices represented only a small premium of above net book cost, approximately 12.5 percent and 23 percent respectively. Both of those cases were decided prior to the oil embargo of the mid 70's and prior to the high inflation which gripped the economy in the late 70's and early 80's, both of which events put great pressure on regulators to maintain utility rates as low as reasonably possible. Furthermore, these transfers involved sales by small companies to larger utilities with the likely consequence of better and more reliable service for consumers.

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The Town's position as to the nature and affect of public utility regulation was that value for rate-making purposes and value for taxation are different because they are based upon different objectives. Value for rate-making purposes is designed to limit the investor to recovery of no more than his original investment (through depreciation), together with a fair rate of return thereon. Value of property for taxation is addressed to current market value and takes into consideration changing price levels, unlike rate-base value.

The Town also argued under New Hampshire law, in sales of public utility property from one public utility to another, the price to be paid is not subject to direct control by the Public Utilities Commission.

3) The Taxpayer, through its witness, Richard E. Rudolf, Jr. explained that it sold through its franchise electricity directly to consumers and also sold wholesale power to other utilities in the state of New Hampshire. Mr. Rudolf testified there are three portions that constitute the electric system of PSNH the first being generation, the second being transmission and the third being distribution. Mr. Rudolf further explained that generation is any number of methods which convert energy from one form into electric energy and these methods are included hydro-electric plants and fossil fire generating plants. Mr. Rudolf then described the transmission system would serve solely to transport bulk amounts of power from one location to another which is located with rights of way throughout the state of New Hampshire. Thirdly, Mr. Rudolf described the distribution system which consisted generally of poles and wires and associated equipment that are located along travel ways, for instance city and town roads, for the purpose of bringing the electrical service close enough to the locations of customers. The Taxpayers submitted an exhibit (Taxpayers Exhibit 4) a glossary of terms used in the electrical utility industry.

Mr. Rudolf also described the history and evolution of the components growing from small community oriented electric power companies to the present day company which is PSNH.

Mr. Rudolf also testified the transmission would be reproduced essentially as it was on the tax assessment dates in question. Mr. Rudolf also testified about the maintenance and repair program conducted by PSNH for its transmissions and distribution systems.

4) The Taxpayer through its witness, Robert G. Ouellette, Controller and Principal Accounting Officer, Public Service Company of New Hampshire, described book keeping procedures and appropriate adjustments made thereto. Mr. Ouellette testified the uniform system of accounts used by PSNH was a publication of the Federal Regulatory Commission listing the accounts that are prescribed for public utilities and all of the detailed procedure and rules by

which accounts are to

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be kept by a public utility. Mr. Ouellette further testified property accounts were maintained for generation, transmission and distribution systems. Mr. Ouellette also testified a fourth category of accounts, which is general in nature and included general purpose buildings, office furniture, vehicles, tools and other miscellaneous types of equipment.

Mr. Ouellette then testified the accounts for these four categories are kept in great detail for each of the components in each of the categories. Mr. Ouellette also testified PSNH maintains its records in a system beyond the requirements FERC for purposes of keeping records by community for all of the accounts for property taxation.

Mr. Ouellette then testified depreciation from an accounting perspective is the periodic write-off of those assets which are in use to provide service to the customer over the expected life of those assets. Mr. Ouellette also described and defined salvage value and likened it to trade in value of an asset. Mr. Ouellette testified depreciation is deducted from original book cost to determine net book cost. Mr. Ouellette described accounting for depreciation as having different formats and detail depending on the category of the property being depreciated and testified this difference was governed by the relative number of transactions within categories of property.

Mr. Ouellette then testified and described the use of this accounting data in the rate making process. Mr. Ouellette testified a public utility petitions for rates which result in the PUC investigating and determining the amount of assets, the operating costs and the rate of return on investment. Mr. Ouellette described that determination as revenue requirements.

5) The Taxpayer argued the appropriate method of valuation for regulated public utility property was net book cost or any method that closely approximated those values due to the regulated nature of the industry.

The Town argued value of a public utility was not only or always determined by net book costs and that better methods of valuation were available which would take into consideration the present value of historic cost.

FINDINGS OF THE BOARD ON THE COMMON ISSUES

1) The Board finds PSNH was a regulated public utility in the tax years in question.

2) The Board finds that public utility regulation does affect market value but does not limit market value to original cost less depreciation or net book cost.

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3) The Board finds PSNH's electrical generation, transmission and distribution systems to be as described by the witness, Mr. Rudolf.

4) The Board finds PSNH follows the uniform system of accounts required by FERC as described by the witness, Mr. Ouellette. The Board also finds the rate requirements as determined by PUC are as were described by Mr. Ouellette and the Board further finds the system of accounts and related depreciation is not the sole determinant to be considered for market value.

5) The Board finds there are five approaches to valuation potentially applicable to utility property: original cost less depreciation (net book); reproduction cost less depreciation; comparable sales; capitalized earnings; cost of alternate facilities capable of delivering equivalent energy.

THE PARTIES' POSITIONS ON ISSUES SPECIFIC TO PSNH v. LONDONDERRY,
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The Taxpayer argued they were presenting evidence to determine the fair value of the subject property for ad valorem taxation purposes. The Taxpayer further argued in its opinion the only realistic purchaser of the subject property would be another public utility subject to regulation. The Taxpayer argued the Board should base its judgment on consideration of all of the facts relating to the subject property, the realities of the market place and the applicable regulation.

The Taxpayer also held it recognized previous testimony before the predecessor Board of Taxation and the evidence accompanying that testimony, failed to adequately or properly determine or allocate depreciation. The Taxpayer acknowledged that valuation for rate making purposes does not automatically fix valuation for taxation. The Taxpayer also acknowledged the FERC or the PUC might allow utility property to be transferred and included in the rate base above the net book cost on the books of the selling or transferring utility.

The Taxpayer stated they had not attempted to conduct an independent appraisal on the land component of the public utility property in the Town of Londonderry. The Taxpayer further argued the Town's appraisal of the land in the years in question trended by the proper proportionality factor would be the proper and fair market value of the land. The Taxpayer submitted it engaged Stone and Webster Management Consultants Incorporated (hereafter Stone & Webster) to determine the fair market value of PSNH's public utility property exclusive of land rights of way and easements as of April 1, 1981 and April 1, 1982. The Taxpayer argued Stone & Webster considered all five approaches to value potentially applicable to the valuation of public utility property as

identified

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by the New Hampshire Supreme Court: (1) original cost less depreciation; (2) comparable sales; (3) capitalized earnings; (4) reproduction cost new less depreciation and (5) cost of alternate facilities capable of producing equivalent energy.

The Taxpayer's expert testified Stone & Webster found original cost less depreciation to be a significant factor in establishing the fair market value of public utility property because it establishes the base upon which a utility would be entitled to earn. The Taxpayer also held Stone & Webster performed additional analysis to determine that the depreciation for PSNH's distribution property in Londonderry properly localized to reflect the life expectancy of that specific property. The Taxpayer further argued Stone & Webster developed a depreciation reserve for that distribution property located in Londonderry which would have been less than that depreciation reserve developed by PSNH thus resulting in an increased value for the net book of PSNH property in Londonderry for the tax years in question.

The Taxpayer then argued Stone & Webster found no comparable sales but noted that in Stone & Webster's experience those transactions that do occur were at prices that closely approximate the sellers net book cost.

The Taxpayer then submitted its consultant, Stone & Webster, gave particular weight to capitalized earnings because a purchaser would be heavily influenced by what it could earn from income producing property in determining what price it would pay for that property. The Taxpayer also argued Stone & Webster concluded a purchaser of public utility property in the tax years in question would be adversely impacted by the cost of capital in the inflationary market of that era.

The Taxpayer's expert then testified Stone & Webster calculated the cost to reproduce PSNH's Londonderry property and then exercised engineering judgment to determine the physical and functional depreciation of the property based upon an examination of that property and a review of PSNH's maintenance records. The Taxpayer further argued Stone & Webster then applied a third factor of depreciation, that of economic depreciation which reflected the affect of factors outside the property which impinged on the fair market value of the property.

The Taxpayer then submitted that Stone & Webster determined that the cost of alternate facilities capable of producing equivalent energy was not relevant because PSNH owned no generation equipment in the Town of Londonderry.

The Taxpayer finally argued that Stone & Webster analyzed and considered the results of an independent appraisal of PSNH performed by the State of New Hampshire Department of Revenue Administration utilizing what is known as the

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unit method. The Taxpayer argued the unit method considers the three classic approaches to value cost, income and market to develop a value for the entire enterprise. The Taxpayer then argued the Department of Revenue Administration allocated the resulting value among taxing districts on the basis of original cost.

The Taxpayer's expert then testified Stone & Webster undertook an examination to determine if there were any unusual circumstances regarding PSNH utility property in the Town of Londonderry which would warrant a potential purchaser paying above net book costs for the property. The Taxpayer further argued Stone & Webster concluded there would be no such set of circumstances wherein that would occur.

The Town's position was that value for rate making and value for taxation are different because they are based on different objectives. The Town further argued rate making has as its objective to allow the lowest possible rates consistent with the constitution. The Town further submitted rate making is designed to limit the investor to recovery of no more than the original investment which is recovered through depreciation along with a fair rate of return on the remaining invested balance. The Town further maintained that in New Hampshire value of property for ad valorem taxation is addressed to its current market value which takes into consideration changes in price levels on like those values determined for rate bases.

The Town's expert testified the original cost less depreciation or net book cost approach for determining value for tax purposes was considered, but was rejected as unreliable because it is not reflective of the current costs and is based on booked appreciation which is more apt for the recovery of the original investment than for the finding of actual physical loss of value due to use.

The Town then argued its expert considered the comparable sales approach but rejected it as there are no comparable sales. The Town further argued actual sales are few in number and also suspect as to whether at arms length and free of course of influences.

The Town's expert then submitted he considered but rejected the capitalized earnings approach. The Town further argued that actual income derived from a particular segment of transmission line or distribution system cannot be accurately determined. The Town held the allocation formulas which were based on historical dollars of investment in the Town is based on a technique of the unit method of valuation which is not authorized by statute in New Hampshire.

The Town's position was its expert considered the reproduction cost less

physical and functional depreciation was the most reliable indicator of value

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for the subject property. The Town argued the gross reproduction cost calculated by using Handy Whitman Indexes before depreciation was \$26,765,539.00 for 1981 and \$30,355,502.00 for 1982. The Town then held physical and functional depreciation of \$6,965,149.00 should be applied for 1981 and \$8,098,222.00 should be applied for 1982. The Town further argued it applied greater values for physical and functional depreciation than the Taxpayer's expert. The Town also argued the Taxpayer's appraiser had the opportunity to physically inspect the subject property and determine physical and functional depreciation might be applied.

The Town then submitted its expert rejected consideration of economic depreciation due to a determination that regulation would not prevent a transfer of the subject property between a willing buyer and a willing seller at his determined market values for 1981 and 1982. The Town further argued its expert made his determination for a used plant cost trended to present day values for the tax years in question and depreciated by approximately 26 percent. The Town argued the transfer of the subject property at those market values would have been a good buy and for the public good and would have enabled a public utility to fill its franchise duties.

The Town maintained economic depreciation should be disregarded as a willing buyer of the subject property would pay more than rate base value for a plant if its current reproduction cost less physical and functional depreciation made it a good buy.

The Town then argued its expert considered the alternative facilities approach to valuation but found it not applicable as it is used principally to value hydro-electric generating stations of which there were none in Londonderry in the tax years in question.

The Town then argued the unit method employed by the State of New Hampshire Department of Revenue Administration should not be given any weight as the legislature had considered and found inexpedient to legislate the unit rule method of assessment for electric utility property. The Town further argued the application of depreciation used in the unit method requires that it be applied uniformly throughout the state without regard to conditions of utility property in individual taxing jurisdictions. The Town also argued the unit method had flaws which rendered it impractical for determination of value for ad valorem taxation purposes.

The Town finally submitted its expert made an independent appraisal of all of the PSNH lands owned and fee as well as the rights of way or easements for transmission lines. The Town further argued its expert valued the land in

accordance with excepted methods and based his valuation on the comparable sales

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method and concluded the market values of PSNH land held in fee was \$1,045,960.00 for the tax years in question and the right of way or easement lands were valued at \$590,675.00 for the same tax years in question for a total of \$1,636,635.00 market value for 1981 and 1982.

FINDINGS OF THE BOARD ON ISSUES SPECIFIC TO PSNH v. LONDONDERRY
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The Board finds the original cost less depreciation or net book cost approach was purely an historical bookkeeping methodology which ignores current market place influences. The Board further finds the net book cost method is designed as an arithmetic method for the sole purpose of recovering investments made and measured on an original dollar basis.

The Board finds there were no comparable sales presented.

The Board finds the capitalized earnings approach ignores other elements of value such as the franchise value of the public utility property. The Board finds the capitalized earnings approach is contributing but not limiting evidence for determination of the value of public utility property.

The Board finds both parties presented values determined by the reproduction cost new less depreciation method. The Board further finds both parties determined values before any depreciation allowances that were within one percent of either parties' total value. The Board notes both parties used the same Handy-Whitman tables for determination of their reproduction cost values.

The Board finds the Taxpayer and the Town did not come to the same conclusion for physical and functional depreciation. The Board finds the Taxpayer made an estimate of economic depreciation based on a calculation of revenues not obtained. The Board finds the Town determined there was no economic depreciation attributable to the regulated status of the subject property for the tax years in question.

The Board finds neither party presented any evidence using the alternate facilities method of estimating values of public utility properties.

The Board rejects the unit method as not property specific enough to enable the Board to make a determination of the value of public utility property in a specific taxing jurisdiction.

The Board finds the Taxpayer relied on trended prior assessments to determine its opinion of value for the land component of the public utility

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property in the Town of Londonderry for the tax years in question. The Board finds the Town made its determination of value of the land both owned in fee by PSNH and the land with easements for utility property rights of way was best valued by comparable properties in the taxing jurisdiction for the tax years in question. The Board finds the highest and best use of the land both held in fee and with easements enjoyed its highest and best use as public utility property but notes that this highest and best use did not preclude alternative equal or higher uses of the land held by PSNH in the Town of Londonderry in the tax years in question.

The Board finds the best evidence of value of the PSNH public utility property is the reproduction cost new estimates of value presented by both parties. The Taxpayer presented evidence and testimony that the reproduction cost new of the public utility property in the Town of Londonderry for the tax year 1981 was \$27,339,965 and for the tax year 1982 was \$29,700,664. The Town presented evidence and testimony that the reproduction cost new of the public utility property in the Town of Londonderry for the tax year 1981 was \$26,765,359 and for the tax year 1982 was \$30,355,502. The Board finds the starting point of the reproduction cost new for each of the tax years in question is best determined by averaging the values presented by both parties. The Board finds the reproduction cost new for the tax year 1981 to be \$27,052,662 and for tax year 1982 to be \$30,028,083.

The Board finds the Town's use of depreciation rates taken from FERC-0058 Bulletin Electric Utility Depreciation Practices, and the acknowledgement that field inspection of PSNH property of Londonderry did not reveal any unusual or atypical situations of physical or functional loss in value to be determinants of these components of depreciation. The Board finds the Town's recognition of the Federal Energy Regulatory Commission definition of: "depreciation, as applied to depreciable electric plant, means the loss in service value not restored by current maintenance, incurred in connection with the consumption of prospective retirement of electric plant in the course of service from causes which are known to be in current operation and against which the utility is not protected by insurance. Among the causes to be given consideration are wear and tear, decay, action of the elements, inadequacy, obsolescence, changes in demand and requirements of public authorities." to also be applicable and appropriate. The Board finds the Taxpayers claim that, "Amounts deducted for depreciation reflect our judgement of proper allowances to be made for losses in value attributable to both physical and functional causes. Our conclusions are based on field inspections of the visible portion of the property, inquiry into the operating experience and maintenance practices of the company, and our general knowledge of the type of property included in this appraisal." to be also an appropriate method of determining physical and functional depreciation.

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The Board is then left with the dilemma of reconciliation and determination of an appropriate and proper value to account for economic depreciation. The Board finds it is dealing with, "Conflicts in the evidence which were to be resolved by the [Board] who could accept or reject such portions of the evidence presented as [they] found proper, including that of expert witnesses". New England Power Company v. Littleton, 114 N.H. 594 at 607. The Board finds the Taxpayer maintained a strong and clear position that economic depreciation would be a major consideration in the determination of value for the public utility property in the Town of Londonderry for the tax years 1981 and 1982. The Board finds the Town gave no recognition to nor made any calculation for economic depreciation in its estimate of value of the subject property. However, the Board finds the Town on more than one occasion did acknowledge either through testimony or submitted evidence that a factor for economic depreciation could be considered in determination of value for public utility property.

The Board now finds itself at the point where it must resolve the conflicts in the evidence before it. The Board finds economic depreciation must be considered in determining the value of property subject to regulatory limitations on its operations and income. The Board finds any factor for economic depreciation is most appropriately applied to estimates of replacement cost new before any allowances for physical and functional depreciation. The Board notes that economic depreciation should be applicable to all of the public utility property other than land, which is best evaluated separate from the public utility property even though the highest and best use of the land may be for supporting public utility property. The Board finds a factor of 15 percent for economic depreciation must be applied to the average determined replacement cost new for the tax years 1981 and 1982. The Board then finds, once again, it must resolve the conflict between experts and thus determines that the average of the physical and functional depreciations calculated by each of the parties is most appropriately used in each of the tax years in question.

The Board finds the Taxpayer made no appraisal of the lands while the Town reviewed tax records and had appraisals made of PSNH lands both held in fee and with easements. The Board finds the Town's current appraisal is appropriate as both parties presented evidence of replacement cost new and respect depreciation allowances specific to the tax years in question. The Board finds the replacement cost new less economic, physical and functional depreciation for the public utility property in 1981 was \$17,487,706 and finds the land value for the tax year 1981 was \$1,636,635. The Board finds the replacement cost new less economic, physical and functional depreciation for the public utility property in 1981 was \$19,245,928 and finds the land value for the tax year 1981

was \$1,636,635. The Board finds the resulting values subject to the equalization ratios stipulated by both parties and therefore finds the proper assessment for 1981 is \$7,267,250 and the proper assessment for 1982 is \$7,517,723.

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THE CONSTITUTION AND THE LAW

Property taxes must be authorized and levied pursuant to and in accordance with Part I, Article 12, Part II, Article 5, and Part II,, Article 6, of the Constitution of the State of New Hampshire which state in part:

Protection and Taxation Reciprocal. Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary

Power to Make Laws, Elect Officers, Define Their Powers and Duties, Impose Fines and Assess Taxes; Prohibited from Authorizing Towns to Aid Certain Corporations. And further, full power and authority are hereby given and granted to the said general court, from time to time, to make, ordain, and establish, all manner of wholesome and reasonable orders, laws, statutes, ordinances, directions, and instructions, either with penalties, or without, so as the same be

not repugnant or contrary to this constitution, as they may judge for the benefit and welfare of this state, and for the governing and ordering thereof, and of the subjects of the same, . . . and to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and residents within, the said state; and upon all estates within the same

Valuation and Taxation. The public charges of government, or any part thereof, may be raised by taxation, upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order.

Statutes enacted pursuant to the above cited Articles and applicable here are:

RSA 72:6, which states:

72:6 Real Estate. All real estate, whether improved or unimproved, shall be taxed except as otherwise provided.

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RSA 72:8, which states:

Electric Plants and Pipe Lines. Structures, machinery, dynamos, apparatus, poles, wires, fixtures of all kinds and descriptions, and pipe lines owned by a person or corporation operating as a public utility as defined in RSA 362:2 generating, producing, supplying and distributing electric power or light, or in transporting natural gas, crude petroleum and refined petroleum products or combinations thereof, shall be taxed as real estate in the town in which said property or any part of it is situated.

RSA 73:10, which states:

73:10 Real Estate. Real and personal property shall be taxed to the person claiming the same, or to the person who is in the possession and actual occupancy thereof, if such person will consent to be taxed for the same; but such real estate shall be taxed in the town in which it is situated.

RSA 72:12, which states:

72:12 Public Utilities. The real estate of railroad and other public utility corporations and companies, which is not used in their ordinary business, or which is excluded from taxation under chapter 82, shall be appraised and taxed by the authorities of the town in which it is situated.

and RSA 75:1 (Supp. 1981), which states:

75:1 How Appraised. Except with respect to open space land appraised pursuant to RSA 79-A:5, and residences appraised pursuant to RSA 75:11, the selectmen shall appraise all taxable property at its full and true value in money as they would appraise the same in payment of a just debt due from a solvent debtor, and shall receive and consider all evidence that may be submitted to them relative to the value of property, the value of which cannot be determined by personal examination.

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In appraising value for ad valorem taxation purposes pursuant to RSA 75:1, "full and true value in money" is defined as the market value or the price which the property will bring in a fair market after reasonable efforts have been made to find the purchaser who will give the highest price for it. Public Service Co. v. Seabrook, 126 N.H. 740 (1985); Public Service Co. v. New Hampton, 101 N.H. 142, 146 (1957); Trustees of Phillips Exeter Academy v. Exeter, 92 N.H. 473, 481 (1943); Winnepesaukee v. Gilford, 67 N.H. 514, 515 (1893). "The value of property is what it is worth in money, what it will bring in money to the seller, or what it will cost the buyer to obtain it." Grafton County Electric Light Co. v. State, 78 N.H. 330, 334. The definition of fair market value for eminent domain purposes is in harmony with the definition for tax purposes. 590 Realty v. Keene, 122 N.H. 284, 287 (1982).

The test of market value presupposes a market. However, utility-company property is rarely bought and sold, and when an exchange does take place it is usually because of a taking by eminent domain, a merger, or an acquisition. "In instances such as this where only a part of an integrated system is involved, the difficulty, if not the impossibility of finding an actual customer, especially where, as here, the owner has a lawful monopoly in the surrounding area, is obvious." Public Service Co. v. New Hampton, supra at 146. Nevertheless, in determining market value the Petitioner, itself, may be considered a hypothetical buyer whose idea of a fair purchase price would depend largely on the price it would have to pay for a new equivalent plant. Public Service Co. v. Seabrook, supra at 742; Public Service Co. v. New Hampton, supra, pp. 146-47, 147-48.

Because of the absence of direct evidence of sales prices of utility property on the open market, in determining value the courts have looked to those factors "that ought to influence the judgment of a seller and a buyer in reaching a fair price." Assessors of Quincy v. Boston Consolidated Gas Co., 309 Mass. 60, 66 (1984).

In New Hampshire "all relevant factors to property value should be considered when making an appraisal in order to arrive at a just result." Steele v. Town of Allenstown, 124 N.H. 487, 491 (1984), (quoting Paras v. Portsmouth, 115 N.H. 63, 67-68 (1975)). In Steele, supra, p. 492, government regulation was held to be a relevant factor for the purpose of determining market value. "There are five approaches to valuation potentially applicable to utility property: original cost less depreciation; reproduction cost less depreciation; comparable sales; capitalized earnings, and the cost of alternate facilities capable of delivering equivalent energy. New England Power Co. v. Littleton, 114 N.H. at 598, 326 A.2d at 701. All the approaches are valid, but all also have weaknesses. For example, even though net book value (original

cost less depreciation) provides the 'rate base' upon which plaintiff's rate of return is

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calculated, 'the value of the plant for tax purposes and the value for rate-making purposes need not be the same.' Public Service Co. v. New Hampton, 101 N.H. at 149, 136 A.2d at 597; Basrnet v. New England Power Co., 130 Vt. at 412, 296 A.2d at 231; Kittery Electric Light Co. v. Assessors, 219 A.2d at 735. The valuation of alternative sources of equivalent energy capacity is suspect since it critically depends on the validity of certain initial assumptions. New England Power Co. v. Littleton, 114 N.H. at 601-03, 326 A.2d at 702-03. Reproduction costs may be more or less relevant depending on the extent to which it would make sense to presently reproduce the existing facility. Id. at 600, 326 A.2d at 702; Concord Natural Gas Co. v. Concord, 114 N.H. at 56, 314 A.2d at 681. Given all the imponderables in the valuation process, '[j]udgment is the touchstone.' New England Power Co. v. Littleton, 114 N.H. at 599, 326 A.2d at 701; Public Service Co. v. New Hampton, 101 N.H. at 154, 136 A.2d at 600." Public Service Co. v. Ashland, 117 N.H. 635, 638-9, (1977).

"The taxpayer has the burden of proof and it is the taxpayer's responsibility to satisfy the board as to the disproportionality of the tax burden imposed by the selectmen. 'The burden was on the company to satisfy [the trier of fact] by a preponderance of the evidence that it was paying more than its proportionate share of the taxes . . . and thus entitled to an abatement.' New England Power Co. v. Littleton, 114 N.H. at 599, 326 A.2d at 701." Public Service Co. v. Ashland, supra at 640. ". . .[A] utility which , after presenting evidence on all of the relevant methods of valuation, can establish the presence of regulation so restrictive as to limit any prospective purchaser of its property to a return based on the net book value of the property, should be deemed to have proven that the property's market value is equal to its net book value, in the absence of any specific evidence of higher market value. . . . Such a demonstration would create a presumption that market value is equivalent to net book value. The presumption may then be rebutted by the towns' coming forward with evidence of other factors that would influence a prospective purchaser: high current reproduction cost, potential for expansion, the remaining useful life of the property, etc. See Public Service Company v. Town of Ashland, 117 N.H. at 638, 377 A.2d at 125, and cases cited therein." Appeal of Public Service Co., 124 N.H. 479, 486, 485-86 (1984).

The Board rules on PSNH's Requests for Findings of Fact as follows:

1. Granted
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted

7. Granted

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8. Granted
9. Neither Granted nor Denied
10. Denied
11. Granted
12. Granted
13. Granted
14. Granted
15. Granted
16. Granted
17. Granted
18. Granted
19. Granted
20. Granted
21. Granted
22. Granted
23. Granted
24. Granted
25. Granted
26. Granted
27. Denied
28. Granted
29. Granted
30. Granted
31. Denied
32. Granted
33. Granted
34. Granted
35. Denied
36. Granted
37. Granted

The Board rules on PSNH's Requests for Rulings of Law as follows:

1. Granted
2. Granted
3. Granted
4. Denied
5. Granted
6. Granted
7. Granted
8. Denied
9. Neither Granted nor Denied
10. Denied

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11. Denied
12. Denied

The Board rules on Londonderry's Requests for Findings of Fact and Rulings of Law as follows:

1. Denied
2. Granted
3. Granted
4. Granted
5. Granted
6. Granted
7. Granted
8. Granted
9. Granted
10. Granted
11. Granted
12. Granted
13. Granted
14. Granted
15. Granted
16. Granted
17. Granted
18. Granted
19. Denied
20. Granted
21. Granted
22. Granted

The Board denies the motion of the defendant made on November 17, 1987, moving reconsideration of the admission of Taxpayer exhibit number 25. The Board finds that while the exhibit in question is admissable it was given the weight it deserves and thus denies the defendants motion.

If the taxes have been paid for the tax year 1981, the amount paid on the value in excess of \$7,267,250 is to be refunded with interest at six percent per annum from date of payment to date of refund. If the taxes have been paid for

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the tax year 1982, the amount paid on the value in excess of \$7,517,723 is to be refunded with interest at six percent per annum from date of payment to date of refund.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

Anne S. Richmond, Esquire, Chairman

George Twigg, III, Member

Peter J. Donahue, Member

(Mr. Franklin did not sit.)
Paul B. Franklin, Member

Date:

I certify that copies of the within Decision have this date been mailed, postage to Eaton W. Tarbell, Jr., Esq. and Margaret H. Nelson, Esq. counsel for Public Service Company of New Hampshire, taxpayer; and Richard F. Upton, Esq. and Barton L. Mayer, Esq. counsel for the Town of Londonderry.

Michele E. LeBrun, Clerk

Date:

0009

