STATE OF MICHIGAN
COURT OF APPEALS

New Covert Generating Co, LLC,

Petitioner, Appellant

v

Covert Township

Respondent, Appellee

COA Docket No. 320877

Michigan Tax Tribunal No 399578
Tribunal Judge Steven Lasher

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BRIEF OF AMICUS CURIAE, MICHIGAN MUNICIPAL LEAGUE,

CITY OF ZEELAND,

CITY OF MARQUETTE, AND

THE PUBLIC CORPORATION LAW SECTION OF THE STATE BAR OF MICHIGAN

FOR LEAVE TO FILE AMICUS CURIAE BRIEF

IN SUPPORT OF APPELLANT COVERT TOWNSHIP

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BASIS OF JURISDICTION

The Amicus, adopts the basis of jurisdiction as stated in the Township's brief on appeal.

STATEMENT OF QUESTIONS PRESENTED

The Amicus, adopts the statement of questions presented raised in the Township's brief on appeal, raises no new issues, but this brief, will be limited to the following three issues:

I. **DID THE TAX TRIBUNAL ERR BY NOT CONSIDERING THE NEWLY DISCOVERED EVIDENCE ON REMAND? (TOWNSHIP'S QUESTION IV),**

Petitioner-Appellee New Covert Generating Co says	NO
Respondent Appellant Covert Township says	YES
The Amicus says	YES

II. **DID THE TAX TRIBUNAL ADOPTED WRONG APPRAISAL METHODS IN ITS DETERMINATION AND MEASURE OF EXTERNAL OBSOLESCENCE (TOWNSHIP'S QUESTION II)**

Petitioner-Appellee New Covert Generating Co says	NO
Respondent Appellant Covert Township says	YES
The Amicus says	YES

III. **DID THE TAX TRIBUNAL ERR BY CONSTRUING MCL 205.735(4)(b) AS TO PERMIT JURISDICTION WHEN THE TAXPAYER HAD NOT FILED A STATEMENT OF ASSESSABLE PROPERTY IN THE FORM REQUIRED BY THE STC? (TOWNSHIP'S QUESTION I)**

Petitioner-Appellee New Covert Generating Co says	NO
Respondent Appellant Covert Township says	YES
The Amicus says	YES

STATEMENT OF FACTS

The Amicus, adopts the statement of facts supplied in the Township's brief on appeal.

INTRODUCTION TO AMICUS BRIEF

Amici and their Interest in the Present Case.

The Michigan Municipal League (MML) is a nonprofit organization which represents the interests of municipalities. Its members include 521 Municipalities. Municipalities have an interest in the proper construction and application of the property tax law, both procedural and substantive. All Cities and Townships are the assessing units which administer the property tax through the actions of assessors and the local boards of review and as the respondents in most property tax appeals. Issues concerning the jurisdictional prerequisites for appeal of assessments are important to all municipalities. The Cities of Marquette and Zeeland are respondents in pending appeals of property tax assessments filed by owners of power plants in those cities. The problems addressed herein also concern the Public Corporation Law Section of the State Bar of Michigan which has joined the MML and the Cities as Amicus. The Public Corporation Law Section consists of over 600 lawyers who generally represent municipalities.

The property tax is a substantial source of needed municipal revenue[1] and an incorrect application of appraisal principles threatens the fisc of all municipalities. Errors in application of

[1]In 2012, property taxes generated about $12.756 billion in revenue http://www.senate.michigan.gov/sfa/Revenue/StateEqualizedPropertyValues.PDF of which $5.8 billion was for counties, cities townships and villages. The remainder was for the State Education tax and local school taxes. While municipalities also receive constitutionally mandated and statutory revenue sharing, the 2012 revenue sharing for counties, cities townships and villages totaled only $0.917 billion. http://www.michigan.gov/documents/treasury/FY2012FY2013RevenueSharingPayments_20130911_434105_7.pdf page ii, thus, the property tax remains an essential and component of municipal operating revenue. While the costs of running a municipality have not decreased materially, the recession reduced statewide state equalized values by about 23% from 2007 levels and in order to balance its own budget,

appraisal principles which overstate obsolescence and thus cause value to be understated, become locked in for years as a result of Proposal A[2]. This exacerbates the effect of error and increases the importance of examining the Tribunal's reasoning for substantial assessment reductions.

There are over 200 power plants in the state.[3] Like the Subject, many of the other power plants are located in small communities and they are often the largest or among the ten largest taxpayers in those communities. A correct application of appraisal principles is, therefore important, beyond the effect on the parties involved and the appellate courts are the ultimate guardians of what is and what is not "the application of correct appraisal principles". It is particularly important that this appellate court consider and decide the issue whether certain indices of general business profitability for the type of business that may use a type of property, are, or are not a proper measure of property obsolescence. That issue affects the resulting value conclusion by approximately $400 million. Getting such an important matter set right when Tribunal decisions vary is also important to assure tax uniformity which is the more significant of the two great rules of property taxation[4]. The Tax Tribunal has taken different positions on

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the state reduced revenue sharing nearly 40% in 2009. The state's municipalities can hardly afford a precedent which may further erode the tax base.

[2] Prior to 1994, if an appraisal principle was misapplied and a value was understated, the resulting in a bad decision would affect the relative sharing of the costs of local services for the years at issue and a correct reappraisal could set the matter right. Since the taxable value cap adopted in Proposal A in 1994 and the implementation of that in MCL211.27a, however, errors resulting in an assessment that is too low caps all future assessments on that property into the indefinite future, until there is a transfer.

[3] http://www.powerplantjobs.com/ppj.nsf/PowerPlants2?Openform&cat=Traverse%20City%20of&Count=500

[4] The two rules being (1) property must be assessed at 50% of true cash value and (2) property must be assessed uniformly. In *Titus v Michigan Tax Commission, 374 Mich 476, 132 NW2d 647 (1965),* the Court instructed that Uniformity as required by the state constitution, requires all property to be assessed according to a "uniform rule" and the use of different methods or modes of assessment for similarly

that issue in cases concerning the valuation of power plants[5]. That issue is important to this case because the incorrect adjustment for external obsolescence adjustment reduced the Tribunal's value conclusion by about $400 million of true cash value (TCV).

This Amicus brief also addresses the issue of whether the Tribunal erroneously avoided consideration on remand of the very information which prompted the remand, by creating an unreasonable standard for due diligence. Newly discovered evidence that construction of a new gas fired power plant was planned and newly discovered evidence that the Subject plant (which the Tribunal valued at $179 Million (TCV) for 2010) was offered for sale at $750 Million, is powerful evidence that this case was not correctly decided. The reasons for avoiding consideration of that information on remand are flawed as explained herein.

This Amicus brief also addresses whether a taxpayer is permitted to appeal when the required "statement of assessable property" has not been filed "in the form required by the State Tax Commission." NCG has claimed that its incomplete filing of a form reporting zero values and a protest statement is sufficient and that it may appeal, without filing at all, if it appeals to the Board of Review. Amicus would apply the statute as written and that would not permit a local board of review protest in the absence of the required filing. Amicus would not conclude that forms filed were filed "in the form" required unless the filing supplied the basic information needed to apply the STC valuation multipliers.

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situated property was held to violate the requirement of uniformity. Whether the use of the types of indices business profitability indices used in this case and rejected in another decision which rejection was upheld on appeal, is a correct or incorrect appraisal method can cause a valuation to vary by hundreds of millions of dollars.

[5] Compare the Tribunal's decision in this case which used such indices to *L'Anse Warden Electric Co. LLC v Township of L'Anse, MTT No. 392335, 2012 Mich. Tax LEXIS 68, August 3, 2012, p 27 – 29, affirmed COA No. 312536, Unpublished, October 17, 2013, 2013 Mich. App. LEXIS 1673,* and the decision on remand, *MTT No. 392335, 8-19-2014* discussed in Section II B, *infra*, in which such indices were rejected.

Concerning whether NSC did file its statement, we have provided many federal cases which have decided what is, and what is not, a filing. That reasoning should apply to this situation. Applying the Michigan Statute, the filing at issue was not a filing of statements of assessable property "in the form" required by the STC.

ARGUMENT

I. THE DECISION ON REMAND DISREGARDED THE VERY EVIDENCE WHICH PROMPTED THE REMAND. THE NEWLY DISCOVERED EVIDENCE THAT CONSUMERS ENERGY PLANNED TO BUILD A NEW PLANT FOR $750 MILLION AND THAT NCG OFFERED TO SELL ITS PLANT FOR THAT AMOUNT SHOULD HAVE BEEN CONSIDERED.

A. Background and decisions.

The Subject property was assessed at $404 million and $401 million for the 2010 and 2011 years (Respondent's Exhibits R4-7), which is substantially less than the over $600 million New Covert Generating (NCG) paid for it in 2008 (05/13/13 Order, p. 18). Nevertheless, NCG appealed the assessment and claimed in the Tax Tribunal that its plant was worth only $149.9 million for 2010 and $334.9 million for 2011. The Tribunal ultimately determined values of $179.1 million for 2010 and $228 million for 2011. The values reflected on the roll, the values asserted by the parties and the Tribunal's concluded values figures are as follows:

Summary of Total TCV Asserted and Tribunal's TCV Conclusion					
Year	Parcel	TCV reflected on Roll (SEV * 2)	TCV Respondent – Township	TCV Petitioner - NCG	TCV MTT
2010	All property	404,568,800	506,475,000	149,947,600	179,100,000
2011	All property	401,268,800	475,000,000	334,947,600	228,400,000

The case was heard in two parts. The value portion was decided on May 13, 2013 a second hearing was then held concerning how that value should be allocated among different parcels. That second part of the case was not decided until February 5, 2014.

More than 21days after the judgment in the second part of the case, the Township learned for the first time, that while NCG was claiming in the Tribunal that its assessed values should be radically reduced, it was simultaneously claiming in the Public Service Commission (MPSC), that Consumers Energy, should not be permitted to spend about $750 million on a new gas fired power plant, because the Subject modern and efficient gas fired plant could instead be purchased from NCG for that amount. (See Township's Ex 6, 7, 8, 10, 13, 14 and 15). Upon learning of the positions taken in the MPSC, the Township brought a motion for relief from the judgment, which was denied (05/12/14 Motion and Supporting Brief; 08/05/14 Order, Township Ex. 6). An interlocutory appeal, to this Court of Appeals was filed and this Court remanded for an evidentiary hearing and consideration of that motion (COA Order 06/10/14). This Court, like Respondent, must have considered the matter important or it would not have remanded.

On remand, the Tribunal acknowledged that the proffered evidence was newly discovered and that Respondent did not know the proffered facts at trial or in time to move for a new trial [21 days after the decision]. (Order attached to the Township's brief as exhibit 6, p19), but concluded that it would still not consider the impact of the new facts on its decision, because the Township should have discovered the evidence in public records earlier, some (not all) of the evidence would be cumulative, and it would not likely alter the decision (Ex 6 p 17, 19). The Amicus submits that the Tribunal erred by avoiding the substance of the new evidence. The significant new facts discussed *infra* (that Consumers Energy applied to construct a new gas fired plant for $750 million and that NCG offered to sell Consumers the Subject for that amount) are not arguably cumulative, and application of correct appraisal principles to the new evidence would require a huge impact on the Tribunal's cost approach based value conclusion. The Tribunal avoided addressing the merits on remand by concluding that with reasonable diligence,

the Township should have discovered the evidence earlier. To reach that conclusion, it applied an impossible standard of diligence.

B. The information could not have been discovered earlier with due diligence.

The municipalities represented by the MML have an interest in not having created an unreasonable standard for "due" diligence.

The Tribunal acknowledged that discovery was closed by the time NCG filed its motion to intervene in the Consumers Energy matter (Exhibit 6 to Township's Brief on Appeal, Order p26). Consumers Energy's Application to build a $750 million gas fired power plant was not even filed until after discovery closed in the present case[6]. Thus during and before the value case to which such filings might be applicable and when the experts and advocates would have been actively looking for value related information, the information at issue did not even exist.

The Tribunal reasoned that because NCG's motion to intervene in the MPSC matter occurred before the date for filing a motion for a new hearing[7], it could have been discovered because MPSC information was public and discoverable. (Exhibit 6 to Townships Brief on Appeal, Order p26). The only sense in which that information was discoverable was that it existed as a public document in the files of the MPSC. The question presented is whether a litigation team breaches a duty of due diligence by failing to know all public information and whether it breaches a duty of due diligence by failing to conduct searches of all public records, even before it has obtained some clue to indicate that potentially relevant facts may exist in those records. NCG attempts to support the proposition that reasonable diligence requires that the

[6] See Township's Exhibit 8 p p3, paragraph 4 in which NCG stated that the Application was filed on July 12, 2013, and the Tribunal's Order denying the Motion for relief from the Judgment p19 which states that the discovery closed January 16, 2013.

[7] The 21 day period for filing motions for a new hearing expired February 26, 2014 and the motion was filed on May 12, 2014 (Order Township's Ex 6, pp1 and 19), which is 75 days after the date for filing motions for a new hearing.

information about the MPSC matter should have been timely found simply because it existed before the time for filing a motion for rehearing, citing *Moskwa v Gracik,* UNPUBLISHED COA. Docket 277439. See NCG's brief on Appeal p45. First, the case as cited in NCG's brief does not disclose that the decision was unpublished. Next and more importantly, the decision does not even arguably support the proposition for which it was cited by NCG. In *Moskwa,* the court held that the evidence at issue could not possibly have been discovered earlier, because it did not exist. That is entirely different than a holding that because certain evidence came to exist before the deadline for filing a rehearing motion, failing to find it demonstrates a lack of reasonable diligence.

The test of MCR 2.612(c)(i)(b) is whether the new information was discoverable with due diligence; no lack of due diligence was demonstrated, and the explanation for the timing of the discovery is entirely reasonable. After discovery and hearing in a case is complete, one would not logically look for new information unless something suggested that something new and material may exist and unless one had some clues as what that was or how to find it. An assessing official who worked on this case, learned of certain key facts (that NCG had intervened in a Consumers Energy matter and offered to sell its plant), which then led him to search for and find the evidence at issue. (Rehearing Transcripts ("RHT") pp. 22-25). The information was then promptly found and presented. Unless all parties are deemed to immediately know all information which comes into the public domain in a public filing, which is truly an impossible standard, then there was no lack of diligence and the matter should have been considered on its merits.

The Tribunal alternatively reasoned that because some other MPSC documents from other MPSC matters were discovered before the first hearing and were listed on the Township's

exhibit list, this particular MPSC information could also have been found. With all due respect, the Tribunal applied an illogical test. The fact that a researcher searching for a file or document he knows to exist and has some information about, can search for and find one document, does not give rise to a logical inference that the researcher should have found some different information about which he did not have the information to conduct a search. The MPSC documents here at issue did not even exist when the MPSC documents which were earlier discovered and listed, were found and listed. At most, the finding of the other MPSC documents only suggests that the researcher knew that the MPSC existed and that it apparently has a data base that can be searched on the internet. That, however, does not establish that the documents at issue should have been discovered before they were discovered, because before one would have reasonably searched the MPSC records, there had to be some clue that there may be a document to look for and find. Before the expert learned after the valuation hearing, that Consumers Energy was applying to build a new plant and that NCG had intervened -- the researcher would not have known what to ask for (or in computer-speak, what terms to enter in a search) to obtain that information.

Contrary to the Tribunal's conclusion that the Township was not diligent, the record establishes that the Township did retain an expert, who did research the MPSC records (and presumably many other sources) for relevant information, before the hearing. His earlier searches did not find the information because it did not then exist and when he obtained enough information to allow a search for the information at issue it was found and disclosed. Rather than complementing the diligent researcher on having recognizing the significance of the new facts to the present matter once he had moved on to a new and unrelated matter, the Tribunal's reasoning would brand him as not reasonably diligent for not conducting constant and continuous searches

of all sources of potential information, even when there was no clue that there was some out there to find.

The Tribunal next and dangerously speculated that there "may have been a duty to supplement" discovery under MCR 2.302(E)(1)(b)[8] if only Respondent had asked about offers and negotiations concerning the sale of the Subject when discovery was open. Order Ex 6, p35. It is also possible that Respondent did not ask a formal discovery question about sales or potential sales of the Subject because it concluded (correctly) that there were none at that time. There was no reason to believe that Consumers Energy was going to announce a plan to build a new plant and no reason to believe that NCG was going to offer to sell Consumers its plant. The Tribunal cited no authority for the legal proposition that a defending party's attorney breaches a duty of diligence by not serving interrogatories about facts which it knows have not occurred in an effort to generate a possible duty on the part of the opposing side to provide supplemental information about future information which does not presently exist and which there is no reason to believe will come to exist. Absent such a duty, there was no lack of diligence in failing to ask questions in an effort to create a duty to produce facts about future matters which there was no reason to believe would occur. Further, the Tribunal only speculated about whether there "may" have been a duty to supplement if a discovery inquiry had been served. The Amici are concerned that absent reversal, the Tribunal's decision could generate a duty to submit meaningless discovery questions not addressing the need for facts which exist, but to generate a possible duty so provide information in the future.

[8] MCR 2.302(E)(1)(b) provides: "A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that (i) the response was incorrect when made; or (ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment."

C. Correct application of proper appraisal principles to the new evidence, would absolutely mandate a different outcome.

Most importantly, the Tribunal's concluded that the new evidence would not likely affect its decision concerning value, (08/05/14 Order, Township's Ex. 6, p. 17). Correct application of proper appraisal principles to the new evidence, however, would absolutely mandate a different outcome, for at least three independent reasons.

First, the new information about Consumers Energy's request for approval to build a new gas fired power plant **was inconsistent with the costs which the Tribunal used in its cost approach**. The Tribunal's determination of value rests entirely on its cost approach. The cost approach starts with a cost to construct a new facility and makes adjustments to that starting point for differences between the Subject and the model represented by the cost figure. If a new gas fired plant would cost more than the Tribunal's cost of replacement figure, the Tribunal's cost and its resulting value would have to be adjusted. The Tribunal cost was $809 million for 2010 and $772 million for 2011 (Appendices 1 & 2 to Order revising its value decision attached to Township's brief as Exhibit 4). By comparison the cost represented by the Consumers Energy application is $750 million for a much smaller plant. Adjusting the costs referenced in the MPSC matter for capacity, would generate a much higher cost for the Subject. The difference would increase the cost estimate starting point and therefore the ultimate value conclusion substantially.

Secondly and importantly, the fact that Consumers Energy applied to build a new power plant is compelling evidence that that a new modern plant **would be worth its cost new**. Application of that fact to proper appraisal principles would require a huge reduction of (and likely the elimination of) the Tribunal's external obsolescence adjustment, which was $442.1 million for 2010 and $305.2 million for 2011. External obsolescence in a cost approach is an

adjustment to cost of replacement to account for the fact (when true) a new model plant (the cost of which is the starting point of the analysis) would not be worth the cost of construction when new. If Consumers Energy is willing to spend 100% of actual construction costs to build a new power plant that is powerful and direct evidence that there should be no external obsolescence adjustment[9].

Thirdly, unless it was disingenuously wasting everyone's time in the MPSC, the newly discovered evidence suggests that **NCG must have believed that it could obtain something approaching $740 million for the Subject property, because it offered to sell its plant for that amount.** That flies in the face of the Tribunal's value conclusions of $178 million and $228 million for 2010 and 2011.

For the reasons described above the MML submits the Tribunal erred by failing to consider the new evidence on its merits.

II. THE TRIBUNAL'S DETERMINATION OF VALUE AND SPECIFICALLY ITS DETERMINATION AND MEASURE OF EXTERNAL OBSOLESCENCE, REQUIRE REVERSAL

A. Whether a particular index actually measures a particular type of obsolescence is a question of appraisal principles which this Court should address.

While the Tribunal's factual findings are accorded deference on appeal, this Court "review[s] whether the Tribunal 'made an error of law or adopted a wrong principle.'" *Pontiac*

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[9] This point is made even Petitioner's appraiser in *Economic Obsolescence: Real Life Stories* , **Michael J. Remsha,** and Kevin Reilly, http://www.american-appraisal.com/US/Library/Articles/Economic-Obsolescence-Real-Lif.htm (Mr. Remsha was NCG's appraiser in this matter):

> "...One important point to remember: in the real world, EO and entrepreneurial profit cannot exist at the same time. Entrepreneurial profit is the anticipated profit an investor requires to construct and sell a property. **If EO exists, an investor would not build a property to sell it because there would be no profit.** In fact, EO can be considered negative entrepreneurial profit."

In applying a cost approach which was the basis for the Tribunal's valuation, there is simply no external obsolescence if power plants are being built.

Country Club v Waterford Twp, 299 Mich App 427, 437; 830 NW2d 785 (2013), quoting Mich Props, LLC v Meridian Twp, 491 Mich 518, 527-528; 817 NW2d 548 (2012). Whether or not certain procedures do or do not account for various types of obsolescence in applying a cost approach is an issue of the correct application of appraisal principles and thus a legal issue[10].

B. External obsolescence is inappropriate in the cost approach, absent a finding that the property represented by cost new, would not be constructed new without a subsidy and evidence that businesses' profit margins are lower as of the valuation date than in some other year and other business valuation indices do not establish that important point.

The Tribunal determined its value using the cost approach. Its revised calculations are set forth in Appendix 1 and 2 of its revised order dated 6-27-13 which is contained in Exhibit 4 of the Township's appellate brief. The figures concerning costs and external obsolescence are as follows.

Cost and External Obsolescence from Tax Tribunal's Cost Approach from Appendix I and Appendix 2 of 1-27-13 Order				
	Appendix 1 2010		**Appendix 2 2011**	
	MTT's values	External Obsolescence as a % of cost	MTT's value	External Obsolescence as a % of cost
Cost of Replacement	809,791,842		772,844,026	
External Obsolescence	(442,146,000)	-55%	(305,270,000)	-39%

The logic of the external obsolescence adjustment is that a new facility represented by the cost new, would not be built if there is external obsolescence[11]. The Tribunal determined that

[10] See *Meijer v Midland Mich App (2000),* in which the Court stated:

> Clearly, the replacement cost approach does eliminate the need to calculate some types of functional obsolescence. By definition, replacement cost eliminates functional obsolescence due to excess construction or superadequacy. However, a determination of other sources of functional obsolescence, not caused by excess construction, must at least be considered in the replacement cost approach. In the present case, the tribunal ruled that all functional obsolescence is eliminated by use of the replacement cost approach. This amounts to an adoption of the wrong appraisal principle.

[11] See note 9 *supra.*

external obsolescence existed primarily due to "excess electricity generation capacity." (Tribunal's Op of value p 40, Township's appellate Brief Ex 3) Assuming that such over-capacity exists as a matter of fact, it does not logically follow that the over-capacity would persist or that a new plant would necessarily be worth less than its cost new if it did. Evidence of an intention to actually construct a new power plant would establish that, whatever the perceived over-capacity may have been, the costs of new construction are still warranted and there is therefore no external obsolescence. (See Section I C *supra*) Stated otherwise, for there to actually exist 65% external obsolescence one must conclude that no rational investor would consider building a new plant, absent a subsidy of 65%[12] of construction cost and a general statement concerning over-capacity, without concern for the projected extent or longevity of that projected over-capacity, does not establish that.

The Tribunal's actual determination of the 65% figure for external obsolescence is based on indices of gross margins and inutility. A determination of external obsolescence is not warranted by simply citing some potential risk or problem facing owners of a type of property, such as over-capacity, reduced gross margins or low operating time because, even if such problems may affect the owner's business profits, because the problem may not affect potential builders of power plant physical assets enough or in a way that would cause one to not undertake new construction of plants. This was the reasoning of the Tax Tribunal in *L'Anse Warden Electric Co. LLC v Township of L'Anse, MTT No. 392335, 2012 Mich. Tax LEXIS 68, August 3, 2012, p 27 - 29.* In that case, Petitioner presented its evidence unopposed because the Respondent was in default. Petitioner's expert (coincidentally, from the same firm that appraised the Subject in the present case for NCG) made a large external obsolescence adjustment based on the business' external issues – just as they did in this case. The Tribunal Judge in that case, who

[12] The Tribunal's 2010 percentage for external obsolescence was 65%. See Value Opinion, p 40.

is an appraiser, first rejected the income approach because that would produce a business value and not a property value. (Op p 23 – 24.) The Tribunal applied a cost approach. It its cost approach, it first rejected the petitioner's external obsolescence claim based on an income analysis because it related to the business and not the property. (Op 24.) Importantly, the Tribunal also specifically rejected methods of measuring external obsolescence based on a business valuation index (Op p27). The "weighted average cost of capital" had been offered as a measure of external obsolescence, and it was rejected because it was a method of business valuation, not property valuation. (Op p 32)[13] In the absence of any evidence of a proper appraisal procedure supporting an external obsolescence adjustment, the Tribunal applied no external obsolescence adjustment.

On appeal, the Court of Appeals affirmed in part and reversed in part. It affirmed the use of the cost approach and the rejection of the income approach, because the income was not strictly for the use of the property[14]. The Court reversed for consideration of a subsidy, which was available to and which had been obtained by the green energy power plant at issue in that case. *L'Anse Warden Elec. Co. v. Twp. of L'Anse, No. 312536, Unpublished, October 17, 2013, 2013 Mich. App. LEXIS 1673.* The Court did not reverse the Tribunal's rejection of the external obsolescence adjustment supported by the weighted average cost of capital index.

On remand, the case was considered by the same judge who decided the present case. The only adjustment made was an adjustment for the subsidy. *L'Anse Warden Electric Co. LLC*

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[13] The weighted average cost of capital method simply determines the average return on capital for all forms of capital in a business. If the average return on capital in a type of business is low, those who advocate for the use of that method argue that external obsolescence exists. The Tribunal rejected that in *L'Anse Warden Electric Co. LLC,* that rejection was affirmed and that method and reasoning is closely related to the "gross margin analysis" is at issue in this case. See Section C-1, *infra.*

[14] As applied to the valuation of tangible assets, the income approach is applicable to determine the value when the income is derived from rents for the use of the subject property (hotels, apartments, shopping malls) and not when the income is from the operation of a business as in the case of a power plant.

v Township of L'Anse, MTT No. 392335, 8-19-2014. The owner received a subsidy to construct or convert that green energy plants, which would not have been done absent such a subsidy. The Tribunal considered other methods of determining value such as an income approach and different methods of considering the subsidy. It determined on remand to continue to use the cost approach. Concerning external obsolescence, it applied the straight forward method of simply reducing cost by the amount of the subsidy. While the Tribunal broadly considered whether it should adjust for more external obsolescence, it did not do so, beyond adjusting for the subsidy. The Tribunal's decision on remand in that case recognized that absent a subsidy, no one would build a plant like that at issue and the government subsidy was the amount of subsidy needed to entice someone to build such a plant. In the present case, there was no such subsidy. The Subject plant is not a green energy plant entitled to any such subsidies. The important point for purposes of the present case is that the general business index was rejected as a measure of external obsolescence and that was not altered either on appeal or on remand.

Applying the lessons of *L'Anse Warden Electric Co.*to the present case:

1. Absent proof that no one would build a plant like that represented by cost of replacement without a subsidy of the construction costs (a burden which was to be borne by the Petitioner, NCG), there should be no external obsolescence adjustment.

2. Business valuation indices do not establish external obsolescence because they do not logically establish that construction costs would have to be subsidized to promote new construction. The Tribunal has rejected the use of such indices twice and the Court of Appeals affirmed that. The determination of 65% external obsolescence in present case which reduced the Tribunal's valuation by $442 million TCV, adopts an appraisal principle and method of assessing which is entirely contrary to the decisions in *L'Anse Warden Electric Co,* in which such indices were properly rejected.

3. This Court as the arbiter of correct appraisal principles can and did properly require additional evidence concerning external obsolescence to be considered. As applied to the present case, the analogous action would be to reverse the application of $442 million of obsolescence based on

methods that do not actually measure such obsolescence and require the Tribunal to consider the new evidence that someone (Consumers Energy), actually had requested permission to spend the full cost of construction to build a gas fired combined cycle plant.

4. Even if the newly discovered evidence concerning the Consumers plant were disregarded, the application of the reasoning in *L'Anse Warden Electric Co,* would prohibit the use of the indices used to measure external obsolescence and the Court of appeals can and did reverse the Tribunal's value conclusion when the determination of external obsolescence violated correct appraisal principles. It should do so in the present case as well.

C. Petitioner's Gross Margins Analysis And Petitioner's Inutility Analysis Which The Tribunal Relied Upon Do Not Establish That The Facility at Issue Would Not Be Constructed For The Costs Of Construction And It Was A Violation Of Proper Appraisal Principles To Rely Upon Those Analyses.

The Tribunal's conclusion for value adjustments of hundreds of millions of dollars is based solely on Petitioner's **gross margins analysis and inutility analysis**, neither of which are described or discussed in the opinion, neither of which measure a permanent or stable problem, and neither of which relate to whether a power plant would be built without a subsidy. The result of that analysis also produces the same wild swings in value that caused the income approach to be rejected. The relationship between the appraisal concept to be measured and the index used is therefore so tenuous, or nonexistent, as to constitute an incorrect appraisal principle.

1. Neither of the analyses used by the Tribunal relate to whether a power plant would be built for the cost of construction.

As described above, the amount of external obsolescence is the subsidy that would be required to warrant spending the cost of construction. While the new evidence of a willingness to spend the cost of new construction suggests that no subsidy is required and that there is no external obsolescence, even if that is erroneously disregarded, it would be as logical to rely on tea leaves as the Petitioner's gross margin and inutility analyses to prove the amount of external

obsolescence. As the ultimate guardians of appraisal principles to be applied, this Court should consider whether the ratios and relationships proffered actually relate to that which they purport to measure.

The gross margin analyses described on pages 71-72 of Petitioner's appraisal starts with electricity prices and gas prices statewide and compute a gross margin figure for several years. The year 2005 had the highest industry wide margins, by far. Gross margins were lower in 2009 and 2010 which correspond to the 12-31-2009 and 12-31-2010 valuation dates[15]. Assuming the gross margins generally were much higher in 2005 than they were as of the valuation dates, this evidences nothing whatever about the how much (if anything) less than construction cost a plant would be worth as of the valuation date. This is because it is entirely possible that market participants would build a new plant if the 2005 high profit margins could be projected for the future, but that the 2009 and 2010 profit margins would also be perceived by investors as more than sufficient to attract investment dollars to the construction of new plants. The simple point is that evidence that one year is better or worse for the industry profits or gross margins than some base year, does not give rise to a logical inference that new construction dollars will not be spent even in years in which there were lower rates of return. The implicit unconsidered assumption of the Tribunal's use of the gross margin analysis that compares gross margins of 2005 base year to the years at issue is that the full cost of construction would only be warranted for new projects in the base (the best) year. There is no logic or data to suggest that is true. Applying the reasoning of that part of the Tribunal decision in *L'Anse Warden Electric Co. LLC v Township of L'Anse, supra,* which was affirmed and in which the related "weighted average cost of capital" method of measuring external obsolescence was rejected, the fact that the business sector was less profitable in the tax years than it might have been in other years, does not establish external

[15] Petitioner's Appraisal, Exhibit 181, p 443 contains a chart showing the index.

obsolescence. The use of business valuation methods and indices to measure external obsolescence in a valuation of real and personal property was also criticized in McKim, *The Rouge Steel Decision, Industrial Real Property or 'Star Wars, Stock Markets and Magic, The Michigan Assessor, September and October 1985,* presented to the International Association of Assessing Officers 5th Annual Legal Seminar March 21 - 22, 1985 and later published in *The Michigan Assessor, September and October, 1985.* The use of a stock market index was criticized in that article because there is frequently no relationship between the way the market participants determine the price to be paid for a business and the way in which those buying and selling tangible assets of the same business would determine the price to be paid. The article also criticized the business value index approach based on its volatility. The gross margin index used in the present case exhibits the same deficiencies. Gross margins are a tool of business analysis and valuation, because businesses are often valued based on their profit potential. The income of a business however is not necessarily the same as the income from the property and property may be needed and built by businesses even in less than the best years.

Petitioner's inutility analysis is not a measure of external obsolescence for the same reason – it does not give rise to any inferences about whether a subsidy would be needed to encourage the construction of a model facility represented by cost of replacement new as of the valuation dates. The inutility analysis compared utilization of the Subject to other Michigan power plants. The issue in determining the existence and amount of external obsolescence however is whether the model plant represented by cost new would be built without a subsidy - not whether the subject is more or less efficient as to be called upon to be utilized more or less than other plants - - that would be a functional obsolescence adjustment, and another large adjustment was taken for functional obsolescence. In summarizing the analysis Petitioner's

Appraisal, p74 even referred to it as a measure of "operational performance". Further some plants are used as base load plants while others are used to satisfy the next level of demand while still others are intended to serve only the peak demand. Their utilization would naturally vary. Application of a comparative inutility analysis based on different types of plants assumes that all peaking plants which are by design and intent to be used only to serve peak demand are all partly externally obsolete, even if a the market would build such a plant. The statistic used to measure external obsolescence simply does not do so.

2. **The Tribunal's external obsolescence took no consideration of how long the shortfall in gross margins would last.**

It would come as no surprise to an investor in power plants that gross margins for any industry will vary. If, contrary to the method employed and affirmed in *L'Anse Warden Electric Co,* one were to assume that because the gross margins close to the tax days were lower than the gross margins in the best year, there is some external obsolescence to be charged to the property, there was still no consideration of how long the reduced margins were likely to last. A shortfall predicted for a few years would have less of an impact than a permanent shortfall. Given the general economic cycles not every year will fall short of the benchmark in equal amounts. This is evident from the chart of gross margins in Petitioner's Appraisal Exhibit, 181, page 443 which shows a spike in 2005, a drop after that and uptick in 2010. Using any one year as a snapshot is obviously wrong because valuation should be future oriented (see Section D, *infra*) and given the cyclical nature of the index and the fact that it had decreased much in recent years, if the index were used at all, a buyer would more likely predict an improvement in the near future. The method used (unlike a discounting of projected future incomes) does not account for known future cycles. It takes a snapshot during the worst of times as compared to the best of times and by looking at only that one point in time radically overstates external obsolescence.

3. The Tribunal's cost approach valuation suffers from the same excessive variation as Petitioner's income approach which was rejected.

The Tribunal criticized and rejected Petitioner's income approach, concluding that it "lacks sufficient credibility to be reliable" precisely because the values varied wildly between the first and second year (Value opinion p 33. Attached to Township's Appellate brief as Ex 3.) Ironically, when applying its own independent cost approach, the Tribunal apparently did not notice that its own external obsolescence adjustment varies by $136,876,000, or if it noticed, it was not prompted to question the result in the face of such dramatic change from one year to the next as it did when faced with such variation in the income approach it rejected. The reason for the variation is that the Petitioner's gross margin analysis treated an aberrational low gross margin figure for 2009 (the figures were higher for the years before and after) as if that would have been perceived in the market as a permanent future condition.

If one bases a calculation on one year's statistic (whether the statistic is income or a gross margin figure) the result will necessarily reflect the one year only. If the year used is an aberration, the result will reflect that. The 2009 gross margin figure used was the worse shown. It was down 50% from the previous year's figure and the following year's figure was up about 50%. Thus 2009 was an aberration. A rational decision maker considering whether to build a power plant would look to the future, and even if that projection were based in part on past performance, it would not be as simplistic as using the current year's figure alone compared to a best year when those figures have varied often and dramatically.

Since the determination of market value and external obsolescence are supposed to be future oriented, (see section D, infra) the use of one year's statistic (whether the statistic be income or a gross margin figure) cannot possibly correctly reflect proper appraisal principles

unless the figure is a stabilized number representing future expectations over the long term. That was not done.

If one looked to the average past performance (as opposed to one year's performance) as evidence of the long term future external obsolescence to use, the result would be a much higher 2010 value and perhaps a somewhat higher 2011 value. This correction would correct the use of an aberrant year for a long term projection, but it would not correct the error of using an index which is not rationally related to the external obsolescence to measure external obsolescence. If, however, the Court determines that the indices used do measure external obsolescence, then this correction should be made in the application of it. The better approach in this situation; however, is that applied by the Tribunal in *L'Anse Warden Electric Co. LLC v Township of L'Anse, supra.* in which an approach like that used in this case was simply rejected and the Tribunal found that no external obsolescence was proven.

D. Determinations Of Value And External Obsolescence Must Be Future Oriented And They Must Consider Whether The Obsolescence For Which The Adjustment Is Being Taken Is Permanent Or Temporary.

A proper determination of value as of any given valuation date, must always be based on the evaluator's perception of the future because the value of a real property asset is "the present worth of future benefits that accrue to real property ownership" or stated otherwise the "anticipation of benefits to be obtained in the future" *The Appraisal of Real Estate* 12th Ed p 20. This point is entirely consistent with Michigan's statutory standard of "true cash value" which looks, *inter alia,* to the "usual selling price", because the price at which property usually sells reflects the anticipated benefits to be obtained from the property over the remaining life of the property. It follows from these appraisal principles, that evidence of past or present income, supply and demand are only relevant to the extent that they suggest something relevant about the expected future benefits.

Bonbright makes this point concerning the income approach, stating:

> ". . . when earnings have once been "realized," so that they can be expressed with some approach to accuracy in the company's accounts, they are already water under the mill and have no direct bearing on what the property in question is now worth. Value, under any plausible theory of capitalized earning power, **is necessarily forward looking.** It is an expression of the **advantage that an owner of the property may expect to secure from the ownership in the future. The past earnings are therefore beside the point, save a possible index of future earnings.** . . . One need, therefore, make no exception to the principle that reported or realized earnings are literally irrelevant except as a possible measure of prospective earnings.

James C. Bonbright, *Valuation of Property,* Vol I, pp 250 – 251 (1937) emphasis added.

Circumstances which affect value, will affect value more if it is projected that the circumstances will continue for the duration of the life of the asset, and much less impact if it is projected that they will continue for a year or two and then change. This is not a new or controversial appraisal principle. This is recognized in the Appraisal Institute, The Appraisal of Real Estate (Chicago: 13th Ed, 2008), p 442.

> **External** obsolescence is a loss in value caused by factors outside a property. It is often incurable. External obsolescence can be either **temporary** (e.g., an oversupplied market) **or permanent** (e.g., proximity to an environmental disaster) Emphasis added.

In addition to the fact that there is simply no relationship between Petitioner's gross margin index and the inutility indices and the concept of external obsolescence of tangible property (that point is described, *supra*), the Tribunal's methods compared the subject years to the best year, without regard for or finding that, the obsolescence so measured was expected to permanently continue at that level. The gross margin index as submitted by NCG, however cyclical. That index was low in 2004, spiked to a high in 2005, dropped in 2006, increased in 2007, fell in 2008 and 2009 and increased again in 2010. The Tribunal used the aberrantly low 2009 gross margin index for 2009 without even considering that the trend from that point was

looking up. In doing so it violated the important appraisal principle that a proper determination of value must be future oriented and the corollary principle that external obsolescence based upon a one year index is erroneous absent a finding that the external obsolescence is not cyclical, but rather permanently at that level. This particular error is especially harsh in its effect as the taxable value cap discussed *supra*, will lock in its impact for many years.

E. The conclusion of Respondent's expert, whose appraisal was rejected, concerning external obsolescence has no impact on the previous arguments.

The Tribunal rejected the appraisal of Township's expert. It repeatedly found his work to have been disappointing and did not rely on it. Ironically, however, NCG's brief seeks to support the Tribunal's determination of external obsolescence by stating the Township's expert also concluded to some amount of external obsolescence. The Tribunal rejected the method of measuring external obsolescence used by Respondent's expert. If NCG's methods are not a correct measure external obsolescence (and they are not for the reasons stated above, it is no support of NCG's position to state that a rejected expert's conclusion, which was based on a different, unrelated, but also rejected, measure came to a similar result. The situation at hand is like that in *L'Anse Warden Electric Co. LLC v Township of L'Anse, supra,* in which the after rejecting consideration of that township's evidence because it was in default, the Tribunal looked to the petitioner's evidence and although it was unopposed, rejected the external obsolescence determination because it did not "relate" to a proper measure of external obsolescence. The *L'Anse Warden Electric* decision is also applicable in that the income based method for determining value or external obsolescence of a power plant was rejected, and by reference to Respondent's rejected method, "also" is the flawed method Petitioner is trying to use as support of its similarly flawed measures of external obsolescence.

III. THE TRIBUNAL DID NOT HAVE JURISDICTION OVER NCG'S PERSONAL PROPERTY APPEALS.

A. Background and Statutes at Issue.

Recognizing that the determinations of annual assessments, particularly property which is to be valued using the STC valuation multipliers, requires assessors to obtain costs of certain property by year of acquisition and by certain classes, the legislature has enacted statutory provisions which require property owners to provide information annually and cuts off appellate rights if they fail to do so.

Specifically, MCL 211.19 provides:

> (1) A supervisor or other assessing officer, as soon as possible after entering upon the duties of his or her office or as required under the provisions of any charter that makes special provisions for the assessment of property, shall ascertain the taxable property in his or her assessing district, the person to whom it should be assessed, and that person's residence.
>
> (2) Except as otherwise provided in section 9m, 9n, or 9o [none of which are relevant], the supervisor or other assessing officer shall require any person whom he or she believes has personal property in their possession to **make a statement of all the personal property of that person whether owned by that person or held for the use of another to be completed and delivered to the supervisor or assessor on or before February 20 of each year.** A notice the supervisor or other assessing officer provides regarding that statement shall also do all of the following:
>
> (a) Notify the person to whom such notice is given of the exemptions available under sections 9m, 9n, and 9o.
>
> (b) Explain where information about those exemptions, the forms and requirements for claiming those exemptions, and the forms for the statement otherwise required under this section are available.
>
> (c) Be sent or delivered by not later than January 10 of each year.
>
> (3) If a supervisor, an assessing officer, a county tax or equalization department provided for in section 34, or the state tax commission considers it necessary to require from any person a

statement of real property assessable to that person, it shall notify the person, and that person shall submit the statement.

(4) A local tax collecting unit may provide for the electronic filing of the statement required under subsection (2) or (3).

(5) A statement under subsection (2) or (3) **shall be in a form prescribed by the state tax commission.** If a local tax collecting unit has provided for electronic filing of the statement under subsection (4), the filing format shall be prescribed by the state tax commission. The state tax commission shall not prescribe more than 1 format for electronically filing a statement under subsection (2) or more than 1 format for electronically filing a statement under subsection (3).

(6) A statement under subsection (2) or (3) shall be signed manually, by facsimile, or electronically. A supervisor or assessor shall not require that a statement required under subsection (2) or (3) be filed before February 20 of each year.

(7) A supervisor or assessor shall not accept a statement under subsection (2) or (3) as final or sufficient if that statement is not in the proper form or does not contain a manual, facsimile, or electronic signature. A supervisor or assessor shall preserve a statement that is not in the proper form or is not signed as in other cases, and that statement may be used to make the assessment and as evidence in any proceeding regarding the assessment of the person furnishing that statement.

(8) An electronic or facsimile signature shall be accepted by a local tax collecting unit using a procedure prescribed by the state tax commission.

MCL 205.735a (4) (b) which describes how the jurisdiction of the Tribunal may be invoked and establishes certain prerequisites, provides:

(4) In the 2007 tax year and each tax year after 2007, both of the following apply: * * *

(b) For an assessment dispute as to the valuation or exemption of property classified under section 34c of the general property tax act, 1893 PA 206, MCL 211.34c, as commercial personal property, industrial personal property, or utility personal property, the assessment may be protested before the board of review or appealed directly to the tribunal without protest before the board of review as provided in subsection (6), if a statement of assessable property is filed under section 19 of the general property tax act,

1893 PA 206, MCL 211.19, prior to the commencement of the board of review for the tax year involved.

(Emphasis added)

B. Applying MCL 205.735(4)(b) Literally, by Properly Applying the Last Antecedent Rule, There Can Be No Appeal of a Commercial, Industrial Or Utility Personal Property Assessment, Unless the Taxpayer Files the Statements Required by MCL 211.19 Before the LBOR meets.

Statutes are to be applied as plainly written absent an ambiguity[16], and the subsection (4)(b) quoted above precludes Tribunal jurisdiction in this appeal of industrial personal property unless " a statement of assessable property is [was] filed under section 19 of the general property tax act, 1893 PA 206, MCL 211.19, prior to the commencement of the board of review for the tax year involved." This conclusion is supported by the "last antecedent rule", which provides that a limiting clause (such as that at the end of MCL 205.735a(4)(b)) following more than one antecedent, limits only the "last antecedent" unless it is preceded by a comma. If the limiting clause is preceded by a comma, it limits all of the preceding antecedents. This rule of construction was first suggested by Jabez Sutherland in *Sutherland on Statutory Construction* § 267 (1st ed. 1891). The last antecedent rule has been recognized as a grammatical rule of construction. See *People v Small, 467 Mich. 259, 263; 650 NW2d 328 (2002).* Michigan appellate courts have applied the last antecedent rule as a rule of grammar presumed to have been known by the Legislature, stating that the Legislature "know[s] the rules of grammar" and

[16] This Court reviews de novo issues of statutory interpretation underlying an administrative body's ruling. *Wexford Med Group v City of Cadillac, 474 Mich 192, 202; 713 NW2d 734 (2006).*

> When faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of the statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. Similarly, courts may not speculate about an unstated purpose where the unambiguous text plainly reflects the intent of the Legislature. *[Pohutski v City of Allen Park, 465 Mich 675, 683; 641 NW2d 219 (2002)* (citations and internal quotation marks omitted).]

the tenet that "statutory language must be read within its grammatical context unless something else was clearly intended [.]" *Niles Twp. v Berrien Co. Bd. of Comm'rs, 261 Mich App 308, 315; 683 NW2d 148 (2004).* Also see In *People v Rahilly*, 247 Mich. App. 108; 635 N.W.2d 227 (2001) in which the Court described the rule, including the effect of including or not including a comma before a limiting phrase, as follows:

> The last antecedent rule of statutory construction posits that "[r]eferential and qualifying words or phrases, where no contrary intention appears, refer solely to the last antecedent." 2A Sutherland, supra at § 47.33, p 369. Applying this rule of construction to subsection 14(2), the phrase "civil disability" stands on its own, and the phrase "following his or her release from that status" modifies only the last antecedent, which in this case is the phrase "loss of right or privilege." There are no commas separating the qualifying phrase that would indicate it applies to all preceding antecedents. See *Spears v Indiana, 412 NE2d 81, 82-83 (1980)* ("Where commas set off a modifying phrase it is evidence that the phrase was intended to apply to all principles instead of only the one adjacent to it."); 2A Sutherland, supra at § 47.33, p 373 ("Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma." [footnote omitted]).

Applying the last antecedent rule, unless "a statement of assessable property is [was] filed under section 19 of the general property tax act, 1893 PA 206, MCL 211.19, prior to the commencement of the board of review for the tax year involved", the taxpayer was not authorized to appeal to the local board of review or to appeal to the tribunal directly. The Tribunal erred in concluding that the phrase "if a statement of assessable property is [was] filed" applied only to direct appeals to the Tribunal.

Application of the last antecedent rule does not produce an irrational result. The denial of an appeal when the taxpayer fails to file is reasonable in light of the property tax law as a whole. Personal property statements are due on February 20. MCL 211.19(2). Costs are reported as of 12-31 of the prior year. STC form 4175 requires costs to be reported by year of acquisition for several different classes of property, such as computers, furniture, as machinery and equipment,

video equipment etc. Thus, the taxpayer is afforded 51 days from 1-2 to the 2-20 deadline for timely filing of the statement of assessable property. Assessors use the reported costs to prepare assessments using the STC valuation multiplies. The reported costs are multiplied by the STC valuation multiplies for each year of acquisition. There are different multipliers for different types of property, which is why the forms require the property to be reported by year of acquisition and type. This method is used in almost all personal property assessments. The timely filing of the required statements is, therefore, very important to the administration of the tax.

If a taxpayer fails to file the required statements by the 2-20 deadline an assessment is made based on the assessor's best judgment. If the taxpayer believes the assessment is, is too high, it may still appeal if it files the required, and now late, statement before the first Monday in March, which is the date of the "first meeting" of the board of review. MCL 211.29. At that meeting the assessor turns the roll over to the LBOR which reviews the roll and corrects errors or omissions. By encouraging those who missed the 2-20 deadline to at least file before the LBOR meets, the legislature afforded the local board of review an opportunity to apply the STC valuation method to the belatedly reported costs at the first meeting of the LBOR. This allows a uniform method of assessment to be implemented at the local level. The encouragement to file the information in the form needed to apply the STC method is provided by MCL 205.735a (4)(b) which prevents any appeal of a personal property assessment to either to "the LBOR" or to the Tribunal unless the statement of assessable property is filed in the form required before the LBOR meets.

The LBOR obviously cannot correct any estimated assessment unless a statement including the costs by property types and years of acquisition is provided by at least the

beginning of the LBOR. If a late personal property statement is filed before the first meeting of the LBOR, the LBOR would at least have a chance to apply the multipliers and use the resulting figures as the basis for the assessment instead of any estimate made by the assessor. Aside from the inconvenience caused by the late filing, if a statement is filed just before the LBOR meets, the process is essentially where it would have been if the taxpayer had timely filed before 2-20, and the statute allows the late filer in this situation the same opportunity to either appeal the LBOR or to skip the LBOR and appeal to the Tribunal by May 31. If, however, the taxpayers does not file the statement at least by the beginning of the LBOR, the local unit is afforded no opportunity to apply the standard STC methods and multipliers at the local level and MCL 205.735a(4)(b) prevents any appeal of a personal property assessment to either the LBOR or the Tribunal. This construction of the statutory scheme provides the assessing unit a chance to set the assessment using STC methods and the actual costs which were required to have been filed earlier, rather than using an estimated assessment. A taxpayer only loses the right to appeal the personal property assessment when it chooses to ignore the actual 2-20 filing deadline and the grace period effectively provided until the first Monday in March.

Ignoring the last antecedent rule, the Tribunal determined that the limitation applied only to the second of the two methods of appeal preceding the limitation. The Tribunal's decision determined that that one who has not filed a personal property statement can still appeal to the Tribunal if it appeals to the LBOR, if affirmed that would create a curious contradiction by which a taxpayer could outright defy the filing requirements, leaving the LBOR helpless in any effort to apply the STC methods uniformly and fairly, and then claim ironically that it can appeal the resulting assessment to the Tribunal precisely because it managed to appear before the LBOR and still refuse to file the required statement of assessable property. That makes no sense.

Reading the MCL 205.735a(4)(b) literally, as the rules of construction require, NCG could not have legally effected an appeal to the LBOR if it had not filed its statements prior to the LBOR. **The mere appearance at the LBOR, without meeting a prerequisites for such a LBOR appeal does not constitute an appeal.** *AERC of Michigan, LLC v City of Grand Rapids, 266 Mich. App. 717; 702 N.W.2d 692 (2005).* If the statement required by MCL 211.19 is not filed before the first meeting of the LBOR, then there was no right to appeal to the LBOR or appeal directly to the Tribunal. That is the result of applying the limiting clause at the end of MCL 205.735a(4)(b) to both of the preceding antecedents. It makes sense in the context of the statute and it should be applied. The Amicus parties therefore submits that that the Tribunal's construction of MCL 205.735a(4)(b) is erroneous.

NCG's argument on appeal concerning this issue misreads MCL 205.735a(4)(b) and fails to acknowledge that absent the filing of a statement of assessable property under section 19, there can be no board of review appeal. NCG posits a conflict between MCL 205.735a(3) and MCL 205.735a(4)(b) which does not exist. MCL 205.735a(6) provides that assessment disputes may be appealed by various dates provided. MCL 205.735a(3), however, provides that "Except as otherwise provided in this section or by law", the Tribunal cannot obtain jurisdiction unless there was a LBOR appeal. (Thus far, all appeals of assessment disputes would have to proceed first to the LBOR). Next, MCL 205.735a(4) creates some exceptions. MCL 205.735a(4)(a) creates exceptions for real property not at issue. MCL 205.735a(4)(b) concerning personal property provides that if one has not filed under section 19, which requires a filing in a form provided by the STC, then there may not be a protest to the LBOR or an appeal to the Tribunal without protest to the LBOR. Contrary to NCG's argument, that does not conflict with sub-section 3. It simply means that the only way to appeal a personal property assessment dispute is

to file the required statement under section 19 in the form required by the STC, because if that filing is not made, section 3 prevents an appeal absent a LBOR appeal and MCL 205.735a(4)(b) prevents a LBOR appeal.

C. Personal Property Statements which are Incomplete Do Not Meet the Test.

Applying the law correctly as described above, the Tribunal either had, or did not have, jurisdiction depending upon whether the required statement of assessable property was filed each year. The Tribunal's opinion concluded that forms 4175 were filed for each year and that **the "content or sufficiency" of the statements was legally immaterial.** (MTT Opinion p 13, third line from bottom.) That legal conclusion is obviously erroneous because the statute does not reference a form 4175 – it requires the filing of a "statement of assessable property" "under section 19" as a prerequisite for an appeal. Under section 19 the statement to be filed is:

- statement of all the personal property of that person whether owned by that person or held for the use of another
- in a form prescribed by the state tax commission.

Entries written <u>on</u> a form supplied by the STC are not necessarily <u>in</u> a form required. Entries on a form that comply with the clear instructions provided by the STC on its form and supply the substantive information required are in a form required by the STC, but that is not what NCG filed. In 2010, despite the clear instructions requiring other forms to be filed with the form 4175, NCG simply did not do so. For 2011 it filed the 4175 and a form 3991, but the 3991 was not completed it stated that NCG was filing under protest and entered zero values instead of those called for by the form. Applying the statutory language, neither the 2010 or 2011 were submissions were "in the form" required by the STC. The filings were therefore not filings of the required statements of assessable property under section 19.

The failure to file the form 3991 cannot be excused because it is labeled a real property form. The instructions to STC form 4175 clearly require power plant property to be reported on form 3991 and not on form 4175. Form 3991 contains tables for generators and turbines which are not on the form 4175. Therefore, to file a proper form 4175, requires power plant owners to also file form 3991. The forms themselves show the significance of getting the various types of assets reported in the right tables on the forms. Different types of property are assessed using different valuation multipliers[17]. The point is that the assessing unit cannot possibly apply the STC methods and procedures as required to determine an assessment if the proper costs are not reported in the form required by the STC.

The Tribunal's conclusion, that that the filing of no statement addressing the turbines and generators, or a statement claiming a zero value for the great bulk of power plant property is a filing for purposes of MCL 205.735a(4)(b), because something was filed and the accuracy or completeness of the statement is immaterial to determining whether one may appeal, elevates form over substance. The purpose of a return, especially a statement of assessable property is to permit the assessing unit (the assessor and the local board of review) to compute the correct tax applying the STC methods and multipliers. While no case concerning what constitutes a filing has been found concerning what constitutes a statement of assessable property, the Michigan statute requires the statement to be in a form required by the STC. The guiding principle for what constitutes a federal return is that the mere filing of a form with a protest statement is not a

[17] Looking to form 4175 attached to the Township's brief as Exhibit 6. If a turbine purchased and installed in 2004 is (in violation of the instructions) reported on table B as "machinery", it is valued at 49% of its cost new. By contrast if the 2004 turbine cost is reported correctly on form 3991 the multiplier 106%. It should be obvious that if they could choose to do so with impunity, power plant owners would prefer to not complete form 3991 and simply report all costs on form 4175.

return. To constitute a return, that which is filed must supply enough information to allow the calculation of the tax liability.[18]

Footnote 4 of the Tribunal's order denying summary disposition posited a hypothetical situation in which a taxpayer fails to file its statement and the assessor estimates a value which is ten times too high, say $100,000, when the value is really $10,000. The, Tribunal concludes that it "does not believe" it was the "intent of the statute" to completely cut off such a non-filing taxpayer's appeal rights. The Tribunal's reasoning is erroneous; because the legislative intent is supposed to be based on the statutory language which as written would require exactly that result. But to be clear, the Tribunal's concern is also misplaced because the law recognizes an exception for constructively fraudulent assessments which are so erroneous that the size of the error constitutes a constructive fraud and in the situation posited by the Tribunal an overvaluation of ten times what the Tribunal postulated, would appear to meet that test. The ability of a party to plead constructive fraud claims has been recognized as within the jurisdiction of the Tribunal in cases where the general nature of the dispute involved the validity of the

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[18] See the Dept of Justice cite, http://www.justice.gov/tax/readingroom/2001ctm/10ctax.htm#10.04[3][a] which states:

> Most courts take the approach **that a form which does not contain sufficient financial information to allow the calculation of a tax liability is not a "return"** within the meaning of 26 U.S.C. 7203. See, e.g., *United States v Kimball, 925 F.2d 356, 357 (9th Cir. 1991) (en banc)*; *United States v Upton, 799 F.2d 432, 433 (8th Cir. 1986)* (where taxpayer included bottom line assertion of liability, **but did not include information from which that figure was derived**); *United States v Malquist, 791 F.2d 1399, 1401 (9th Cir. 1986)* (Form 1040 with **word "object"** written in all spaces requesting information is not a return); *United States v Green, 757 F.2d 116, 121 (7th Cir. 1985)*; *United States v Goetz, 746 F.2d 705, 707 (11th Cir. 1984)*; *United States v Mosel, 738 F.2d 157, 158 (6th Cir. 1984)*; *United States v Vance, 730 F.2d 736, 738 (11th Cir. 1984)*; *United States v Grabinski, 727 F.2d 681, 686-87 (8th Cir. 1984)* **(taxpayer must divulge "sufficient financial circumstances" to determine tax liability)**; *United States v Stillhammer, 706 F.2d 1072, 1075 (10th Cir. 1983)*; *United States v Verkuilen, 690 F.2d 648, 654 (7th Cir. 1982)*; *United States v Reed, 670 F.2d 622, 623-24 (5th Cir. 1982)*; *United States v Crowhurst, 629 F.2d 1297, 1300 (9th Cir. 1980)*; *United States v Edelson, 604 F.2d 232, 234 (3d Cir. 1979)*; *United States v Brown, 600 F.2d 248, 251-52 (10th Cir. 1979)*. . .

Emphasis added.

property tax assessment. See *Colonial Village Townhouse Co-op v City of Riverview, 142 Mich App 474, 478; 370 NW2d 25 (1985).*

> "A valuation is necessarily fraudulent where it is so unreasonable that the assessor must have known that it was wrong. If the valuation is purposely made too high through prejudice or a reckless disregard of duty in opposition to what must necessarily be the judgment of all competent persons, or through the adoption of a rule which is designed to operate unequally upon a class and to violate the constitutional rule of uniformity, the case is a plain one for the equitable remedy by injunction."

IV Cooley on Taxation, 4th ed., § 1645. Also see *Helin v Grosse Pointe Twp, 329 Mich 396, 406-407; 45 NW2d 338 (1951) quoting the passage quoted above.* Therefore, the concern about some poor innocent non-filer (if there can be such a combination) who may be saddled with a constructively fraudulent assessment is both not before the court and not a valid concern as a matter of law.

The Tribunal found that the assessor made conflicting statements concerning whether the statements filed were sufficient. Conflicting statements if material would simply suggest a factual issue for hearing, not a finding of jurisdiction. There was no hearing concerning any such statements or instructions and, as importantly, no hearing about what previous representations may have been made by the taxpayer to prompt any such statements.

SUMMARY AND CONCLUSION

The four Amicus parties have has submitted this brief, because this case raises important procedural, valuation and jurisdictional issues which affect assessing units.

Concerning procedure, when this Court was confronted with the inconsistencies between NCG's positions in this case upon which the Tribunal so completely relied, and the positions of NCG in the MPSC, it remanded. That inconsistency was not addressed on its merits because the Tribunal found that the Township was not diligent in discovering it earlier. In doing so, it

created an impossible or impractical standard of diligence. The decision creating that standard should be reversed and the issue of the positions taken in the MPSC should be addressed on their merits.

Concerning valuation, whether any particular method for measuring external obsolescence, such as the gross margin or inutility method used in this case, actually measures external obsolescence is a matter of the correct application of appraisal principles which is the proper province of the appellate courts. The Tribunal is effectively split on this issue, a very similar weighted average cost of capital method having been rejected in *L'Anse Warden Electric Co, supra,* as a business valuation tool which did not properly measure external obsolescence of property. There is simply no demonstrated or logical connection between the general industry gross margins or comparative inutility, and the question of whether anyone would pay the full cost of construction for a power plant or the question of how large a subsidy would be required to warrant the construction of a power plant. This is an even stronger argument when one considers the evidence that another market participant sought permission to spend the full cost of construction to build a similar new plant.

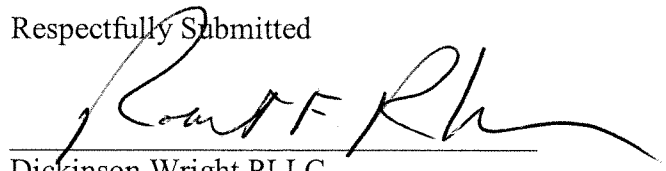
Also concerning value, the Tribunal's value conclusions were not future oriented as demonstrated by the large swings in the Tribunal's value conclusion from one year to the next and the methods used which are based on business valuation indices which varied wildly. Because the present value of an asset is the present worth of its expected future benefits over its entire remaining life, the appraisal method used must take that into account, and the result will be, a higher 2010 value and a less dramatic difference between the 2010 and 2011 values.

Concerning jurisdiction, properly applying the last antecedent rule, MCL 205.735(4) (b) provides that there can be no appeal of a commercial, industrial or utility personal property

assessment unless the taxpayer files the statements required by MCL 211.19 in the form required by the STC before the LBOR meets. Filing an appeal to the LBOR is not permitted by the statute unless the statement has been filed, so the filing requirement cannot be evaded by an appeal to the LBOR. Further, filing a statement which is not in the form required by the STC does not meet the requirement.

For these reasons, Amici requests that this honorable Court reverse the decision of the Tax Tribunal.

Respectfully Submitted



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