

**REDACTED DECISION – DK#’S 23-1355**

**BY: A.M. “FENWAY” POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE  
SUBMITTED FOR DECISION ON JUNE 5, 2024  
ISSUED ON OCTOBER 9, 2024**

**FINAL DECISION**

The Petitioners in this matter are three (3) limited liability companies with commercial property in DDD County, West Virginia (hereafter “property owner”). Specifically, they own and operate natural gas pipelines. In August of 2022, the property owner submitted property tax returns for this property to the DDD County Assessor. Thereafter, by email dated December 13, 2022, the property owner requested that the Assessor consider economic obsolescence when valuing the property. By letter dated January 30, 2023, the Assessor denied the property owner’s request. Thereafter, on February 7, 2023, the property owner timely filed an appeal with this Tribunal. Evidentiary hearings were held on October 25, 2023, and January 10, 2024. After the filing of post-hearing briefs, the record was closed on May 6, 2024. On May 16, 2024, the Assessor moved to reopen the record in this matter, a Motion the property owner did not oppose. This Tribunal granted the Assessor’s Motion, and the record in this matter was closed a second time on June 5, 2024, and the matter became ripe for a decision at that time.<sup>1</sup>

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<sup>1</sup> The pipelines at issue in this matter carry either ethane or natural gas liquids (NGLs). The purpose of the Assessor’s Motion to Reopen the Record was to present additional evidence and argument regarding amended filings that the ethane pipeline owners filed with the Federal Energy Regulatory Commission (FERC). However, no additional argument was necessary, because the two property owners who owned the ethane pipelines, namely, AAA and BBB, agreed, by letter dated June 4, 2024, to withdraw their appeals regarding valuation of the eight/ten (8/10) inch pipeline and the 12-inch ethane pipelines. As a result, the findings of fact below generally concern only the remaining pipeline at issue, the 20-inch pipeline owned by CCC. However, because the issue of the ethane pipelines valuation was resolved after the conclusion of the evidentiary hearings, there will be obviously be some overlap in the findings of fact and the testimony relied on.

## FINDINGS OF FACT

1. The property owner in this matter is CCC, a limited liability company, formed in EEE in 2017. Its principal business is the ownership and operation of natural gas assets.

2. The property at issue in this matter is a 20-inch natural gas pipeline, a portion of which is located in DDD County, West Virginia.

3. In August of 2022, the property owner filed property tax returns regarding the aforementioned pipeline property. These returns were for property tax year 2023. The returns contained the property owner's appraised and assessed property values as follows:

- a. Account Number 000, 20-inch Town A to Town B 10.084mi, appraised value \$YYY, assessed value \$YYY.
- b. Account Number 000, 20-inch Town B to Town C 5.925mi, appraised value \$YYY, assessed value \$YYY.
- c. Account Number 000, 20-inch Town B to Town C 8.557mi, appraised value \$YYY, assessed value \$YYY.

4. The values in Findings of Fact number 3 above were based upon the cost minus depreciation valuation method of valuing commercial property called for in Section 3 of Series 1P, Title 110 of the West Virginia Code of State Rules. However, the values listed above contained adjustments for economic obsolescence. These adjustments were calculated by the property owner.

5. While the record is not clear when the property owner received the Assessor's appraised and assessed values, the parties do agree on those amounts:

- a. Account Number 000, 20-inch Town A to Town B 10.084mi, appraised value \$YYY, assessed value \$YYY.

- b. Account Number 000, 20-inch Town B to Town C 5.925mi, appraised value \$YYY, assessed value \$YYY.
  - c. Account Number 000, 20-inch Town B to Town C 8.557mi, appraised value \$YYY, assessed value \$YYY.
6. Based upon findings of fact numbers 3 & 5, the assessed values in controversy are:
- a. Account Number 000, 20-inch Town A to Town B 10.084mi, \$YYY.
  - b. Account Number 000, 20-inch Town B to Town C 5.925mi, \$YYY.
  - c. Account Number 000, 20-inch Town B to Town C 8.557mi, \$YYY.

7. By email attached to the property tax returns, the property owner advised the Assessor's office that it would be providing an expert report to justify the valuations in the returns. Specifically, the report would detail the calculation of the economic obsolescence amounts. Hr'g Tr. pp. 10:1-2.

8. By email dated December 13, 2022, the property owner sent the Assessor an Obsolescence Analysis prepared by FFF, the consulting firm hired by the property owner (hereafter the "FFF report")<sup>2</sup>. See Property owner's Ex. 2. This report can be characterized as opining that throughput deficiencies in the pipelines at issue caused a reduction in the pipelines value. Moreover, the report utilized four (4) methods to ascertain exactly how much loss in value had occurred.

9. By letter dated January 30, the Assessor denied the property owner's request for a reduced valuation. The Assessor based his decision in part on his belief that the throughput deficiencies the property owner complained of were not a form of economic obsolescence. With

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<sup>2</sup> The report is signed and certified by the President of FFF, along with its Vice President, GGG, and a company appraiser named HHH. However, Mr. FFF testified on this matter before the DDD County Commission for property tax year 2022, and before this Tribunal for property tax year 2023. Moreover, all parties refer to the report as the "FFF report".

his letter, the Assessor attached reports prepared by two experts he had retained, namely, III, of III, LLC, and JJJ of KKK. (hereafter “JJJ Report”)<sup>3</sup>. See Respondent’s Ex. 2 & 4. Generally, the III report can be characterized as opining that economic obsolescence cannot be found to exist unless the situation that led to the economic obsolescence is permanent. The JJJ report can be characterized as opining, that the method utilized by Assessors in West Virginia was so generous in its depreciation calculations that the property owner’s property was already so undervalued that a calculation of economic obsolescence was not necessary.

10. The most salient fact in this matter was the property owner’s decision to build a new 20-inch pipeline to carry natural gas liquids to and from various natural gas facilities in West Virginia and to other locations out of this state. This decision was based upon representations made to the property owner by natural gas producers that production would increase to an extent that more pipeline capacity would be needed. Construction on this 20-inch pipeline began in 2018. Hr’g Tr. pp. 25:3-11, 49:7-13.

11. The expected increase in production did not materialize, and the property owner attributes this in large part to the economic downturn occasioned by COVID. Moreover, the parent company of the property owner was forced to scale back construction of processing facilities, also due to COVID. Hr’g Tr. pp. 12:4-13.

12. To prove the throughput deficiencies of its pipelines, the property owner undertook simple mathematical calculations. It took the rated capacity of the pipelines and measured the

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<sup>3</sup> It should be noted that this exact matter was previously litigated before the DDD County Commission regarding property tax years 2021 and 2022, with the same parties and same experts. Those matters are currently pending before the Circuit Court of DDD County.

actual utilization and arrived at an inutility percentage. It then transmitted those figures to FFF for preparation of the economic obsolescence report.<sup>4</sup>

13. The pipelines at issue suffered from throughput deficiencies on the assessment date of July 1, 2022. Hr'g Tr. pp. 67-69. *See also* Exhibit 2 to Property Owner's Ex. 5. Specifically, the three 20-inch NGL lines were being utilized at 28%, 36%, and 47% of their design capacity, respectively. *See also* Exhibit 9 to Property Owner's Ex. 5.

14. These throughput deficiencies were the result of changes in the supply and demand relationships between the property owner and its customers, brought about by the economic downturn from COVID.

15. Specifically, COVID lessened demand for the NGLs traveling through the property owner's pipelines. This lessened demand caused investors to pull back, and demand that producers reallocate profits from seeking more reserves to providing a greater return to the investors. Hr'g Tr. pp. 277-278.

16. The FFF report utilized four (4) methods to calculate the amount of economic obsolescence. Those methods were, the inutility method, the rate of return on capital method, the capitalization of income loss method, and the blue chip method.

17. FFF regularly appraises Federal Energy Regulatory Commission (hereafter "FERC") regulated pipelines for buyers and sellers, and as part and parcel of that process he performs an economic obsolescence analysis. Hr'g Tr. pp. 56:7-11.

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<sup>4</sup> A certain percentage of the testimony revolved around the math of what the pipelines could carry, and the fact that generally pipelines such as this do not ever actually operate at 100% of capacity. Hr'g Tr. pp. 39:18-21. Additionally, there was some testimony from the Assessor regarding his concerns that he could not independently verify the amount of throughput deficiencies of the pipelines. However, the Assessor abandoned that argument in his post hearing brief. The evidence and testimony, taken in its entirety prove that the pipelines in question were underutilized as of the assessment date of July 1, 2022.

18. Under West Virginia law, when valuing commercial property, an income approach is defined as the process of discounting an estimate of future income into an expression of present worth. W. Va. Code R. §110-1P-2.12 (2013).

19. The parties agree that only one of those four (4) methods of calculating economic obsolescence in the FFF report could be considered an “income approach”, as that term is used in Sections 2.12 and 3.5.2 of Series 1P, Title 110 of the West Virginia Code of State Rules. Hr'g Tr. pp. 305:1-7

20. Specifically, the capitalization of income loss method in the FFF report took publicly available information from FERC regarding the Property owner’s cash flows, divided/capitalized it by an industry based weighted average cost of capital (hereafter “WACC”). From this weighted average cost of capital, the report subtracted a growth rate (in the case of the pipelines at issue the report estimated a 0% growth rate). Next, the capitalized cash flows are compared with FERC net value, to arrive at a percentage of economic obsolescence. Hr'g Tr. pp. 71:3-15, 319-320. *See also* Ex. 4 of Property owner’s Ex. 5.

21. Mr. FFF testified that to his knowledge, twenty-two (22) states utilize the method described in Finding of Fact #16, to estimate an income approach to value for FERC regulated pipelines. Hr'g Tr. pp. 71:6-10.

22. The III report did not provide a dollar amount of economic obsolescence. Nor did this report attempt to show specific errors in the FFF report. Instead, this report (and the accompanying testimony) can be fairly summarized as arguing two general points. First, that “Application of External Obsolescence would create inequities in the valuation of personal property for all taxpayers. For example, when a commercial business is highly profitable, the value of the personal property is not increased because of profitability. Similarly, the loss of revenue, for

bankruptcy, management, or other reasons not attributable to the loss in value of personal property is not considered in the property valuation." See Respondent's Ex. 2 p17. Second, she opines that economic obsolescence must always be permanent and incurable. Hr'g Tr. pp. 181.

23. JJJ prepared two reports. The first, dated January 27, 2023, was provided to the property owner (along with the III report) in response to the Assessor receiving the FFF report. The second report, dated December 12, 2023, was prepared after the conclusion of the first hearing in this matter. In the first report Mr. JJJ opines that the Assessor's valuation, arrived at using the cost minus depreciation method, is too low. Mr. JJJ opines as such due to his opinion that West Virginia's use of the Marshall Swift trend and depreciation tables is too generous, and that in his first report he utilizes a different trend and depreciation table, namely Handy Whitman. Hr'g Tr. pp. 232-234. See also Respondent's Ex. 4 p12-13. In his second report, Mr. JJJ presents counterpoints to FFF's capitalization of income loss method.<sup>5</sup> However, he uses a different WACC. Mr. JJJ's WACC is based upon the WACC that the property owner reported to FERC. Hr'g Tr. pp. 213:5-6. As for the growth rates he utilized, that will be discussed in greater detail below, the record is somewhat confusing. Moreover, in this second report Mr. JJJ increased (as compared to his first report) the overall value of both the ethane and NGL pipelines by five hundred (500) million dollars each. See Respondent's Ex. 4 p 110 and Ex. 5 p 37 & 38. Finally, his report apportioned the income-based values based upon a ratio of pipeline miles. The average of the two methods resulted in a value for the property at issue that was more than double the Assessor's value. Hr'g Tr. pp. 255:14-22, 256:1-2.

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<sup>5</sup> We use "counterpoints" in the plural, because while not clearly articulated, it appears that the PPP report utilized at least two methods that he seemed to characterize as an income approach under West Virginia law. One is identified as a direct capitalization method, and the other as a discounted cash flow method. See Respondent's Exhibit 5, p37-42.

24. Mr. JJJ admitted that he had never before valued FERC regulated pipelines utilizing the two (2) methodologies above. Hr'g Tr. pp. 254:1-3.

### **DISCUSSION**

There are two (2) issues in this matter. First, was the property owner's pipeline suffering from economic obsolescence on July 1, 2022? Second, if economic obsolescence was present on that date, how much did it reduce the value of the subject property?

Despite the length and breadth of the arguments advanced by both parties, the law of this matter is clear, unambiguous and well settled, and neither party argues otherwise. “[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.” W. Va. Const. art. X, § 1. Article 1C of Chapter 11 of the West Virginia Code follows this constitutional mandate, and is titled “Fair and Equitable Property Valuation”. Subsection (a) of Section 7, Article 1C, Chapter 11 follows the same through line, and directs assessors to “appraise all real and personal property in their jurisdiction at fair market value . . . .” W. Va. Code Ann. § 11-1C-7(a) (West). When it comes to valuing commercial property, such as the pipeline at issue in this matter, the Legislature has given the Tax Commissioner the authority to draft legislative rules. *See* W. Va. Code Ann. § 11-1C-5(b) (West). In West Virginia, properly promulgated legislative rules, that have gone through legislative rule making, have the force and effect of law. *See e.g. Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995).

The Legislative Rules that control this matter are found in Sections 2 and 3 of Series 1P, Title 110 of the West Virginia Code of State Rules. Subsection 3.1.1 continues our through line, and again states:

The market value of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing

buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell.

W. Va. Code R. 110-1P-3.1.1 (2013). Section 3 provides specific direction as to how assessors are to value commercial property.

- Three (3) approaches to fair value considered and used in estimating fair market value are: (A) cost, (B) income, and (C) market. W. Va. Code R. 110-1P-3.4.3.1 (2013).
- Of the three (3) approaches to value, the cost approach may apply most consistently to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data. The market approach is used less frequently, principally due to a lack of meaningful sales. The income approach is not normally used because of the difficulty in estimating future net benefits to be derived except in the case of certain kinds of leased equipment. W. Va. Code R. 110-1P-3.4.3.2 (2013).
- Adjustments. -- When physically inspecting commercial and industrial personal property for appraisal, use three (3) types of depreciation: should be considered; physical deterioration depreciation, economic obsolescence and functional obsolescence. W. Va. Code R. 110-1P-3.4.3.3 (2013).
- Physical Depreciation - Depreciation tables for commercial and industrial personal property are developed using the Marshall Valuation Service as the source guide. W. Va. Code R. 110-1P-3.5.1 (2013).
- Economic Obsolescence - Economic obsolescence can best be measured by either a market approach method or an income method. Due to the lack of sales volume for comparable commercial or industrial properties, an income approach is normally used. However a market approach method may be used where the specific facts and circumstances would indicate that that method would achieve a more accurate measure of value. W. Va. Code R. 110-1P-3.5.2 (2013).
- “Income approach” means the appraisal process of discounting an estimate of future income into an expression of present worth. W. Va. Code R. 110-1P-2.12 (2013).
- “Economic obsolescence” means a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships. W. Va. Code R. 110-1P-2.5 (2013).

It is well settled in West Virginia that an Assessor’s property valuations are presumed correct. *See, e.g.,* Syllabus pt. 1, Berkeley County Council v. Government Properties Income Trust LLC, 247 W. Va. 395, 880 S.E.2d 487 (2022); In re Tax Assessment of Foster Foundation’s

Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, (2008); In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757, (2000); Western Pocahontas Properties, Ltd. v. County Commission of DDD County, 189 W. Va. 322, 431 S.E.2d 661 (1993); In re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53, 303 S.E.2d 691 (1983); Bankers Pocahontas Coal Co. v. County Court of McDowell County, 135 W. Va. 174, 62 S.E.2d 801, (1950). Finally, H.B. 2581, passed in 2021, gave this Tribunal jurisdiction over property tax appeals, and additionally, changed the burden of proof in such appeals. Prior to its passage, the burden of proof for property owners to prevail in a property tax appeal was by clear and convincing evidence. Now the burden of proof in such appeals is a preponderance of the evidence. *See* W. Va. Code Ann. § 11-10A-10(h) (West) (For all appeals regarding property tax assessments, taxability, and classifications the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard.)

Due to the newness of property tax appeals before this Tribunal, this matter presents numerous first impression questions of law, beyond the changed burden of proof. First, is the Assessor's contention that his consideration of economic obsolescence **prior to** the property owner's filing of its appeal is a determinative fact for this Tribunal's consideration. The Assessor relies on the West Virginia Supreme Court of Appeals case of Berkeley Cnty. Council v. Gov't Properties Income Tr. LLC, 247 W. Va. 395, 880 S.E.2d 487, (2022) as standing for the proposition that Subdivision 3.4.3.3 of Title 110, Series 1P merely directs Assessors to only consider economic obsolescence, and that he or she is under no obligation to make any adjustments requested by the property owner. The Berkeley Cnty. Council court stated as such clearly:

[Subdivision 3.4.3.3] [D]oes not require the Tax Commissioner to make any adjustment to the valuations made regarding property because of physical deterioration, functional obsolescence and economic obsolescence. Rather, all that is required of the Tax

Commissioner in applying the cost approach to valuation is that the Tax Commissioner will think about or contemplate three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.

Id at 407, 499.<sup>6</sup> Obviously, the Legislature has not directed Assessors to adjust for economic obsolescence in every instance of valuation. However, the purpose of the Assessor's reliance on the quoted language from the Berkeley Cnty. Council decision is unclear. If the Assessor is suggesting that the fact that he considered economic obsolescence prior to the property owner's appeal to this Tribunal is determinative, he is incorrect. Pursuant to West Virginia Code Section 11-3-25b, all property tax appeals before this Tribunal are heard *de novo*. In such a *de novo* hearing, where the record is built, the burden of persuasion is on the property owner, and that burden never shifts. Nonetheless, once the property owner has presented its case in chief, the burden of production does shift to the Assessor to rebut the evidence presented by the property owner. See In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty., 223 W. Va. 14, 672 S.E.2d 150, (2008) (When a party has the burden of persuasion on an issue, that burden does not shift. The burden of production merely requires a party to present some evidence to rebut evidence proffered by the party having the burden of persuasion.) See also Champlin Realty Co. v. State Bd. of Tax Comm'rs, 745 N.E.2d 928 (Ind. T.C. 2001) (the taxpayer is required to present a prima facie case as to both the identification of causes and quantification of obsolescence. Once the taxpayer carries its burden of production with respect to the identification and quantification of

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<sup>6</sup> The commercial property in this matter was appraised and assessed by the county assessor's office. However, all of the work done by the county assessors is overseen to some extent by the Tax Commissioner. There are numerous statutory provisions contained in Chapter 11 of the West Virginia Code which outline the working relationship between the two entities. See e.g. W. Va. Code Ann. § 11-1C-7(a) (West) (county assessors shall appraise all real and personal property utilizing the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner.) As such, any references to the Tax Commissioner's mandatory duty to follow the directives of Series 1P flows to the county assessors as well. Additionally, assessors statewide utilize a computer program to value commercial property that is established and maintained by the West Virginia State Tax Department.

obsolescence, the burden of production shifts to the State Board to rebut the taxpayer's evidence and justify its decision with substantial evidence.); Coomey v. Bd. of Assessors of Sandwich, 367 Mass. 836, 329 N.E.2d 117 (1975) (The burden of proof as to the existence of such a scheme is, of course, on the taxpayer. However, by proper proof, the taxpayer may shift the burden of production of evidence to the assessors.); TransCanada Hydro Ne., Inc. v. Town of Newbury, 206 Vt. 462, 180 A.3d 843, (2017) (Once the town produces evidence that the property was properly appraised, a presumption of validity attaches. This is a “bursting bubble presumption” that disappears if the taxpayer presents admissible evidence to show that the value exceeds fair market value. At that point, the burden of production shifts to a town to show its valuation is correct, but the burden of persuasion always lies with the taxpayer.); Weber v. Lane Cnty. Assessor, 2016 WL 336552, (Or. T.C. Jan. 27, 2016) (the taxpayer must introduce substantial evidence tending to show a value different from that asserted by the assessor in order for the burden to shift to Defendant to refute such a showing.)

In this matter, a *de novo* hearing was held, during which the property owner presented evidence that its property in DDD County suffered from economic obsolescence and that the condition altered what a willing buyer would pay a willing seller for the property. During this hearing the Assessor presented evidence to rebut that put on by the property owner. As such, we find the Assessor’s reliance on Berkeley Cnty. Council, and his accompanying suggestion that his consideration back in his office of economic obsolescence is determinative, to be unavailing.

As is sometimes the case, despite a 12-hour hearing, hundreds of pages of exhibits and lengthy post-hearing briefs, the facts of this matter (regarding the existence of economic obsolescence, not the amount) are simple and essentially undisputed. For starters, we have COVID, and the accompanying economic downturn, which are facts generally known to all and

that this Tribunal takes judicial notice of. Next comes the decision from the property owner to build a new 20-inch pipeline to transport natural gas liquids. This decision was made based upon representations from producers that natural gas production would increase, necessitating increased transportation capacity. And finally, the underutilization of the 20-inch pipeline, which the property owner refers to as “throughput deficiencies”. It should be noted that while there was some cross examination regarding the existence and amount of these throughput deficiencies, the Assessor does not seriously suggest that the property owner is lying about the underutilization of its pipeline, in order to lower its property tax bill. Moreover, as was pointed out during the hearing, the property owner is an entity that is regulated by FERC, with the accompanying scrutiny that comes from such regulations. Additionally, the property owner charges its customers for transportation of their natural gas, so outright lies about the utilization of its pipelines would make no economic sense. An engineer for the property owner testified that he sent spreadsheets to Mr. FFF showing the throughput deficiencies. That information was the starting off point for Mr. FFF’s economic obsolescence calculations and formed the basis for Exhibit 9 of his report.<sup>7</sup> Exhibit 9 shows that as of July 1, 2022, the assessment date in this matter, the three 20-inch NGL lines were being utilized at 28%, 36%, and 47% of their design capacity, respectively.

Once the FFF report established the amount of throughput deficiencies it undertook to quantify the dollar amount of economic obsolescence. More to the point, the report attempted to show what, in an arms-length transaction, a willing buyer would pay a willing seller for the pipeline property in DDD County. Mr. FFF utilized four (4) methods, the inutility method, the rate of return

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<sup>7</sup> Exhibit 9 of the FFF report is two pages, one calculating the throughput deficiencies for the 20-inch NGL line segments, and one for the ethane lines. It should also be noted that the FFF report has a crude map which identifies the three 20-inch segments in their entirety, from JJJ County to the West Virginia state line. Moreover, the report identifies the three (3) NGL segments differently than the Assessor has them identified in the county’s land books. The Assessor does not argue that this variance is determinative.

on capital method, the capitalization of income loss method, and the blue chip method. However, we only need to address one of these methods, and can discard the other three (3). In his post-hearing brief, the Assessor argues that only one of the four methods, the capitalization of income loss, can fairly be characterized as an “income method” as that term is defined in Subsection 2.12 of Title 100, Series 1P of the Code of State Rules. During the evidentiary hearing, upon cross examination by counsel for the Assessor, Mr. FFF admitted that the method is the only one that undertakes the process of discounting an estimate of future income into an expression of present worth.

ATTORNEY KKK: Okay. And you also did not do any approach to value to measure economic obsolescence that discounted an estimate of future income into an expression of present work, correct?

MR. FFF: No, we did. It's in the capitalization of the income loss method in order to measure EO by that method.

ATTORNEY KKK: So, only in the capitalization of income loss method?

MR. FFF: Correct.

Hr'g Tr. pp. 305:1-7. Because both parties agree that only one of Mr. FFF's methods comports with Subsection 2.12, we give no weight to the other three methods utilized.<sup>8</sup>

Before we analyze Mr. FFF's capitalization of income loss method, we must address a possible area of confusion. In his reply brief, the Assessor devotes five pages (17-22) to errors in Mr. FFF's inutility method. These pages devote significant time to the design capacity of the pipelines and to the property owner's utilization, or underutilization of the same. Essentially, the

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<sup>8</sup> This Tribunal is aware that Subsection 2.12 states that economic obsolescence can **best** be measured by either the market or income method of valuation, and that the Subsection does not mandate a method. However, reading all of Series 1P in *pari materia* we believe that the West Virginia Legislature, in promulgating Series 1P, did not envision the valuation of commercial property (and the attendant economic obsolescence calculations) utilizing methods other than the sales, cost or income methods. Moreover, in this matter we need not go too deep down that road, because both parties agree that the FFF report contains one methodology that meets the definition of an income approach.

Assessor argues (regarding Mr. FFF's inutility method) that the record is not clear on how much gas the pipelines are designed to carry, and that the record is not clear on when the pipelines would reach the final utilization levels anticipated by the property owner. As stated above, we give no weight to Mr. FFF's three (3) methodologies that are not an income method under West Virginia law. Moreover, it is critical to note that this decision's ruling is based upon two facts. First, that the pipelines at issue suffered from economic obsolescence on July 1, 2022, and second, how much loss in value resulted from the economic obsolescence. As will be discussed below, Mr. FFF's capitalization of income loss method does not arrive at an economic obsolescence percentage based upon simply taking, for example, the 28% utilization of the 20-inch line from Town A to Town B, and saying as a result, the economic obsolescence amount is 72%. Rather, Mr. FFF, after examining the data provided by the property owner, established that due to throughput deficiencies, economic obsolescence existed. He then quantified that economic obsolescence by utilizing (among other methods) the capitalization of income loss method. As such, the Assessor's arguments about the percentages of inutility or throughput deficiencies are not determinative to our decision, because Mr. FFF's capitalization of income loss method did not utilize those numbers.

At hearing, Mr. FFF testified both generally and specifically as to how his capitalization of income values were arrived at. Generally, he stated:

MR. FFF: So, summarizing this real fast, what that is essentially when you look at it's an income approach on the capitalization. It's very common, especially with FERC regulated pipelines where all the information is publicly available. I believe 22 states that we have FERC regulated pipeline we value in use this method to estimate an income approach to value. They take a stabilized, they usually do averages of previous three years, five years, last year, trailing 12 months, take a stabilized income, divide that by a capitalization rate to produce an income to value. Now in order to quantify how that relates to EO, we can compare the conclusion of that income

capitalization once again to the FERC net book value or FERC net carrier operating property. And that will give us, as a percentage, the amount of EO that is present within the asset.

Hr'g Tr. pp. 71:6-15. To arrive at his capitalization rate, Mr. FFF created two fifty-two (52) page cost of capital studies, one for the ethane lines and one for the NGL lines. *See* Exhibit 10 to property owner's Ex. 5. During direct testimony, Mr. FFF attempted to sum up how he arrived at his weighted average cost of capital (WACC).

ATTORNEY LLL: Okay. Talk a little bit about, this is your large Exhibit 10, your weighted average cost capital analysis, what that's used for, how do you go about calculating that? Just kind of a general overview of what it's intended to do.

MR. FFF: Sure. And I don't have to go into too much detail, but essentially we look at capitalization rates, the equity and the debt in the bond market, just on a consistent basis. Every month we're providing weighted associated capital studies for different users, some government authorities, some buyers and sellers of pipelines, some property tax type issues. So, we're analyzing the debt and equity. And really theory is that if we as investors are going to look at, okay, we want to buy this asset, we want to purchase it. And to some extent are we purchasing the asset, what is our required rate of return? If we're going to have to go out, we don't have the money, the \$700 million, \$500 million, whatever it might be, we can finance it in two ways. We can go borrow money, take on debt, and we could issue stock, or we could go to the equity route. And so really what this is meant to do is say, okay, there's a representative field of potential buyers or risk portfolio, right? We look at our publicly traded companies, identify a subset of companies that are like our subject, equal to the risk of our subject in some way to determine, okay, what is the required investor capital requirement based upon the risk exhibited in the cash flows. And so, this analysis that walks through it gives you the real non fifth graders version, but the real meat and potatoes and the mechanics of how we go about building the equity to debt component, the apportionment rate called the capital structure between debt and equity to reach our final conclusion. And then that number that we conclude as the weighted average cost of capital is then used in our income capitalization and our rate of return methodology.

Hr'g Tr. pp. 74:4-23, 75:1-3. The subset of companies FFF was referring to were twenty-four (24) publicly traded oil and gas companies, selected as financial performance peers to the property

owner. *See* Property owner's Ex. 5, P 12-13. Based upon his study, Mr. FFF arrived at a WACC percentage of 12.59%. *See* Exhibit 10 to property owner's Ex. 5, P 2. FFF then applied a growth rate of 0% for the NGL lines, and arrived at a economic obsolescence percentage for those lines of 35.57%. *See* Ex. 3 of property owner's Ex. 5.<sup>9</sup>

Once we find that three (3) of Mr. FFF's four (4) methods are not determinative, we are left with essentially three (3) prongs to the Assessor's arguments in this matter. First, Ms. III argues that there is no economic obsolescence in the property, because in order to find economic obsolescence the situation/economic obsolescence must be permanent. Secondly, the first expert report from Mr. JJJ (Assessor's Ex.4) contends that West Virginia's cost methodology, as mandated by Subdivision 3.4.3.2 of Series 1P, Title 110 and utilized by the Assessor, is too generous. Mr. JJJ contends that this generosity is contained in West Virginia's utilization of the Marshall Swift valuation service as a source guide for trending and depreciating commercial properties. The Assessor's third argument is that despite the parties agreement that Mr. FFF's capitalization of income loss method is an income method under West Virginia law, he nonetheless made errors in his calculations, thus rendering his economic obsolescence percentage incorrect. These errors are that he used an incorrect WACC, that his guideline companies utilized to arrive at his WACC are not true peers of the property owner, and that his growth rate of 0% is too low, and not an accurate representation of the property owner's potential growth. We address these arguments in order.

Ms. III argued that economic obsolescence must be permanent, and that because the parties agree that the throughput deficiencies of the NGL pipelines will eventually be abated, economic obsolescence could not be found in this matter. Ms. III's authority for this proposition is two fold.

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<sup>9</sup> Obviously, given the length and breadth of Mr. FFF's report, there were many more steps to his calculation of economic obsolescence. We focus on his WACC, selection of guideline companies and growth rate, because in post hearing briefs the Assessor finds these three (3) parameters the most problematic.

First, in her January 19, 2023, report, on page 15, she declaratively states “[E]xternal Obsolescence is properly applied by the assessor/appraiser when the external forces influencing value are permanent and all considerations for adaptability for alternative uses have been eliminated.” *See* Assessor’s Ex. 2 p 15. The Assessor’s Ex. 2 is a document associated with a 2021 presentation Ms. III made to the International Association of Assessing Officers. On page 13 of Ex. 2, Ms. III again declaratively states that . . . “the Personal Property appraiser needs to evaluate whether the inutility is permanent.” However, upon direct examination, she testified that economic obsolescence could be either permanent or incurable. “ATTORNEY KKK: Well, is external obsolescence always permanent or incurable when valuing personal property? MS. III: Yes.” Hr’g Tr. pp. 181:14-16. In his post-hearing brief, the Assessor abandons Ms. III’s contention that economic obsolescence must be permanent, and instead provides citation to three authorities that acknowledge the permanent **or** incurable nature of economic obsolescence. *See* Respondent’s Brief p16.

We find this argument from the Assessor to be unavailing, primarily because it ignores West Virginia law. Economic obsolescence is a defined term under West Virginia law; “Economic obsolescence” means a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships. W. Va. Code R. 110-1P-2.5 (2013). Neither party argues that Section 2.5 is ambiguous. As a result, if we give the words their plain and ordinary meaning, as is our mandate, we believe that it clearly contemplates the permanent versus incurable distinction argued by the parties. The examples given in Section 2.5 clearly show conditions that by their very nature are not permanent. One would be hard put to find a condition less permanent than legislation. The same can be said for supply and demand relationships. The facts of this matter are the perfect

example of this. The producers came to the property owner and said that they anticipated production to increase, thereby calling for increased pipeline capacity. The Assessor does not argue that these conversations never took place. However, due to COVID and the accompanying changes in the United States economy, on July 1, 2022, the increased pipeline capabilities were not being utilized. The testimony was clear that this change in the supply and demand relationship between the producers and the property owner is clearly not permanent, but it is incurable. Clearly, the property owner cannot show up at the producers' offices and demand that they immediately produce more natural gas. We rule that none of the three (3) examples of economic obsolescence contained in Section 2.5 are conditions that, by their plain and ordinary meaning, are permanent.

Ms. III's report also expresses general concerns regarding the ramifications of finding economic obsolescence under the facts of this case. She states that "[T]he application of obsolescence consideration in consistently changing oil price market would tend to create a commodities market for the valuation of personal property in the oil industry, which is not appropriate or consistent with the cost approach. *See* Assessor's Ex. 2 p 17. She goes on to state "[S]imilarly, the loss of revenue, for bankruptcy, management, or other reasons not attributable to the loss in value of personal property is not considered in the property valuation." *Id.* These arguments suffer from the same infirmity discussed above, because they again ignore West Virginia law. The Legislature has given the Tax Commissioner and Assessors a clear mandate to consider depreciation, economic obsolescence and functional obsolescence when **valuing** commercial property in this state.<sup>10</sup> Despite Ms. III's suggestion, the property owner is not asking

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<sup>10</sup> This Tribunal has consistently considered the law in West Virginia to be that legislative rules that have gone through legislative rule making, are an act of the Legislature, no matter to what extent they were drafted by the executive branch. *See Appalachian Power Company v. State Tax Department of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995)(being an act of the West Virginia Legislature, legislatively approved rules are entitled to more than deference, they are entitled to controlling weight.)

the Assessor to lower its pipeline valuations because of fluctuations in the price of natural gas. Nor is it arguing that it did not make as much profit in any given year. Again, it is arguing that on July 1, 2022, a willing buyer would pay it less than the cost minus depreciation value assigned by the Assessor, because of a change in the supply and demand relationship between it and the natural gas producers. As such, we disagree with Ms. III's contentions, and find that the loss in value is attributable to the changes in the supply and demand relationship.

We acknowledge that this line of analysis raised by Ms. III is a fine line. Throughout the pendency of this matter this Tribunal has grappled with the question of where does bad decision making end and economic obsolescence begin. In answering this question, we have turned to the plain and ordinary meaning of "supply and demand relationships," as that phrase is used in Section 2.5 of Series 1P, Title 110 of the West Virginia Code of State Rules. We are of the opinion that the Legislatures' use of the word "relationships" is determinative to our reasoning. We take the city of San Francisco as our example. It is common knowledge (and we take judicial notice of the fact) that the COVID pandemic has created a huge glut of empty commercial office space in many cities in this country, but particularly in San Francisco. This glut is due to a loss of **tenants**, or put another way, a change in supply and demand relationships. If a developer chooses to build a new commercial office building in San Francisco today, without committed tenants, that may be a bad business decision. However, an existing commercial property owner with a half its tenants gone due to COVID is suffering from a non-permanent, incurable change in the landlord tenant **relationship**, which leads to economic obsolescence and the resulting loss in value.<sup>11</sup> A two-second Google search confirms that all across this country cities are grappling with a loss in

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<sup>11</sup> Some might argue that the situation described is not incurable, in that a motivated landlord will find new tenants. We might agree under normal circumstances. However, this Tribunal believes that the nationwide collapse of the commercial real estate market, due to millions of workers now working from home in the wake of the COVID pandemic, is for all intents and purposes, an incurable situation.

property values due to this exact situation. More to the point of this matter, Mr. FFF testified that the situation the property owner in this matter finds itself in is not uncommon.

MR. FFF: Back up to the question that you kind of put in there. Do not all these assets have economic obsolescence? And my question is, what makes you think they don't? Because like of all the pipelines in Texas that we have, hundreds of thousands of miles, nearly every single one of them have a measure of economic obsolescence when they're valued. It is a pervasive measurement. It's why it's in the cost approach. It's not necessarily a unicorn that we just found with this one or that OOO makes an adjustment for. It's not everywhere on every asset, but it is very pervasive within industrial-type assets to have.

Hr'g Tr. pp. 108:18-23. As such, we find unavailing, Ms. III's contention that finding economic obsolescence in this matter would open the floodgates to the necessity of finding economic obsolescence within every bad business decision.

The Assessor's next two arguments both involve expert witness, JJJ. Mr. JJJ's first report was prepared in response to the FFF report, which was sent by the property owner to the Assessor on December 13, 2022. This report, and Mr. JJJ's accompanying testimony generally focuses on two areas of rebuttal. First, Mr. JJJ analyzes Mr. FFF's inutility method of determining economic obsolescence. As discussed above, because this method is not an income approach to valuation, under West Virginia law, we give it no weight. Mr. JJJ then argues that Assessor's cost minus depreciation value is too low. Mr. JJJ arrives at his own cost minus depreciation value for the property, and his valuation is approximately one hundred and twelve (112) million dollars higher than the Assessor's.

ATTORNEY KKK: Let me see if I can easily summarize that or put it in a little bit simpler terms. So, you agree that using the state's mandated methodology, the figure that Mr. MMM arrived at of \$XX million and some change was correct using that methodology?

MR. JJJ: Based upon the information that was supplied to the county Assessor for the self-reporting, yes.

ATTORNEY KKK: Okay. And however, you and Mr. FFF both have experience outside of the state mandated methodology, and you have both used different methodologies to arrive at figures in this case. And so, you're saying that when you apply a market analysis market methodology that you would use outside of the state mandated methodology, you arrived at a figure of XX using the cost approach?

Hr'g Tr. pp. 208:1-11. The key phrase above is from counsel for the Assessor, when he says “outside of the state mandated methodology”. What counsel for the Assessor is obliquely referencing is the fact that Mr. JJJ believes that West Virginia’s use of the Marshall Swift trend and depreciation tables is too generous. As a result, he utilized a different trend a depreciation table, one called Handy-Whitman. He did this despite the fact that Subsection 3.5.1 of Series 1P, Title 110 directs assessors to utilize the Marshall-Swift trend and depreciation tables. *See* W. Va. Code R. § 110-1P-3.5.1 (2013) *Supra* at p.10.

ATTORNEY LLL: . . .Would the West Virginia allow for the use of the Handy Whitman trend tables for commercial purposes?

MR. JJJ: My answer was that they gave --- well, the answer is no, it doesn't. It gives a different trend table. It gives its own trend table. I'm sorry.

ATTORNEY LLL: Okay. So, summarize the first step you took in calculating your own fair market value of these lines was to use a trend table that's not suggested by the tax division in West Virginia, not used by the Assessor, and not referenced under West Virginia law. Is that accurate?

MR. JJJ: Yeah, I did an independent analysis. That's correct.

Hr'g Tr. pp. 234:1-9.<sup>12</sup> In his post-hearing brief, the Assessor again reiterated this argument, stating: “Mr. JJJ testified that, in his opinion, the leniency in the State’s mandated tables also accounts for economic obsolescence.” *See* Respondent’s Brief, p. 34. However, in the very next

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<sup>12</sup> On page 204 of Mr. PPP’s direct examination, he attempts to explain his theory of pipeline depreciation. However, it is not until Mr. PPP’s cross examination that he clearly articulates his usage of the Handy-Whitman depreciation tables.

sentence, the Assessor back peddles from this argument, stating: “Regardless of whether Mr. JJJ’s opinion is correct on this point, the effect is the same.” Id.

We find the first report from Mr. JJJ to be unconvincing. In similar fashion to the III report, his opinion is not supported by West Virginia law. In Subsection 3.5.1 the West Virginia Legislature has clearly and unequivocally directed the Tax Commissioner and assessors to use the Marshall Swift trend and depreciation tables. The Legislature has also directed that economic obsolescence shall also be considered in valuing commercial property. In plain English, in his first report, Mr. JJJ is arguing that assessors can ignore this economic obsolescence calculation, but quite obviously they cannot.

The final prong of the Assessor’s arguments is contained in Mr. JJJ’s second report. This report was prepared during the period between the hearing held in October of 2023 and the continuation in January of 2024. As a result, Mr. JJJ was able to testify and be cross examined about its contents. The general thrust of the report was to provide a counterpoint to the FFF report.<sup>13</sup> Specifically, this report contained what Mr. JJJ described as two income methods to identify/quantify any economic obsolescence in the subject pipelines. The first method he called “direct capitalization” and the second “discounted cash flow.” *See* Respondent’s Ex. 5 p. 37-44. In his two methods, Mr. JJJ performed economic obsolescence calculations similar to those done by Mr. FFF. Mr. JJJ’s weighted average cost of capital is based upon the WACC that the property owner reported to FERC. Hr’g Tr. pp. 213:5-6. He utilized a different growth rate than utilized by Mr. FFF. Moreover, his overall valuation of the pipelines increased by approximately a billion dollars. Finally, his report apportioned the income-based values based upon a ratio of pipeline

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<sup>13</sup> It should be noted that pages 27-36 of this report, and pages 210-218 of the transcript concern Mr. PPP’s analysis of the ethane pipelines and alleged mistakes made by Mr. FFF and the property owner regarding the cost figures provided to the Assessor. Due to the fact that the ethane lines are no longer part of this matter, we find these arguments not relevant to our decision.

miles. The average of the two methods resulted in a value for the property at issue that was more than double the Assessor's value. Hr'g Tr. pp. 255:14-22, 256:1-2.

At this point our analysis turns on Mr. FFF's capitalization of income loss method versus Mr. JJJ's direct capitalization method and his discounted cash flow method. Both men have extensive backgrounds in their fields. Mr. FFF has been employed by FFF for eighteen (18) years, doing appraisal and valuation, including extensive work involving FERC regulated entities. Neither lawyer questioned Mr. JJJ regarding his experience. According to his CV, he has been employed by KKK as an appraisal manager for over fourteen (14) years, and he apparently had some appraisal experience going back an additional fifteen (15) years prior to that. Therefore, it was puzzling to hear his testimony that he had never before utilized the two income methods in his second report. This fact most certainly damaged his credibility in the eyes of this tribunal. Moreover, as will be discussed in greater detail below, in his post-hearing brief, the Assessor does not rely as heavily on Mr. JJJ's report as one might expect. Nonetheless, we will analyze below the methods utilized by both men, in the order of the complaints by the Assessor.

### **Weighted average cost of capital**

Here, the Assessor argues that Mr. FFF utilized a WACC that was too high, in an attempt to lower the valuation of the subject pipeline. Mr. FFF's WACC was arrived at by utilizing the financial performance of twenty-four (24) guidelines companies. *See* property owner's Ex. 5 p. 12-13. The Assessor argues that these twenty-four (24) companies are not actual peers to the property owner, and that Mr. FFF should have only examined companies that transport ethane or NGLs. In his second report, Mr. JJJ utilized a WACC that was taken directly from the WACC that the property owner reports to FERC. After Mr. JJJ completed his testimony, Mr. FFF was recalled

for rebuttal purposes. Counsel for the Assessor asked Mr. FFF directly why his WACC was correct, and Mr. JJJ's was incorrect.

ATTORNEY KKK: . . . The first question I have on that is why are you using a market or industry level weighted average cost of capital rather than the cost of capital that was reported by OOO in zone FERC 6 forms?

MR. FFF: . . . Again, in terms of experience and valuing these pipelines across the US and how every single person does it, is we're looking at a market value. We're looking at what the investors would require. And again, there's several coursework that goes over how to develop and why you should use a market based weighted average cost of capital as opposed to a rate regulated based weighted average cost of capital. . . . We are absolutely convinced that the procedures we recommend are correct. . . . It hasn't been something that comes up even for common sense. So, for example, when Oklahoma Tax Commission developed their fluid pipeline weighted average cost of capital, why would they do that if every single one of those FERC reports had individual companies weighted average cost of capital in their cost of service in their FERC form 6? The reason being is you wouldn't arrive anywhere close to market value. If it was as simple as that they would just say, oh, we don't need to develop a fluid pipeline cost of capital. We'll just use the cost-of-service cost of capital that's in there. But it's pretty widely known by practitioners that you would use a market based weighted average cost of capital. . . . Every other state that values it does that. All the counties in Texas, everywhere except for Marshall, uses a weighted average cost capital result in the market.

Hr'g Tr. pp. 305:17-23, 306:1-23, 307:1-9. Counsel for the Assessor also inquired as to why Mr. FFF did not pick guideline companies that exclusively transported natural gas.

ATTORNEY KKK: And NNN is a producer, correct?

MR. FFF: Yes, they are.

ATTORNEY KKK: And OOO is not?

MR. FFF: That is correct. But really, what's important, say, let's look at, like, Oklahoma that takes crude pipelines coming out of refineries. If I told you as an investor that I performed this analysis and I didn't even consider the risk that these assets are very closely tied to the producer. They operate in the same geographic area. They have a little bit of a portion of their risk is associated with that producer, and that's why those would be included.

Hr'g Tr. pp. 309:9-17.

Turning to Mr. FFF's choice of guideline companies, given the facts of this case, we find the testimony above to be both logical and credible. The throughput deficiencies in this matter are the result of changes in the supply and demand relationship between the property owner and natural gas producers. Therefore, as Mr. FFF testified, it makes sense for him to examine both transporters and producers, when arriving at his WACC.

As for the contention that it was proper for Mr. JJJ to utilize a WACC based upon the property owner's WACC listed in their reporting to FERC, we disagree, for a variety of reasons. First, we find credible Mr. FFF's testimony that a market based WACC is necessary and commonly utilized. Again, West Virginia law requires a valuation to reflect what a willing buyer would pay a willing seller in an arm's length transaction. As such, a market based WACC makes intellectual sense. We also find credible, Mr. FFF's testimony that it would make no sense for a state like Oklahoma to develop a fluid pipeline WACC, if the state could just utilize each pipeline company's FERC reported WACC. In his reply brief, the Assessor again complains about Mr. FFF's WACC, however he pointedly fails to offer any analysis or explanation as to why or how Mr. JJJ's FERC based WACC leads to a more accurate valuation.

### **Growth rate**

Mr. FFF utilized a 0% growth rate in his income valuation method. During his direct examination, Mr. JJJ offered no opinion about the correctness of Mr. FFF's number. However, during his cross-examination Mr. JJJ offered somewhat confusing testimony regarding the growth rate he picked for his two income-based valuation methods (direct capitalization & discounted cash flow).

ATTORNEY LLL: So, for your direct capitalization method appraisal, you use a weighted average cost of capital of 8.38 for the ethane line and 8.28 for the NGL line, is that correct?

MR. JJJ: Yes.

ATTORNEY LLL: And you subtracted a 2.9% US growth rate from those percentages and calculated a discount rate for the DCF analysis.

MR. JJJ: For the DCF, for the terminal value, yes. For the DCF.

Hr'g Tr. pp. 254:4-10.

Page 38 of Mr. JJJ's second report shows his calculations for his first income method, (direct capitalization) for the NGL lines. However, those calculations do not show a growth rate. Page 42 of the second report shows Mr. JJJ's calculations for his second income method, discounted cash flow. Line 26 in the chart on page 42 shows that Mr. JJJ utilized a 2.9% growth rate. Based upon the testimony above, whereby Mr. JJJ seems to clarify that he only applied a growth rate to one of his two income methods, and the lack of a growth rate identified in the calculations on page 38, it appears that Mr. JJJ did not apply a growth rate to his direct capitalization method. It is not clear from anywhere in the record why he did not do so, or whether this constitutes a mistake in his direct capitalization method. As will be discussed in greater detail below, this Tribunal believes that the lack of an identified growth rate in this method calls its credibility into question. Moreover, there is no explanation in the record as to what exactly the 2.9% U.S. growth rate represents, and where that number came from.

During his cross examination of Mr. FFF, and in his post hearing brief, counsel for the Assessor points to figures contained in exhibit 6 of Mr. FFF's report. The Assessor argues that in exhibit 6 Mr. FFF found, (among other things) for the NGL lines, 9.29% average growth in revenue, a 26.26% average growth in net income and a 27.76% average growth in earnings before interest, taxes, depreciation, and amortization. *See* Ex. 6 to Petitioner's Ex. 5. & Assessor's Reply

Brief, p. 25. The Assessor argues that these figures call into question Mr. FFF's 0% growth rate. We are unconvinced for two reasons. First, exhibit 6 in the FFF report pertains to the blue chip method, which, as discussed above, both parties agree is not an income based method. Additionally, on cross examination, Mr. FFF explained that the 0% growth rate contained in his capitalization of income loss method is an anticipated growth rate versus a historical growth rate.

ATTORNEY KKK: Okay. And then you used a growth rate of 0% based on the information that was pulled to you by OOO or what you anticipated that the market would do over the next several years?

MR. FFF: If you look at historical FERC income, you have from 2019 forward, you have after federal tax income of \$54 million, then \$60, then \$59 million, and then \$58. So, we haven't seen just a perpetual income increase that warrants a change above that. With regards to the NGL would be the fact that those volumes have ramped up and the future is not as rosy as anticipated on the day. So, there's no growth concluded with that.

Hr'g Tr. pp. 102:11-19. We find Mr. FFF's growth rate of 0% for the NGL lines, based upon the historical FERC income to be more credible than the unexplained 2.9% U.S. growth rate utilized by Mr. JJJ, in only one of his two income methods of valuation.

In addition to the discussion above, regarding the Assessor's complaints about Mr. FFF's WACC and utilized growth rate, we must note that we find Mr. JJJ's overall credibility to be less than Mr. FFF's. We find as such for one reason, and that reason is because Mr. JJJ conducted an income approach to value in his first report, which was prepared eleven (11) months prior to his second report. Until the drafting of this final decision, this Tribunal was under the impression that Mr. JJJ's second report was done specifically to provide an income approach to valuation to counterpoint Mr. FFF's income valuation. Due to the fact that there was virtually no testimony about Mr. JJJ's first income-based valuation method, the undersigned was unable to question Mr.

JJJ about the income-based numbers contained therein. In his post hearing brief, the Assessor also fails to mention this methodology from Mr. JJJ.

A close look at Mr. JJJ’s capitalization of income method, which is briefly discussed on pages 15-16 of his first report, and the accompanying exhibits raises some unanswered questions. The confusion arises directly from the two main complaints of the Assessor, namely that Mr. FFF should have used the WACC method that the property owner reports to FERC, and that FFF’s growth rate was too low. Mr. JJJ’s calculations are shown below.

	KEA STUDY		TASC STUDY
<b>ETHANE PPLN</b>			<b>Jul-22</b>
<b>INC TO CAP</b>	\$59,000,000		\$55,953,525
<b>CAP RATE</b>	12.59%		8.72%
<b>GROWTH</b>	1.00%		1.00%
<b>CAP LESS GROWTH</b>	11.59%		7.72%
<b>VALUE</b>	\$509,059,534		\$724,786,593
<b>NET BOOK</b>	\$558,575,781		\$558,575,781
<b>EO</b>	\$49,516,247		-\$166,210,812
<b>EO AS % NBV</b>	8.86%		-29.76%
<b>NGL PPLN</b>			
<b>INC TO CAP</b>	\$60,000,000		\$61,185,811
<b>CAP RATE</b>	12.59%		8.72%
<b>GROWTH</b>	0.00%		0.00%
<b>CAP LESS GROWTH</b>	12.59%		8.72%
<b>VALUE</b>	\$476,568,705		\$701,672,144
<b>NET BOOK</b>	\$730,183,260		\$730,183,260
<b>EO</b>	\$253,614,555		\$28,511,116
<b>EO AS % NBV</b>	34.73%		3.90%

**3.90 OBSOLESCENCE**

See Respondent’s Ex. 4 p. 110. The fact that these calculations were done eleven (11) months prior to Mr. JJJ’s second report raises a couple of red flags. First, regarding the WACC debate, Mr. JJJ

testified that he did not look at the property owner's FERC filings until he prepared his second report.

ATTORNEY LLL: That's referencing what we discussed earlier, that FERC report was available to you when you did that original analysis, correct? You could have gone online and found that report?

MR. JJJ: I did not have it. No.

ATTORNEY LLL: It was available online, though? Could you access it by going to Google?

MR. JJJ: Obviously, yes. You could have done that by knowing what the reports were. Yes.

Hr'g Tr. pp. 255:6-13.

If this testimony is correct, and the Assessor's post hearing argument is also correct, namely that the correct WACC to use in a capitalization of income method would be the WACC that the property owner reports to FERC, then that begs the question, why did Mr. JJJ prepare an income valuation with a WACC that is both different than that of Mr. FFF's and also not what was reported to FERC? A bigger, brighter red flag is raised regarding the other main complaint of the Assessor, that Mr. FFF's growth rate of 0% for the NGL lines was artificially low. As is plain in the exhibit, Mr. JJJ also used a 0% growth rate for his calculations. Again, there was virtually no testimony about Mr. JJJ's first income based methodology.<sup>14</sup> Obviously, Mr. JJJ's use of a growth rate identical to Mr. FFF's undermines the Assessor's argument that Mr. FFF's growth rate was incorrect. The lack of any testimony and post hearing discussion about Mr. JJJ's first income valuation method strongly suggests that it was jettisoned in favor of his second report, however, the record is not clear as to why that decision was made. Ironically, the page 110 chart above not

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<sup>14</sup> Counsel for the property owner did briefly cross examine Mr. PPP regarding his \$XX valuation. However, this cross examination was limited to inquiring as to how Mr. PPP increased his valuation from seven hundred million dollars to one point two billion dollars between his first and second report. A review of Mr. PPP's first report does not reveal how he reached his valuation figure.

only undermines Mr. JJJ's overall credibility, but it also shows that Mr. FFF's general methodology for his capitalization of income loss method was sound, because Mr. JJJ followed the exact same steps in his methodology.<sup>15</sup>

### SUMMATION

- This Tribunal takes judicial notice of the effect the COVID pandemic had on the U.S. economy
- The property owner experienced supply disruption which resulted in throughput deficiencies in its NGL lines on July 1, 2022.
- This supply and demand relationship change was the result of outside forces. The change was not permanent but was incurable by the property owner.
- We find the calculations done by Mr. FFF, which resulted in a finding of 35% economic obsolescence for the property owner's NGL lines in DDD County to be credible. *See* Petitioner's Ex. 5 p. 17.
- We find Mr. JJJ's usage of the Handy-Whitman trend and depreciation tables in his first report to be unconvincing.
- We find Mr. JJJ's income capitalization method in his first report to be unexplained and unconvincing.
- We find Mr. JJJ's two income method calculations (direct capitalization & discounted cash flow) in his second report to be unconvincing. We find as such due to his admission that he had never before calculated economic obsolescence utilizing these methods.

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<sup>15</sup> As noted above, Mr. PPP found 4% economic obsolescence for the NGL lines, as opposed to Mr. FFF's 35%. This is due to Mr. PPP's unexplained seven hundred-million-dollar valuation, and his 8.72% WACC. Due to our ruling in this matter and the fact that the Assessor also did not rely on Mr. PPP's first income valuation, we need not linger long on this difference. Suffice to say that Mr. PPP's WACC was arrived at by his use of a different beta and a different equity risk premium than Mr. FFF.

Moreover, no explanation was given as to why these methods were necessary, when, in his first report, Mr. JJJ calculated economic obsolescence using a formula/method identical to Mr. FFF's capitalization of income loss method. Finally, Mr. JJJ's methods in his second report suffered from numerous omissions and unexplained anomalies, thereby rendering them unconvincing.

### **CONCLUSIONS OF LAW**

1. Except for property appraised by the State Tax Commissioner under section ten of this article and property appraised and assessed under article six of this chapter, all assessors shall, within three (3) years of the approval of the county valuation plan required pursuant to this section, appraise all real and personal property in their jurisdiction at fair market value except for special valuation provided for farmland and managed timberland. They shall utilize the procedures and methodologies established by the Property Valuation Training and Procedures Commission and the valuation system established by the Tax Commissioner. W. Va. Code Ann. § 11-1C-7(a) (2017).
2. All property, except public service businesses assessed pursuant to article six of this chapter, shall be assessed annually as of July 1 at sixty (60) percent of its true and actual value. W. Va. Code Ann. § 11-3-1(a) (2014).
3. A petitioner whose request to an assessor for reconsideration of value is denied, in whole or in part, . . . may file a protest with . . . the Office of Tax Appeals. W. Va. Code Ann. § 11-3-15i(c)(2022).
4. The market value of commercial and industrial real property is the price at or for which the property would sell if it was sold to a willing buyer by a willing seller in an arms-length transaction without either the buyer or the seller being under any compulsion to buy or sell. W. Va. Code R. 110-1P-3.1.1 (2013).

5. The three (3) approaches to fair value considered and used in estimating fair market value are: (A) cost, (B) income, and (C) market. W. Va. Code R. 110-1P-3.4.3.1 (2013).
6. Of the three (3) approaches to value, the cost approach may apply most consistently to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data. The market approach is used less frequently, principally due to a lack of meaningful sales. The income approach is not normally used because of the difficulty in estimating future net benefits to be derived except in the case of certain kinds of leased equipment. W. Va. Code R. 110-1P-3.4.3.2 (2013).
7. Adjustments. -- When physically inspecting commercial and industrial personal property for appraisal, three (3) types of depreciation should be considered: physical deterioration depreciation, economic obsolescence and functional obsolescence. W. Va. Code R. 110-1P-3.4.3.3 (2013).
8. Physical Depreciation - Depreciation tables for commercial and industrial personal property are developed using the Marshall Valuation Service as the source guide. W. Va. Code R. 110-1P-3.5.1 (2013).
9. Economic Obsolescence - Economic obsolescence can best be measured by either a market approach method or an income method. Due to the lack of sales volume for comparable commercial or industrial properties, an income approach is normally used. However, a market approach method may be used where the specific facts and circumstances would indicate that that method would achieve a more accurate measure of value. W. Va. Code R. 110-1P-3.5.2 (2013).
10. "Income approach" means the appraisal process of discounting an estimate of future income into an expression of present worth. W. Va. Code R. 110-1P-2.12 (2013)

11. “Economic obsolescence” means a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships. W. Va. Code R. 110-1P-2.5 (2013).
12. In West Virginia, an Assessor’s property valuations are presumed correct. *See, e.g.*, Syllabus pt. 1, Berkeley County Council v. Government Properties Income Trust LLC, 247 W. Va. 395, 880 S.E.2d 487 (2022); In re Tax Assessment of Foster Foundation’s Woodlands Retirement Community, 223 W. Va. 14, 672 S.E.2d 150, (2008); In re Tax Assessment Against American Bituminous Power Partners, L.P., 208 W. Va. 250, 539 S.E.2d 757, (2000); Western Pocahontas Properties, Ltd. v. County Commission of DDD County, 189 W. Va. 322, 431 S.E.2d 661 (1993); In re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53, 303 S.E.2d 691 (1983); Bankers Pocahontas Coal Co. v. County Court of McDowell County, 135 W. Va. 174, 62 S.E.2d 801 (1950).
13. For all appeals regarding property tax assessments, taxability, and classifications the standard of proof which a taxpayer must meet at all levels of review and appeal shall be a preponderance of the evidence standard. W. Va. Code Ann. § 11-10A-10(h) (West).
14. All property tax appeals before this Tribunal are heard *de novo*. W. Va. Code Ann. § 11-3-25b(c) (West).
15. When a party has the burden of persuasion on an issue, that burden does not shift. The burden of production merely requires a party to present some evidence to rebut evidence proffered by the party having the burden of persuasion. In re Tax Assessment of Foster Found.’s Woodlands Ret. Cmty., 223 W. Va. 14, 672 S.E.2d 150 (2008).
16. The evidence introduced by the Assessor in this matter did not rebut the evidence presented by the property owner.

17. The property owner in this matter proved by a preponderance of the evidence that the DDD County Assessor was incorrect in his assertions that the pipelines at issue did not suffer from economic obsolescence. The Assessor was also incorrect in his reliance on the economic obsolescence determinations contained in the III and JJJ reports.

**DISPOSITION**

Based upon the foregoing, it is hereby **ORDERED** that the appraised values arrived at by the DDD County Assessor, for the three (3) properties, identified as parcel numbers 00025826, 00025827 and 00025828, are hereby **MODIFIED** to reflect new values consistent with this opinion, namely, a 35% reduction to reflect economic obsolescence.

It is further **ORDERED** that the Sheriff of DDD County shall provide the property owner with a credit against future property taxes on the subject property, in an amount consistent with the revised values, as reflected in this decision.

**WEST VIRGINIA OFFICE OF TAX APPEALS**

By: \_\_\_\_\_  
A. M. "Fenway" Pollack  
Chief Administrative Law Judge

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Date Entered