

03-0936
CENTRALLY ASSESSED PROPERTY
TAX YEAR: 2003
SIGNED: 06-21-2011

BEFORE THE UTAH STATE TAX COMMISSION

PETITIONER,)	
)	FINDINGS OF FACT, CONCLUSIONS
Petitioner,)	OF LAW AND FINAL DECISION
)	
v.)	
)	
)	
PROPERTY TAX DIVISION OF THE)	
UTAH STATE TAX COMMISSION,)	
)	Appeal No. 03-1000
Respondent.)	
)	
_____)	
RURAL COUNTY et al,)	
)	Appeal No. 03-0936
Petitioner,)	
)	Account No. #####
v.)	Tax Type: Property Tax/Centrally Assessed
)	Tax Year: 2003
PROPERTY TAX DIVISION OF THE)	Judge: Phan
UTAH STATE TAX COMMISSION,)	
)	
Respondent.)	

This Order may contain confidential “commercial information” within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and regulation pursuant to Utah Admin. Rule R861-1A-37. The rule prohibits the parties from disclosing commercial information obtained from the opposing party to nonparties, outside of the hearing process. However, pursuant to Utah Admin. Rule R861-1A-37 the Tax Commission may publish this decision, in its entirety, unless the property taxpayer responds in writing to the Commission, within 30 days of this order, specifying the commercial information that the taxpayer wants protected. The taxpayer must mail the response to the address listed near the end of this decision.

Presiding:

Pam Hendrickson, Commission Chair
Palmer DePaulis, Commissioner
Marc B. Johnson, Commissioner
Jane Phan, Administrative Law Judge

Appearances:

For PETITIONER: PEITITONER REP. 1
PEITITONER REP. 2

Appeal Nos. 03-0936 & 03-1000

For Counties: COUNTIES REP. 1
 COUNTIES REP. 2
For Division: DIVISION REP. 1
 DIVISION REP. 2

STATEMENT OF THE CASE

This case arose as an appeal by PETITIONER. (“PETITIONER”) and the affected counties (“Counties”) of the 2003 assessed value of PETITIONER’s taxable Utah property of \$\$\$\$ performed by the Property Tax Division of the Utah State Tax Commission (“Division”). The cases were consolidated and a Formal Hearing was held on March 14-16, 2005. Based upon the evidence presented at the hearing, the Tax Commission hereby makes its:

FINDINGS OF FACT¹

Field Code Changed

1. Petitioners are appealing the assessed value as set by the Division for ad valorem property tax purposes.
2. The lien date is January 1, 2003.
3. The Utah taxable value for the original assessment was \$\$\$\$ based on a system value of \$\$\$\$ before allocation and adjustments.
4. On or about June 1, 2003, PETITIONER filed a timely Petition for Redetermination challenging the Division’s assessed valuation of PETITIONER’s property. PETITIONER’s appeal was assigned Appeal No. 03-1000.
5. On or about June 1, 2003, the Counties filed a timely Petition for Redetermination challenging the Division’s assessed valuation of PETITIONER’s property. The Counties appeal was assigned Appeal No. 03-0936.

Corporate Structure and History

¹ This order is based in part on Proposed Findings of Fact, Conclusions of Law and Final Decisions submitted by the parties in this matter.

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6. PETITIONER is a wholly owned subsidiary of COMPANY 1, an international telecommunications company based in CITY 1, COUNTRY 1. Formal Hearing Exhibit ("Ex.") 4, p. B-1.

7. PETITIONER's United States operations are based in CITY 2, STATE 1. Ex. 4, p. B-1.

8. The predecessor to PETITIONER was COMPANY 2, which was created in YEAR through the merger of COMPANY 3 and COMPANY 4. Ex. 4, p. B-1.

9. Through Federal Communications Commission (FCC) auctions of broadband PCS licenses in 1995, 1997 and 1999, COMPANY 2 acquired PCS licenses through a subsidiary called COMPANY 5 ("COMPANY 5"). Ex. 4, p. B-1.

10. COMPANY 5 launched the first auctioned PCS license in CITY 3, STATE 2, on DATE, and continued to aggressively build out its PCS licenses in the REGION 1 United States, based on the GSM technology platform. Ex. 4, p. B-1.

11. On DATE, COMPANY 5 was spun off from COMPANY 2. Ex. 4, p. B-1.

12. In MONTH and MONTH YEAR, COMPANY 5 completed merger transactions with two other regional GSM service providers, COMPANY 6 and COMPANY 7. Ex. 4, p. B-1.

13. COMPANY 5 fully integrated the three companies by the end of YEAR, converting to a single customer billing platform, implementing standard business practices, and successfully launching the COMPANY 5 brand name in all markets including CITY 4, CITY 5, CITY 6, CITY 7 and CITY 8. Ex. 4, p. B-1.

14. On DATE, COMPANY 1 ("COMPANY 1") acquired the common stock of COMPANY 5 and COMPANY 7, and transferred the stock to its mobile telecommunications subsidiary, PETITIONER. Ex. 4, p. B-1, Ex. 21, p. 4.

15. Based on the purchase price paid by COMPANY 1, COMPANY 5 included \$\$\$\$ on its balance sheet for goodwill and \$\$\$\$ for licenses. Ex. 22, p. 27.

16. As stated in PETITIONER's 10K report, "[g]oodwill consists of the excess purchase price over the fair value of net assets acquired in purchase business combinations." Ex. 21, p. F-10.

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17. COMPANY 5 was the first U.S. member of PETITIONER. Other members of PETITIONER in MONTH YEAR included COMPANY 8 in COUNTRY 1, COMPANY 9 in the COUNTRY 2, COMPANY 10 in COUNTRY 3 and COMPANY 11 in the COUNTRY 4. Ex. 4, p. B-1.

18. In MONTH YEAR, PETITIONER began bringing its family of international companies together under the PETITIONER global brand name exclusively. Ex. 4, p. B-1.

19. This initiative culminated DATE, with the final transition of the COMPANY 5 brand name to PETITIONER across the United States. Ex. 4, p. B-1.

20. COMPANY 7 is, like PETITIONER, a wholly owned subsidiary of PETITIONER and provides the same services as PETITIONER under the PETITIONER brand in the REGION 2 United States. COMPANY 7's results are not consolidated with PETITIONER but PETITIONER provides management and other services to COMPANY 7. Ex. 21, p.4.

21. PETITIONER does not have a subsidiary limited to Utah's geographical boundaries. Tr. 135.

22. PETITIONER is the (X) subsidiary in the chain of COMPANY 1 group of companies that owns the Utah property at issue for which publicly reported financial statements are available. Tr. 135-136, 570-573.

23. PETITIONER is the entity with employees in Utah. Tr. 136.

24. The expenses reported by PETITIONER on its 2003 Utah Annual Property Tax Report filed with the Division were allocated to Utah, not directly booked to Utah. Tr. 138-139.

Technology/Licenses

25. (PARAGRAPH REMOVED)Ex. 4, p. B-1.

26. (PARAGRAPH REMOVED) Ex. 21, p.14.

27. As of the lien date PETITIONER generally built out its cell sites so that it had just enough capacity to service its existing customer base. As more customers would sign up, additional physical capacity would be added. Tr. 69-79 (PERSON 1), 200 (APPRAISER 2, 576-577 (APPRAISER 3).

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28. In the industry in general revenue per minute for existing customers has been decreasing. Tr. 77-78 (PERSON 1).

29. Licenses encompass areas that are not limited by state boundaries. For example MTA 36, the license that covers most of Utah, does not cover three counties in Utah, and it covers portions of four other states. Ex. 34.

30. A PCS license in CITY 4 is worth more than a license in Utah because the population is so much smaller in Utah. Ex. 25, P. Ex. 1.

31. Other wireless property is also worth more in larger metropolitan areas because there are more people using it. Tr. 48-56, 607-608 (PERSON 1).

Goodwill and Impairment Test

32. PETITIONER applied the Statement of Financial Accounting Standard (“SFAS”) No. 142 effective January 1, 2002. Ex. 21, p. F-10.

33. On DATE an impairment test of its goodwill and indefinite life intangible assets, as required by SFAS No. 142 was completed by COMPANY 11, a COUNTRY 1 organization, who performed the test based on a discounted cash flow analysis of the two entities that comprised PETITIONER, which were PETITIONER and COMPANY 7. The COMPANY 11 Impairment Test revalued the customer relationships and trade names in order to determine the fair value of the goodwill. The fair value of these items exceeded their book values. As a result, the fair value of these items caused the residual fair value of the goodwill to be lower and the impairment to goodwill larger. Ex. 23.

a. The COMPANY 11 Impairment Test valued the licenses using an income indicator with a weighted average cost of capital (“WACC”) of %%% and a terminal growth rate of %%%. COMPANY 11 described the effect of this method as follows:

“Taken as whole, the Company’s FCC licenses create a (X) footprint . . . Therefore, the value of the Company’s licenses . . . when analyzed as a (X) footprint is greater than the value of the sum of the individual licenses.”

b. In the impairment test of PETITIONER and COMPANY 7, COMPANY 11 assumed PETITIONER and COMPANY 7 would spend \$\$\$\$ from YEAR-YEAR on capital improvements. Ex. 23, p. 8, Ex. 24; Tr. 605 (PERSON 1).

c. In the impairment test for intangible assets, COMPANY 11 ascertained the reasonableness of the book value of PETITIONER and COMPANY 7 by multiplying an average value per cell site of \$\$\$\$ by the ##### sites of these two entities. Ex. 23, p. 58.

34. PETITIONER did not provide documentation showing how PETITIONER or COMPANY 11 allocated the PETITIONER findings from the Impairment Test to PETITIONER and COMPANY 7. A comparison of the figures in the PETITIONER 10-K and the COMPANY 11 Impairment Test indicate that approximately %%%% to %%%% of the book value of PETITIONER was attributable to PETITIONER. Ex. 23, 21, Tr. 456-457.

35. As a result of the COMPANY 11 impairment test for intangible assets, PETITIONER wrote down the goodwill on its books by \$\$\$\$ to \$\$\$\$ and its licenses by \$\$\$\$ to \$\$\$\$ on DATE. Ex. 21, p. F-15.

36. In YEAR, PETITIONER performed a separate impairment test for long-lived tangible assets, in accordance with SFAS 144. Ex. 21, p. F-11; Ex. 48. Under this test, PETITIONER analyzed whether the undiscounted cash flows from the long-lived assets produced a value greater than the book value of the assets. Id. Finding this answer to be affirmative, PETITIONER did not proceed further in testing the long-lived assets for impairment, as set forth in SFAS 144. Id.

37. Substantially all of the \$\$\$\$ in goodwill on PETITIONER's books on DATE was related to the DATE COMPANY 1 acquisition. Ex. 21, p. F-10, Tr. 92-93 (PERSON 1).

38. In general goodwill may be capable of being sold separately from tangible property, as it could be sold in conjunction with intangible licenses or other intangible property. Tr. 92-94, 605 (PERSON 1), 192-193 (APPRAISER 2, 569 (APPRAISER 3).

Customer List and Software

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39. On January 1, 2003, PETITIONER's customer list was booked at \$\$\$\$.

40. During this period when the parties were reaching a settlement concerning the YEAR Utah assessed value, COMPANY 12 was in the process of selling its subscriber list. Tr. 88-89 (PERSON 1)

41. SFAS 141 & 142 indicates customer lists are separate from goodwill on the basis that they meet the separability criteria. It also classifies customer lists as "identifiable and transferable." Ex. 16.

42. Customer lists are capable of private ownership separate from tangible property. However, customer bases may not be capable of private ownership separate from tangible property. Tr. 404 (APPRAISER 1);

43. On January 1, 2003, PETITIONER owned computer software. Clearly there was some customization of the software used with the switches specifically for PETITIONER's needs. However, the provider of the software, COMPANY 16 provides the same type of software to at least one other customer. The software, therefore, is at least to some extent "canned" software. Exs. 2, 36; Tr. 95-101, 141-143, 599-601 (PERSON 1).

44. Petitioner remotely downloads the software to the switches or remotely alters the software on the switches. However, it is unclear whether the software could be used independently of the switch. Tr. 143 (PERSON 1).

Facts Considered for the Appraisal Unit

45. There is some Utah-specific financial information as it is used for calculating and remitting 911 fees and local option sales taxes. Tr. 60-62 (PERSON 1).

46. However, in its 2003 property tax filing with the Property Tax Division, PETITIONER provided financial information allocated from a regional entity rather than the actual Utah-specific financial data. Ex. 20, p. 18-23.

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47. PETITIONER does not have audited financials at the Utah level. There are audited financials at both the international and national level. Tr. 44 (PERSON 1), 572-573 (APPRAISER 3), Ex. 21.

48. PETITIONER does not provide a calling plan limited to Utah's geographical boundaries. Tr. 140.

49. PETITIONER's Basic Trading Area (BTA) and Major Trading Area (MTA) licenses, which cover the State of Utah, extend beyond Utah's boundaries and also cover parts of other states. Tr. 56-59. Exs. 28, 34.

50. The highest and best use of PETITIONER's Utah property is as part of a nationwide network. Tr. 480.

51. PETITIONER does not have a subsidiary limited to Utah's geographical boundaries and PETITIONER is the smallest subsidiary in the chain of COMPANY 1 group of companies that owns the Utah property at issue for which publicly reported financial statements are available. Tr. 135-136, 570-573.

52. PETITIONER is the entity with employees in Utah. Tr. 136.

53. As of January 1, 2003, it is possible that PETITIONER could have sold its Utah assets, but a sale of assets would more likely be for assets in some other geographical area not necessarily limited to a state boundary, but based on licensing areas. Tr. 101-104, 145-152 (PERSON 1), 403-404 (APPRAISER 1). PETITIONER recently purchased from COMPANY 17 the assets of two MTA's, which take in essentially all of STATE 4 and STATE 5, as well as one county in STATE 6. Tr. 102-104, 145-152 (PERSON 1).

54. There is sharing of personnel and property between COMPANY 1 and PETITIONER, and control by COMPANY 1 over PETITIONER. Tr. 44-45, 62-69 (PERSON 1). COMPANY 1's ownership also allows PETITIONER to purchase tangible assets at a much lower cost than it otherwise would be able to based on economies of scale. Tr. 44-45, 64-67 (PERSON 1), 491, 557 (APPRAISER 3).

55. By YEAR the Division had started using national units as the normal valuation unit for wireless companies. Prior to this some wireless companies were valued by the Division based on a Utah unit. See Ex. 10.

The Assessment

56. The Division relied on its original assessment at the Formal Hearing and did not submit a new appraisal.

57. The Division first obtained the COMPANY 11 Impairment test during discovery conducted after the Initial Hearing in this appeal, and did not have it when preparing the original assessment.

58. Prior to DATE, and the creation of PETITIONER, PETITIONER property in Utah was a part of COMPANY 5. COMPANY 5's assets were purchased by PETITIONER's parent COMPANY 1 in YEAR. Ex. 21, p.3.

59. The value set by the Division for the 2003 lien date was \$\$\$\$\$, for the Utah taxable property at issue in this appeal. Ex. 19, p.1. This value was based on the Division's determination that appropriate unit for valuation purposes was the system wide market value of PETITIONER. It was the Division's conclusion that the system wide value of PETITIONER was \$\$\$\$\$. Id. The Division utilized for the assessment the financial information contained in the PETITIONER 10-K. Tr. 570-572.

60. The Division's assessment was based on a "Cost Indicator." The Division did not prepare an income, or a market approach valuation. Ex. 19, p. 2.

61. The Division's "Cost Indicator" was basically a net book value approach. Tr. 589-90 (APPRAISER 3). From the 10-K information the Division added the net book value of the total plant in service, construction work in process at cost, goodwill and customer lists to determine the net book value of the system wide property as follows:

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Total plant in service @ NAB	\$\$\$\$
Construction work in process @ cost	\$\$\$\$
Goodwill, net	\$\$\$\$
<u>Customer list, net</u>	\$\$\$\$
	\$\$\$\$

Ex, 19, p. 5.

62. The Division reduced its Construction Work in Progress figure from the \$\$\$\$ on PETITIONER's 10-K to \$\$\$\$ by applying a present value factor to account for the fact that the property under construction was not be available for use on the lien date. Ex. 19, p. 6.

63. To the approximately \$\$\$\$ the Division derived as the net book value for the system, the Division made a %%%% good "Telecommunication Market Adjustment" which reduced the system wide value to \$\$\$\$\$. Ex. 19, P. 5. The market adjustment was a judgment call made by the Division based upon an analysis of the stock price decline in the industry and extensive negative media coverage about the wireless telecommunications industry. The Division made the adjustment upon the assumption that all items in the Division's Cost Indicator were taxable, including customer lists/relationships and goodwill. Tr. 451.

64. The Division determined that there was insufficient income history to prepare a reliable income indicator because PETITIONER was formed in 2001, was first assessed by the Division for the lien date January 1, YEAR and had losses for both years of its existence.

65. This lack of history and losses are because PETITIONER is in a start-up mode with extensive capital expenditures. As evidenced by its revenue forecasts used in the COMPANY 11 impairment test, PETITIONER fully anticipates its revenue in the future to cover its current expenditures. However, PETITIONER did not provide the Division with the forecasts of anticipated revenue found in the COMPANY 11 report, which would have assisted the Division in the preparation of a proper Discounted Cash Flow.

66. The Division's appraisal determined a %%%% interstate allocation.

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67. The Division's interstate allocation was derived with the assumption that all of the goodwill reported by PETITIONER was taxable property. Tr. 446-448. It was the Division's position that if the goodwill or any portion thereof was not taxable, the non-taxable portion of goodwill should not be used to derive the interstate allocation. If all goodwill was removed from the interstate allocation factor because it is no longer taxable, the interstate allocation factor becomes %%%%. Tr. 517-518.

68. The interstate allocation method to derive the %%%% is identical to the method sustained by the Commission in its formal hearing decision regarding tax year YEAR for another wireless carrier. Tr. 518. See also Findings of Fact, Conclusions of Law, and Final Decision in Tax Commission Appeal Nos. 02-1010 et al.

Appraisal of APPRAISER 1

69. The Counties submitted an appraisal prepared by APPRAISER 1, establishing a value of \$\$\$\$ for the Utah taxable property at issue in this appeal. Ex. 31, p. viii.

70. APPRAISER 1 determined that the system wide market value of PETITIONER. was \$\$\$\$. Of this system wide value, APPRAISER 1 determined that %%%% was allocable to Utah. Ex. 31, p. 1.

71. APPRAISER 1's appraisal was based on a "Pseudo Cost Indicator of Value," and eight Market Indicators of Value. Ex. 31, p. 1. APPRAISER 1 did not rely on an income approach valuation. Ex. 31, p. vii.

72. APPRAISER 1's Pseudo Cost Indicator is adopted from PETITIONER's net book value in its 10-K report. Ex. 31, p. 2.

73. APPRAISER 1 notes that the SEC requires PETITIONER to annually test its long-lived assets for impairment value pursuant to a discounted cash flow analysis or other standard valuation methodology, and write the assets down accordingly. Ex. 31, p. iv.

74. APPRAISER 1 thus believes that PETITIONER's net book value is thus "a derivative income indicator, as well as possibly a market approach." Ex. 31, p. iv.

75. APPRAISER 1 also believes “it can be assumed that PETITIONER’s *book value* of assets does not exceed the actual *market value*.” Ex. 31, p. iv.

76. APPRAISER 1’s Pseudo Cost Indicator is based on information reported by PETITIONER on its Form 10- K for the year ending DATE. Ex. 31, p. 2; Ex. 21. From the 10-K information he added the net book value of the property, plant, equipment and goodwill to determine the net book value of the system wide property as follows:

Property, Plant and Equipment, Net	\$\$\$\$
Goodwill, net	\$\$\$\$
<hr/>	<hr/>
Total Taxable Property	\$\$\$\$
Pseudo Cost Indicator of Value (Rounded)	\$\$\$\$

Ex. 31, p. 2.

77. APPRAISER 1’s property, plant and equipment figure included construction work in progress. APPRAISER 1 did not apply a present value factor to the construction work in progress like the Division did. Ex. 31, p. 2; Ex. 21, p. F-17.

78. APPRAISER 1’s goodwill figure is lower than the Division’s because he allocated some goodwill to PETITIONER’s non-current assets and investments. Ex. 31, p. 19.

79. Unlike the Division, APPRAISER 1 did not include PETITIONER’s customer list in his cost approach. Ex. 31, p. 2; Ex. 19, p. 5.

80. APPRAISER 1 applied eight market indicators of value based on five companies he deemed comparable to PETITIONER. Ex. 31, pp. v-vii, 1, 3-18.

81. For each of the eight approaches, APPRAISER 1 determined a market value for the five comparables based on the stock and debt held by the company. Ex. 31, pp. 3-18.

82. For four of the indicators, APPRAISER 1 then developed an average ratio of the five companies based on their market value compared to the following benchmarks:

- a. Property and equipment plus goodwill;
- b. Number of subscribers;
- c. Total assets;
- d. Number of Employees. Ex. 31, pp. 3-10.

83. APPRAISER 1 then multiplied the resulting ratio by these four benchmarks for PETITIONER to determine a market value for PETITIONER. Ex. 31, pp. 3-10.

84. APPRAISER 1 then divided his Pseudo Cost Indicator of value of \$\$\$\$ by PETITIONER's total assets (including licenses, current assets, investments, etc.) of \$\$\$sto derive a ratio of PETITIONER taxable property to total property of %%%%. Ex. 31, pp. 3-10.

85. APPRAISER 1 applied this %%%% ratio to the total PETITIONER market value he had derived for each benchmark to produce a market indicator of taxable value. Ex. 31, pp. 3-10.

86. The other four indicators were similar to the first four, applying the same stock and debt market values of the same five comparables, the same four benchmarks, and the same %%%% taxable property ratio. Ex. 31, pp. 11-18.

87. The only difference in the second four benchmarks was that rather than determining a ratio for each benchmark and comparable company, APPRAISER 1 applied a "linear regression" to determine the market value for all of PETITIONER's assets. Ex. 31, pp. 11-18.

88. After determining the eight market indicators of value, APPRAISER 1 determined that %%%% of the system wide value was taxable to Utah. Ex. 31, p. 19.

89. APPRAISER 1 then correlated his various indicators of value, and produced a Utah taxable value as follows:

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<u>Indicator</u>	<u>Weight</u>	<u>Value</u>
Pseudo Cost Indicator of Value	%%%%%%%%	\$\$\$\$\$
Market Indicators of Value		
Market Value Multipliers:		
Book Value of PP&E + Goodwill	%%%%%%%%	\$\$\$\$\$
Number of Subscribers	%%%%%%%%	\$\$\$\$\$
Book Value of Total Assets	%%%%%%%%	\$\$\$\$\$
Number of Employees	%%%%%%%%	\$\$\$\$\$
Linear Regression of Market Value and:		
Book Value of PP&E + Goodwill	%%%%%%%%	\$\$\$\$\$
Number of Subscribers	%%%%%%%%	\$\$\$\$\$
Book Value of Total Assets	%%%%%%%%	\$\$\$\$\$
Number of Employees	%%%%%%%%	\$\$\$\$\$
Reconciled System Value		\$\$\$\$\$
Utah Allocation Percent		
Allocated Utah Value	%%%%%%%%	\$\$\$\$\$
Less: Utah Vehicles at Net Book Value		\$\$\$\$\$
Indicated Utah Assessment (rounded)		\$\$\$\$\$

Ex. 31, p. 1.

Appraisal of APPRAISER 2

90. PETITIONER submitted an appraisal prepared by APPRAISER 2, establishing a value of \$\$\$\$\$ for the Utah taxable property at issue in this appeal. Ex. 4, p. 4. APPRAISER 2 had submitted a prior appraisal during the Formal Hearing preparation process that arrived at a value of \$\$\$\$\$. Ex. 33, p.27.

91. APPRAISER 2 used a different unit than did the Division and Counties. Rather than valuing PETITIONER. and allocating value back to Utah, APPRAISER 2 valued only the Utah assets, based on PETITIONER’s accounting data that was reported on PETITIONER’s YEAR Annual Property Tax return filed with the Division. Ex. 4, p. 6.

92. APPRAISER 2 testified that it would be possible to sell its Utah property as a unit but he did not know how likely such an occurrence would be. Tr. 275-276. It was APPRAISER 2’s position that the highest and best use of the Utah property is operating as a wireless network. Tr. 284.

93. APPRAISER 2’s appraisal was based on a Replacement Cost Approach, an Income Approach, and a Comparable Sales Market Approach. Ex. 4, pp. 4, 8-22.

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94. APPRAISER 2 used the unaudited financial statements filed with the Division as part of the Utah Annual Property Tax Report as the basis for his appraisal. Tr. 273-274. PETITIONER does not produce audited financial statements for just its Utah Property. Tr. 135-136.

95. It was APPRAISER 2's understanding that the numbers on the Utah Annual Property Tax Report were directly booked and not allocated. Tr. 284-285, 299. However, the numbers for operating revenue, operating expenses, depreciation and amortization were, in fact, allocated from a regional entity. Tr. 525-27; Posthearing Affidavit of PERSON 1 dated DATE, allowed only to the extent indicated in the Order Striking Portions of PERSON 1 Affidavit, Striking PETITIONER's DATE Letter, which was issued in this appeal by the Tax Commission on September 1, 2005.

96. Although in his replacement cost approach, APPRAISER 2 considered studies performed by the U.S. Departments of Labor and Commerce, Marshall and Swift, and Value Line, a significant portion of the value came from two unpublished schedules prepared by COMPANY 13. Ex. 4, pp. 9-12, D. The schedules were based on information from COMPANY 14 and COMPANY 15. Tr. 227. From these studies APPRAISER 2 determined ratios for the differences between replacement costs of specific property to the original costs.

97. APPRAISER 2 then applied these ratios to the original cost of PETITIONER's Utah property based on PETITIONER's books to derive a replacement cost of PETITIONER's property as of DATE. Id.

98. In applying these ratios, APPRAISER 2 utilized a random number generator to determine which of the sources would be applied to the specific types of property. Id.

99. After determining the replacement cost new for each type of property, APPRAISER 2 applied a depreciation factor to each type of property based on the depreciation schedules in the Marshall and Swift cost guide. Id.

100. APPRAISER 2's replacement cost minus depreciation value was \$\$\$\$\$. Ex. 4, p. D-7.

Income Approach

101. APPRAISER 2's used a 100-year Discounted Cash Flow ("DCF") Model as his income indicator. His income approach considered revenue, expenses, depreciation and amortization numbers provided by PETITIONER in its Annual Property Tax Report, which were allocated and not actual numbers. Tr. 525-27. Ex. 20. The income approach was derived by projecting PETITIONER's cash flows into the future based on property in existence on the lien date, and ascertaining the present value of those cash flows on the lien date by applying a weighted average cost of capital of %%%%. Ex. 4, pp. 12-21, C and F.

102. The weighted average cost of capital was based on a capital structure of %%%% debt and %%%% equity based on comparable companies. Ex. 4, pp. F-3 to F-7.

103. The cost of debt was %%%% based on published bond ratings of comparable companies. Ex. 4, pp. 15-16, F-8 to F-12.

104. The cost of equity was %%%% based on the capital asset pricing model ("CAPM")(%%%%), a build up model (%%%%), a discounted cash flow model (%%%%), and a Value Line high-low average (%%%%). The CAPM was weighted %%%%, the build-up model %%%%, and the other two models %%%% each, to produce the overall %%%% cost of equity. Ex. 4, pp. 16-21, F-13 to F-17.

105. Within the CAPM and build-up models, APPRAISER 2 applied a size premium of %%%% citing the Ibbotson Associates 2003 valuation yearbook. Ex. 4, pp. F-16 to F-17.

106. To his overall capitalization rate, APPRAISER 2 added a flotation cost adjustment of %%%%. Ex. 4, p. F-2.

107. APPRAISER 2's income approach value was \$\$\$\$\$. Ex. 4, p. G.

Market Approach

108. APPRAISER 2's market approach is based on sales of eight companies, which occurred between 1996 and YEAR. Ex. 4, pp. 21-22, E. The companies he considered, as comparable sales in the market approach were four paging companies, a retail store that sold cellular telephones, a computer

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software company, a “dial-around” company and a very small cellular wireless company. Tr. 299-301, 533.

109. APPRAISER 2 derived a ratio of the sales price of these eight sales compared to the fixed assets that sold, and then applied that ratio to PETITIONER’s fixed assets. Id.

110. APPRAISER 2’s market approach value was \$\$\$\$\$. Ex. 4, p. G.

Correlation

111. APPRAISER 2 applied a range of weighting scenarios to derive his final value. He weighted the cost approach the most heavily, from 50-80%. He weighted the income approach from 15-35%, and the market approach 5-15%. Ex. 4, p. G.

112. APPRAISER 2’s final correlated value was \$\$\$\$\$, from which he removed \$\$\$\$\$ for computer software and \$\$\$\$\$ for motor vehicles, resulting in a final value for the Utah taxable property of \$\$\$\$\$. Ex. 4, p. A.

Commission’s Valuation Conclusions

Unit

113. Based on the factors indicated above, the unit relied on by Petitioner, that being limited to the geographical boundaries of Utah is not the appropriate unit in this matter. Of the two choices relied on by the parties in their appraisals the better unit for valuation in this matter is the unit considered by the Division and the Counties, the regional unit of PETITIONER.

114. Additionally, PETITIONER had argued an option would be to use COMPANY 1. PETITIONER is a better choice than COMPANY 1 as it is the smallest subsidiary discussed in the chain of companies that owns the Utah property and, therefore, the unit most related to the property in Utah.

Valuation

115. The comparison of the assessed values for the Utah Taxable Property area presented at the hearing are as follows:

	Assessment	PETITIONER	Counties
Unit	Nationwide Unit	State Property	Nationwide Unit
Cost Model	\$\$\$\$\$	\$\$\$\$\$	\$\$\$\$\$
Income Model	not used	\$\$\$\$\$	not used

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Market Model	not used	\$\$\$\$	various
Market Adjustment	%%%%% good	none	none
Reconciled System Value	\$\$\$\$	\$\$\$\$	\$\$\$\$
Allocation Factors	%%%%%		%%%%%
Software Adjustment		\$\$\$\$	
Vehicle Adjustment		\$\$\$\$	\$\$\$\$
Utah Taxable Value	\$\$\$\$	\$\$\$\$	\$\$\$\$

116. APPRAISER 2's Appraisal in this matter is based on a unit which is limited to the geographical boundaries of the state of Utah, a unit that does not represent the highest and best use of the property and is not the best unit for property tax valuation purposes. In addition, the Commission has other concerns with the appraisal and for that reason determines that it is insufficient to support the value conclusion requested by PETITIONER.

a. The Commission has concerns that APPRAISER 2 believed that the numbers he relied on in his appraisal were historical numbers specifically derived from Utah operations. In fact, they were not actual results but instead results allocated to Utah from a regional entity.

b. Of concern to the Commission in the income approach is APPRAISER 2's use of a %%% small firm premium in his Capital Asset Pricing Model ("CAPM") and Build Up Model, which he used to determine the cost of equity portion of his %%% cost of capital. He argued that this was appropriate when valuing the Utah property as a unit. However, the Commission finds, and APPRAISER 2 acknowledged, that this was not appropriate where the unit is PETITIONER, the nationwide company. Tr. pp. 530-531 and 270. Additionally, APPRAISER 2 had added .16% to the rate for flotation costs. Ex. 4. Although this amount is small, consistent with its prior decisions the Commission would disallow this factor.

c. In APPRAISER 2's comparable sales approach, the comparables were significantly dissimilar and many occurred too far prior to the lien date to be reliable for the purposes of determining the value of the subject property.

d. In the index of his cost approach, APPRAISER 2 relied on two schedules prepared by a consultant at "AUS" that came from PETITIONER's competitors, COMPANY 14 and

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COMPANY 15. Tr. p.227. The Commission has concerns with the comparability of these schedules to determine a value for PETITIONER's equipment. PETITIONER's the Global System for Mobile Communications, or GSM Technology. COMPANY 14 and COMPANY 15 use CDMA technology. Ex. 21, p.14; Tr. 535-536. Additionally these schedules are not published. Although APPRAISER 2 did consider data from Marshall & Swift, U.S. Dept. of Labor and the U.S. Dept. of Commerce, for many categories of assets in his cost approach the COMPANY 14 and COMPANY 15 Schedules were a significant part of the valuation. Ex. 4, Schedule D.

e. The Commission notes that the COMPANY 11 impairment test was performed on the nationwide unit comprised of both PETITIONER and COMPANY 7, and made only a rough valuation of the physical assets based on an estimated value for per cell cite. However, there is some concern that COMPANY 11 found no impairment of the physical assets, and APPRAISER 2 reached a value of approximately \$\$\$\$\$, where the net book value of the Utah property was \$\$\$\$\$. Tr. 287-288.

f. APPRAISER 2 used a random number generator for determining the value in his cost approach. This was similar to his appraisal in a prior appeal, which the Commission did not find supportive of value he determined. See Findings of Fact, Conclusions of Law and Final Decision, Appeal Nos. 02-101 et al. The Commission has not seen this approach used by other appraisers and no support was offered for the approach in appraisal texts.

g. APPRAISER 2's deduction for software, which was in the amount of \$\$\$\$\$, was not sufficiently shown to be intangible.

117. Considering APPRAISER 1's appraisal submitted by the Counties, although he has valued the most appropriate unit, the Commission also has concerns and finds that it does not adequately support the higher value of \$\$\$\$\$ for the nationwide system or \$\$\$\$\$for the Utah taxable assets.

a. APPRAISER 1 gave %%% weight to an indicator he titled "pseudo cost indicator" which was a net book value approach. He acknowledged during the hearing that it was not a true cost indicator and did not rely on the principle of substitution. Tr. 379. Additionally there is an

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assumption in his indicator that “fair value” under SFAS 142 is “practically identical” to “fair market value” for Utah tax purposes. Tr. 411-412 (Prawitt). The Commission also finds that APPRAISER 1 has not followed Administrative Rule R884-24P-62 (“Rule 62”) in calculating his value. The Commission has concerns with the approach for these reasons, but additionally determines that it significantly overstates the value in a manner similar to the original assessment. APPRAISER 1 adds more than \$\$\$\$ billion in goodwill to the value of the tangible property to determine that the cost indicator of value was just over \$\$\$\$.

b. Eighty percent of the weight in APPRAISER 1’s appraisal went to eight market indicators that are neither commonly used by appraisers, nor discussed as appropriate techniques in appraisal texts. APPRAISER 1 acknowledged they were not found in any appraisal texts Tr. 380, and that, with the exception of number of subscribers, he has not seen the benchmarks used before Tr. 381. The benchmarks he relied on were property, goodwill, number of subscribers, total assets, and number of employees.

118. Clearly, lack of confirmation in the appraisal industry in support of the approaches used by APPRAISER 1 and the departure from Rule 62 are considerations that the Commission must take into account in determining how much weight should be given APPRAISER 1’s appraisal. In light of these considerations and the evidence submitted by the other parties it is the conclusion of the Commission that the appraisal does not support the higher value for the property.

Original Assessment/Goodwill

119. Goodwill can be and often is sold as part of licenses or other intangible property. Tr. 92-94, 605 (PERSON 1), 193 (APPRAISER 2), 569 (APPRAISER 3).

120. The Commission turns to the Division’s assessment that does consider the appropriate unit for valuation purposes. The Division’s assessment appraisal was based on a “Cost Approach” to which the Division made a market adjustment factor of %%%% good. Although the Division called the

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approach a cost approach,” it was essentially a net book value approach where the Division added the net book value of the property and equipment of \$\$\$\$\$, a present value for construction work in process of \$\$\$\$\$, goodwill of \$\$\$\$\$ and net customer lists of \$\$\$\$\$, which resulted in a total cost indicator of value for the nationwide unit of \$\$\$\$\$. APPRAISER 3 then applied a %%%% good factor to take into account general market conditions, which resulted in a value for the nationwide unit of \$\$\$\$\$. Ex. 19, pg. 5. With the exceptions of goodwill and customer list, APPRAISER 3’s cost approach is the preferred method established under Rule 62, which is referred to as “Historic Cost Less Depreciation, or HCLD.” The Commission finds that there are two errors in the Division’s appraisal that overstate the value, and one that understates the value. After these items are corrected the Commission notes that changes to the factor used to allocate the portion of the unit value to Utah needs to be corrected accordingly.

a. The Commission disagrees with the approach taken by the Division to add the entire book value of goodwill into the cost approach.

b. The Commission agrees with the Counties and PETITIONER regarding the customer lists. These are intangibles and the Division erred in adding the book value of the customer lists into the taxable value.

c. The Division’s market adjustment of %%%% good was not well supported and appears to be an arbitrary adjustment.

121. After review of the evidence submitted in this matter with consideration given to the COMPANY 11 report and the testimony regarding the marketability and premiums attached to the licenses, it is the Commission’s position that the amount listed as goodwill on PETITIONER’s 10-K and added by the Division in its cost approach results from the function of all tangible and intangible assets combined and operating as a business. The Commission would note the book value of the spectrum licenses, which are intangible property and not subject to property tax, was \$\$\$\$\$, significantly higher than the value of the property, plant and equipment of \$\$\$\$\$. However, the approach taken by the Division attributes all of the goodwill to the taxable plant and equipment, when it is clear that the goodwill is the result of combining tangible and intangible assets. By definition, goodwill cannot be

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attributed to any single class or type of asset. However, the Commission is required by statute to assess property that is not capable of private ownership separate from tangible property, while at the same time exempting intangible property. Were we to assess all goodwill, we would have to assess some property that is exempt under Utah law. Were we to exempt all goodwill, we would run the risk of possibly exempting at least some property that is not capable of ownership apart from tangible property. In order to reconcile this problem, the Commission concludes that it is appropriate to allocate the goodwill between the taxable and nontaxable assets and to include in the taxable value only that portion of the goodwill that is attributable to the taxable assets.

122. The Commission concludes that since goodwill is a non-current asset, it should be allocated to other non-current assets on a pro-rata basis. In other words, goodwill is not attributable to current assets. We recognize, at the same time however, that some long-term assets as well may not be applicable for assigning goodwill. However, there is no evidence of this in this proceeding.

123. Based on the evidence on record, particularly the Division's appraisal and the 10-K report for PETITIONER, the Commission finds that the goodwill in the amount of \$\$\$\$\$ is attributable to the following assets and their corresponding values:

Property and equipment	\$\$\$\$
Customer list & Trade names	\$\$\$\$
Investments in affiliates	\$\$\$\$
Other intangible assets	\$\$\$\$
Spectrum licenses	<u>\$\$\$\$</u>
Total Non-current assets	\$\$\$\$

124. The Commission concludes that only %%% or \$\$\$\$\$ of the goodwill is attributable to the taxable tangible property of \$\$\$\$\$.

125. The evidence presented in the hearing indicated that the customer lists were capable of separate ownership and qualify as intangible property. Therefore, they should have also been removed from the value along with any goodwill attributable to the customer lists.

126. After correcting for these two errors, it is the Commission's conclusion that the nationwide unit value of the taxable property is \$\$\$\$\$.

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127. In the Division's assessment the Utah interstate allocation percentage calculated was %%%%. As the Division testified in the hearing this was based on including all goodwill in the value. The allocation for goodwill was derived by first deducting pre-impairment goodwill amounts attributable to two subsidiaries, COMPANY 6 Corporation and COMPANY 7. An impairment factor was then applied to the remaining goodwill, which was allocated to Utah at the same ratio as plant in service.

128. The Commission concludes that the Division is correct in its argument that if the goodwill is reduced as proposed by the Commission the allocation factor should be adjusted on the same basis accordingly. After reviewing APPRAISER 3's calculations, the Commission concludes that the figures were calculated correctly, according to his assumptions. Ex. 49.; Tr. 508-515. However, APPRAISER 3 also testified that further adjustments are necessary; in particular stating that property, plant and equipment for COMPANY 6 and COMPANY 7 should be excluded from the allocation calculation. The Commission agrees. In addition, the 10-K report specifically states ". . . substantially all goodwill is related to the PETITIONER merger." Ex. 21, p. F-10. Therefore, it would be improper to include any prior goodwill from COMPANY 7 or COMPANY 6. We note a further concern that the very act of allocating even adjusted goodwill results in an allocation (total Utah property) of an allocation (goodwill.)

129. Because of the uncertain nature of intangible property such as goodwill, the Commission does not believe it can be determined how much, if any, goodwill can be attributed to property located in Utah. Therefore it would not be appropriate to include goodwill in an interstate allocation formula.

130. The Commission concludes that the allocation factor should be based only upon tangible property and income attributable to Utah. The result is an allocation factor of %%%%.

131. Applying the allocation factor to the nationwide system value results in a Utah value of \$\$\$\$\$. The Commission would then subtract \$\$\$\$\$ for vehicles from the value and the resulting Utah taxable value for the assets is \$\$\$\$\$, rounded to \$\$\$\$\$.

APPLICABLE LAW

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By May 1 of each year the following property, unless otherwise exempt under the Utah Constitution or under Part 11 of this chapter, shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter: (a) except as provided in Subsection (2), all property which operates as a unit across county lines, if the values must be apportioned among more than one county or state; (b) all property of public utilities; ...

Utah Code Ann. Sec. 59-2-201(1).

So that each person and corporation pays a tax in proportion to the fair market value of his, her, or its tangible property, all tangible property in the State that is not exempt under the laws of the United States or under this Constitution shall be: (a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and (b) taxed at a uniform and equal rate.

Constitution of Utah, Article XIII, Sec. 2(1).

The Legislature may by statute determine the manner and extent of taxing or exempting intangible property, except that any property tax on intangible property may not exceed .005 of its fair market value. If any intangible property is taxed under the property tax, the income from that property may not also be taxed.

Constitution of Utah, Article XIII, Sec. 2(5).

The following property is exempt from taxation: . . . (g) intangible property.

Utah Code Ann. Sec. 59-2-1101(2).

"Intangible Property": (a) means property that is capable of private ownership separate from tangible property and (b) includes: (i) moneys; (ii) credits; (iii) bonds; (iv) stocks; (v) representative property; (vi) franchises; (vii) licenses; (viii) trade names; (ix) copyrights; and (x) patents.

Utah Code Ann. Sec. 59-2-102(17).

C. All tangible operating property owned, leased, or used by unitary companies is subject to assessment and taxation according to its fair market value as of January 1, and as provided in Utah Constitution Article XIII, Section 2. Intangible property as defined under Section 59-2-102 is not subject to assessment and taxation.

D. Unitary properties shall be assessed at fair market value based on generally accepted appraisal theory as provided under this rule.

1. The assemblage or enhanced value attributable to the tangible property should be included in the assessed value. See *Beaver County v. WilTel, Inc.*, 995 P.2d 602 (Utah 2000). The value attributable to intangible property must, when possible, be identified and removed from value when using any valuation method and before that value is used in the reconciliation process.

2. The preferred methods to determine fair market value are the cost approach and a yield capitalization income indicator as set forth in E.

a) Other generally accepted appraisal methods may also be used when it can be demonstrated that such methods are necessary to more accurately estimate fair market value.

b) Direct capitalization and the stock and debt method typically capture the value of intangible property at higher levels than other methods. To the extent intangible property cannot be identified and removed, relatively less weight shall be given to such methods in the reconciliation process, as set forth in E.4.

c) Preferred valuation methods as set forth in this rule are, unless otherwise stated, rebuttable presumptions, established for purposes of consistency in mass appraisal. Any party challenging a by a preponderance of evidence, that the proposed alternative establishes a more accurate estimate of fair market value.

E. Appraisal Methodologies.

1. Cost Approach. Cost is relevant to value under the principle of substitution, which states that no prudent investor would pay more for a property than the cost to construct a substitute property of equal desirability and utility without undue delay. A cost indicator may be developed under one or more of the following methods: replacement cost new less depreciation (RCNLD), reproduction cost less depreciation reproduction cost, and historic cost less depreciation (HCLD).

a) "Depreciation" is the loss in value from any cause. Different professions recognize two distinct definitions or types of depreciation.

(1) Accounting. Depreciation, often called "book" or "accumulated" depreciation, is calculated according to generally accepted accounting principles or regulatory guidelines. It is the amount of capital investment written off on a firm's accounting records in order to allocate the original or historic cost of an asset over its life. Book depreciation is typically applied to historic cost to derive HCLD.

(2) Appraisal. Depreciation, sometimes referred to as "accrued" depreciation, is the difference between the market value of an improvement and its cost new. Depreciation is typically applied to replacement or reproduction cost, but should be applied to historic cost if market conditions so indicate. There are three types of depreciation:

(a) Physical deterioration results from regular use and normal aging, which includes wear and tear, decay, and the impact of the elements.

(b) Functional obsolescence is caused by internal property characteristics or flaws in the structure, design, or materials that diminish the utility of an improvement.

(c) External, or economic, obsolescence is an impairment of an improvement due to negative influences from outside the boundaries of the property, and is generally incurable. These influences usually cannot be controlled by the property owner or user.

b) Replacement cost is the estimated cost to construct, at current prices, a property with utility equivalent to that being appraised, using modern materials, current technology and current standards, design, and layout. The use of replacement cost instead of reproduction cost eliminates the need to estimate some forms of functional obsolescence.

c) Reproduction cost is the estimated cost to construct, at current prices, an exact duplicate or replica of the property being assessed, using the same materials, construction standards, design, layout and quality of workmanship, and embodying any functional obsolescence.

d) Historic cost is the original construction or acquisition cost as recorded on a firm's accounting records. Depending upon the industry, it may be appropriate to trend

HCLD to current costs. Only trending indexes commonly recognized by the specific industry may be used to adjust HCLD.

RCNLD may be impractical to implement; therefore the preferred cost indicator of value in a mass appraisal environment for unitary property is HCLD. A party may challenge the use of HCLD by proposing a different cost indicator that establishes a more accurate cost estimate of value.

2. Income Capitalization Approach. Under the principle of anticipation, benefits from income in the future may be capitalized into an estimate of present value. Yield Capitalization . The yield capitalization formula is $CF/(k-g)$, where "CF" is a single year's normalized cash flow, "k" is the nominal, risk adjusted discount or yield rate, and "g" is the expected growth rate of the cash flow.

(1) Cash flow is restricted to the operating property in existence on the lien date, together with any replacements intended to maintain, but not expand or modify, existing capacity or function. Cash flow is calculated as net operating income (NOI) plus non-cash charges (e.g., depreciation and deferred income taxes), less capital expenditures and additions to working capital necessary to achieve the expected growth "g". Information necessary for the Division to calculate the cash flow shall be summarized and submitted to the Division by March 1 on a form provided by the Division.

(a) NOI is defined as net income plus interest.

(b) Capital expenditures should include only those necessary to replace or maintain existing plant and should not include any expenditure intended primarily for expansion or productivity and capacity enhancements.

(c) Cash flow is to be projected for the year immediately following the lien date, and may be estimated by reviewing historic cash flows, forecasting future cash flows, or a combination of both.

i) If cash flows for a subsidiary company are not available or are not allocated on the parent company's cash flow statements, a method of allocating total cash flows must be developed based on sales, fixed assets, or other reasonable criteria. The subsidiary's total is divided by the parent's total to derive the allocation percentage to estimate the subsidiary's cash flow.

ii) If the subject company does not provide the Commission with its most recent cash flow statements by March 1 of the assessment year, the Division may estimate cash flow using the best information available.

(2) The discount rate (k) shall be based upon a weighted average cost of capital (WACC) considering current market debt rates and equity WACC should reflect a typical capital structure for comparable companies within the industry.

(a) The cost of debt should reflect the current market rate (yield to maturity) of debt with the same credit rating as the subject company.

(b) The cost of equity is estimated using standard methods such as the capital asset pricing model (CAPM), the Risk Premium and Dividend Growth models, or other recognized models.

i) The CAPM is the preferred method to estimate the cost of equity. More than one method may be used to correlate a cost of equity, but only if the CAPM method is weighted at least 50% in the correlation.

ii) The CAPM formula is $k(e) = R(f) + (\text{Beta} \times \text{Risk Premium})$, where $k(e)$ is the cost of equity and $R(f)$ is the risk free rate.

a. The risk free rate shall be the current market rate on 20-year Treasury bonds.

b. The beta should reflect an average or value-weighted average of comparable companies and should be drawn consistently from Value Line or an equivalent source. The beta of the specific assessed property should also be considered.

c. The risk premium shall be the arithmetic average of the spread between the return on stocks and the income return on long-term bonds for the entire historical period contained in the Ibbotson Yearbook published immediately following the lien date.

(3) The growth rate "g" is the expected future growth of the cash flow attributable to assets in place on the lien date, and any future replacement assets.

(a) If insufficient information is available to the Division, either from public sources or from the taxpayer, to determine a rate, "g" will be the expected inflationary rate in the Gross Domestic Product Price Deflator obtained in Value Line. The growth rate and the methodology used to produce it shall be disclosed in a capitalization rate study published by the Commission by February 15 of the assessment year.

b) A discounted cash flow (DCF) method is impractical to implement in a mass appraisal environment, but may be used to value individual properties.

c) Direct Capitalization is an income technique that converts an estimate of a single year's income expectancy into an indication of value in one direct step, either by dividing the normalized income estimate by a capitalization rate or by multiplying the normalized income estimate by an income factor.

3. Market or Sales Comparison Approach. The market value of property is directly related to the prices of comparable, competitive properties. The market approach is estimated by comparing the subject property to similar properties that have recently sold.

a) Sales of comparable property must, to the extent possible, be adjusted for elements of comparison, including market conditions, financing, location, physical characteristics, and economic characteristics. When considering the sales of stock, business enterprises, or other properties that include intangible assets, adjustments must be made for those intangibles.

b) Because sales of unitary properties are infrequent, a stock and debt indicator may be viewed as a surrogate for the market approach. The stock and debt method is based on the accounting principle which holds that the market value of assets equal the market value of liabilities plus shareholder's equity.

4. Reconciliation. When reconciling value indicators into a final estimate of value, the appraiser shall take into consideration the availability, quantity, and quality of data, as well as the strength and weaknesses of each value indicator. Weighting percentages used to correlate the value approaches will generally vary by industry, and may vary by company if evidence exists to support a different weighting. The Division must disclose in writing the weighting percentages used in the reconciliation for the final assessment. Any departure from the prior year's weighting must be explained in writing.

Utah Admin. Rule R884-24P-62.

CONCLUSIONS OF LAW

1. The Utah Supreme Court has determined that the taxpayer has a dual burden of proof in property tax valuation appeals, stating in Utah Railway Company v Utah State Tax Commission, 2000 UT 49, ¶ 6, 5 P.3d 652 (2000) as follows: "the protesting taxpayer is required "not only to show substantial error or impropriety in the assessment, but also to provide a sound evidentiary basis upon which the Commission could adopt a lower valuation."" Citing Utah Power & Light Co. v. Tax

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Commission, 590 P.2d 332, 335 (Utah 1979). Petitioner has both shown error and provided an evidentiary basis for a new value, although not the value Petitioner requests in this matter.

2. Intangible property is not subject to assessment and taxation. Utah Code Sec. 59-2-1102(2)(g). The statute defines “intangible property” as “property that is capable of private ownership separate from tangible property” Utah Code Sec. 59-2-102(17). Some items are listed in the statute as intangibles but neither goodwill, nor customer lists are specifically addressed. The Commission has concluded in prior appeals that the list is not exclusive and for those items not specifically mentioned the determination as to whether the item is an intangible for the purposes of taxation is whether it is “capable of private ownership separate from tangible property.” *id.* The evidence presented in this hearing indicated that the customer lists met this test as being intangible. The evidence also indicated that there was a portion of the goodwill that was not capable of separate ownership. However, the goodwill was attributed to a function of all assets operating together as a unit both tangible and intangible. The largest assets of PETITIONER were the licenses and certainly a major portion of the goodwill on the books of the company was capable of ownership separate from tangible property as it would be sold with the intangible licenses. The Commission concludes from this that the portion of goodwill that would be attributed to intangible assets should be excluded from the assessment.

DISCUSSION

The first issue that must be considered in this matter is what is the appropriate unit for valuation purposes. In making this determination the Commission considers a number of factors including:

(1) The availability of reliable financial data. For PETITIONER, there are audited financials at the national PETITIONER level. There is some Utah specific financial information, but it is not audited.

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(2) The nature and ownership of the properties. PETITIONER does not have a subsidiary limited to Utah's geographical boundaries. PETITIONER is the smallest subsidiary in the chain of COMPANY 1 group of companies that has audited financials, owns the Utah property at issue and is the entity with employees in Utah.

(3) The use of the properties. The property in Utah is used as part of a wireless network. The property is not operated as a network limited to the geographical boundaries of the state of Utah. PETITIONER argues that the network is not limited to a national network, that it is an international network and that if the company is going to be valued as a network, the Division should use COMPANY 1 instead of PETITIONER. However as the Commission noted in its ruling in Appeal no. 03-0226, the unit for valuation purposes should be "as close to the actual property being valued as possible." Based on this PETITIONER would be more appropriate than COMPANY 1 as the unit for valuation purposes.

(4) The most probable grouping of assets that would be sold. COMPANY 1 could have sold all of its national or international assets as of DATE. However, as of that date, if PETITIONER were going to sell a smaller group of assets, the likely grouping of assets would be based along license lines, which extend beyond the state of Utah.

The second consideration in this matter is to determine if there was error in the Division's assessment. The Commission concludes that there is error in the treatment of goodwill. The parties offer different opinions on the treatment of goodwill. The Division included in its cost approach \$\$\$\$ in goodwill, which had been on PETITIONER's books on the lien date. Ex. 19, p. 5. This goodwill line item is the largest component of the Division's cost approach, comprising %%% of the Division's entire cost approach value. The \$\$\$\$ in goodwill is attributable mostly to the purchase price paid for PETITIONER by COMPANY 1 in YEAR. Ex. 21, p. F-10, Tr. 92-93 (PERSON 1), 562 (APPRAISER 3). The Division included goodwill in the cost approach because it believes "all of PETITIONER's reported goodwill is taxable." Tr. 40 (Lind). The Commission disagrees with the treatment of goodwill in this manner.

PETITIONER, on the other hand argued that none of the goodwill should be subject to property tax. PETITIONER offered various arguments on this issue including the position that the taxation of goodwill violates the Utah Constitution and statutes because the goodwill is not tangible property. Citing Utah Constitution, Art. XIII. PETITIONER points out that under this constitutional language, only tangible property may be taxed in Utah and argues that it is undisputed that goodwill is intangible property as a matter of fact.² PETITIONERs' constitutional arguments are in the record in this matter to protect PETITIONERs' right to have them addressed on appeal.

² PETITIONER cites as support for this position the: PETITIONER 10-K at Ex. 21, p. F-10 ("[g]oodwill consists of the excess purchase price over the fair value of net assets acquired in purchase business combinations" and the goodwill in this case resulted from the COMPANY 1 acquisition in 2001); Real Estate Appraisal Terminology ("goodwill" means "an intangible, saleable asset arising from the reputation of the business and its relation with its customers as distinguished from the value of the physical plant and its stock"); SFAS 142 at Ex. 27 (referring to goodwill as an "intangible asset"); Tr. pp. 78-79 (Van Ness referring to goodwill as a purchase premium); Tr. p. 195 (APPRAISER 2 referring to goodwill as "what is left over after you identify everything else"); Tr. p. 378 (Prawitt referring to goodwill as a purchase premium); Tr. pp. 560 (Peterson agreeing with Real Estate Terminology definition of goodwill).

The Utah Legislature has defined intangible property as a matter of law for property tax purposes and the Commission follows the statutory definition. The Legislature defined “intangible property” as follows:

“Intangible Property”: (a) means *property that is capable of private ownership separate from tangible property* and (b) *includes*: (i) moneys; (ii) credits; (iii) bonds; (iv) stocks; (v) representative property; (vi) franchises; (vii) licenses; (viii) trade names; (ix) copyrights; and (x) patents.

Utah Code Ann. Sec. 59-2-102(17) (emphasis added). In interpreting this statute, it is well established that “the plain language controls the interpretation of a statute, and only if there is ambiguity do we look beyond the plain language to legislative history or policy considerations.” Vigos v. Mountainland Builders, Inc., 2000 UT 2, ¶ 13, 993 P.2d 207 (2000). In addition the Commission would note that it has “a duty to construe statutes to avoid constitutional conflicts.” State v. Mooney, 2004 UT 49, ¶ 12, 98 P.3d 420 (2004) (citations omitted).

As testified to by three experts in the case, APPRAISER 2, PERSON 1, and APPRAISER 3, goodwill, or at least a portion of the goodwill, is capable of private ownership separate from tangible property because goodwill can be and often is sold as part of licenses or other intangible property. If the Legislature had intended to limit intangible property to property that is capable of private ownership by itself separate from tangible property, it could have, but it did not. The Legislature specified only that the property had to be capable of ownership separate from tangible property. Utah Code Ann. Sec. 59-2-102(17). The section defines exempt intangible property to any property “capable of private ownership separate from tangible property,” including: (i) “moneys; (ii) credits; (iii) bonds; (iv) stocks; (v) representative property; (vi) franchises; (vii) licenses; (viii) trade names; (ix) copyrights; and (x) patents.” *Id.* Whereas the statute provides that these items of property are separate and distinct assets of the enterprise, there is no reason that goodwill would not serve to enhance many of these assets at least to the same extent as the tangible assets. Because portions of the goodwill at issue can indisputably be owned separate from tangible property as part of licenses or other intangible property, that portion of the goodwill is tax-exempt intangible property under statute as a matter of law.

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The Division argued that the 2002 impairment study of licenses specified a value for those licenses, meaning the licenses could not be enhanced by goodwill. Tr. 468-69 (APPRAISER 3). This argument fails. Goodwill is the enhanced value of all assets, working together. As stated in Real Estate Appraisal Terminology, “goodwill” means “an intangible, saleable asset arising from the reputation of the *business* . . .” (emphasis added). Furthermore, SFAS 141 and 142, upon which the goodwill for PETITIONER is predicated, recognize goodwill as an intangible asset that cannot be separated from the business entity as a whole. Ex. 26, p. 17 and Ex. 27. It is quite logical that the sum of the various parts would be less than the whole because goodwill is created by the synergy of the enterprise. There is no evidence, textbook, accounting pronouncement or other authority before us indicating that goodwill arises from or enhances the value of one class of assets over another. In summary, simply assessing goodwill based on the reported figure on financial statements, without considering adjustments or allocating the goodwill among all the assets considering the facts in this matter is inadequate for determining the taxable fair market value of the subject property.

PETITIONER argues that in a recent decision, the Tax Commission removed goodwill from another cellular company’s value where all the goodwill had been reclassified as licenses. See Tax Commission Appeal No. 02-1010. The Commission notes that there is a significant dissimilarity between that other appeal and the facts in this matter. In the other case the company had gone through the process of having all goodwill reclassified as licenses with the Securities and Exchange Commission. Licenses are intangible and not subject to property tax in Utah. PETITIONER has not reclassified its goodwill with the SEC. Should PETITIONER go through the process with the SEC to reclassify its goodwill in the future, that factor would be considered at that time.

The Commission also finds the Division made a second error. The Division included \$\$\$\$ in its cost approach for PETITIONER’s “customer list.” Ex. 19, p. 5. Property tax in Utah may not be imposed on “intangible property,” meaning “property that is capable of private ownership separate from tangible property.” Utah Code Ann. §§ 59-2-102(17), -1101(2)(g). A customer list is intangible, and is clearly capable of private ownership separate from tangible property. Tr. 88-89 (PERSON 1), 404

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(Prawitt); Ex. 16. We have ruled recently that similar types of customer lists are intangible property. Appeal No. 02-1010 at 41 (quoting Appeal No. 03-0226 at 35 and citing Appeal Nos. 95-0789 and 95-0824). The Division thus erroneously included the customer list in its cost approach and it must be removed.

PETITIONER also argues that the computer software should be deducted as an intangible. The Utah Supreme Court has concluded that “computer programs” that are “customized rather than ‘canned’ or mass-produced” are exempt intangible property under Utah law because the “costs [are] primarily for personal services rendered to customize a program.” Cache County et al., v. Tax Comm’n ex rel. Questar Pipeline Co., 922 P.2d 758, 768 (Utah 1996) (citations omitted). However, in this case the vendor of the computer programs is also selling the same program to other customers in the industry, which indicates a ‘canned’ or massed-produced component. There is some customization indicated, but the evidence is not sufficient to make a determination on this issue.

In weighing all the evidence presented in this matter, clearly there were errors in the Division’s assessment, thus satisfying the first prong of the two-part Utah Railway test. The Commission must next analyze whether there is a sound evidentiary basis upon which the assessment may be altered. See Utah Railway, 2000 UT 49 at ¶ 6.

For the reasons stated in the Findings of Fact above, it is the Commission’s conclusion that the Counties’ have failed to support the higher value they were requesting. In closing argument, the Counties’ counsel argued that APPRAISER 1 presented the “only unchallenged” appraisal. Tr. 640. The Commission disagrees with this argument. APPRAISER 1’s own concessions that his appraisal did not follow standard valuation techniques are enough to justify rejection of the appraisal by the Commission. While preferred valuation methods in Rule 62 are rebuttable presumptions and some departure from the rule is permitted, APPRAISER 1 does not seem to even consider standard valuation techniques, and thus clearly does not arrive at fair market value. Additionally the Commission did not find PETITIONER’s appraisal to support the value requested by PETITIONER for the reasons noted in the findings above. Having determined that there is error in the Division’s assessment, and that the

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Commission is not willing to accept either the Prawitt appraisal or the APPRAISER 2 appraisal as fair market value. The Commission analyzes whether evidence has been presented to allow it to ascertain fair market value. The Commission concludes that the Division's original assessment with the corrections noted supports a new value. As detailed in the Findings above, the Commission makes the calculation concerning the portion of the goodwill related to tangible and intangible assets, so that goodwill may be appropriately allocated. In its calculation the Commission considers the portion of good will allocated to customer lists to be intangible, while the portion related to computer software is included with the taxable property. The result is that of the \$\$\$\$ of goodwill on the books of PETITIONER, only \$\$\$\$ can be attributed to taxable property.

One adjustment in the assessment, which lowered the value considerably, was the Division's 65% good "market adjustment," which appears similar to an economic obsolescence measure. Ex. 19, p. 5. The Commission finds that this is also an error in the assessment that should be disallowed. Without finding whether the specific method is correct, the Commission finds that no economic obsolescence was established in the hearing. PETITIONER made no such argument, and the 10-K report shows that PETITIONER took an impairment charge to goodwill during 2002 in the amount of \$\$\$\$. Ex. 21, p. F-15. There is no evidence that the tangible property suffered economic loss greater than this amount. Moreover, to exclude such a large portion of the goodwill and still allow a "market adjustment" may well be double counting to a significant degree. Accordingly, the Commission finds that the market adjustment is not warranted if only the goodwill attributable to the taxable assets is added in the value. After correcting these errors in the Division's assessment and revising the factor for allocating the portion of the unit to Utah to account for the reduction of goodwill, the Commission calculates a new value for the subject property.

DECISION AND ORDER

Based on the information presented by the parties and considering the burden of proof in this matter, the Commission finds that the Utah taxable value of PETITIONER for the lien date January 1,

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2003, is \$\$\$\$\$. The Commission would then subtract \$\$\$\$\$ for vehicles from the value and the resulting Utah taxable value for the assets is \$\$\$\$\$. It is so ordered.

DATED this _____ day of _____, 2005.

Administrative Law Judge

BY ORDER OF THE UTAH STATE TAX COMMISSION:

The Commission has reviewed this case and the undersigned concur in this decision.

DATED this _____ day of _____, 2005.

Pam Hendrickson
Commission Chair

R. Bruce Johnson
Commissioner

Palmer DePaulis
Commissioner

Notice of Appeal Rights: You have twenty (20) days after the date of this order to file a Request for Reconsideration with the Tax Commission Appeals Unit pursuant to Utah Code Ann. §63-46b-13. A Request for Reconsideration must allege newly discovered evidence or a mistake of law or fact. If you do not file a Request for Reconsideration with the Commission, this order constitutes final agency action. You have thirty (30) days after the date of this order to pursue judicial review of this order in accordance with Utah Code Ann. §§59-1-601 and 63-46b-13 et. seq.

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CONCURRING OPINION

Goodwill and Intangibles in General

Under any definition, outside the Commission's interpretation of § 59-2-102(17), goodwill is intangible. The definitions and usage within the legal, financial, accounting, and appraisal professions are so abundant and universal that there is no need to cite specific references beyond those identified in the decision. Goodwill is typically regarded as either: 1) accounting goodwill, for which the goodwill for PETITIONER has been assessed, or 2) economic goodwill. The latter concept is more vague, and generally refers to a competitive advantage, patronage, or public favor gained by business resulting from superior business practices, perceived or actual. (See *Black's Law Dictionary*, 6th ed.)

Some positions taken by organized professional groups suggest a rationale for considering goodwill as being directly related to tangible property. These are to the effect that goodwill (and some other intangibles) "are not separate or divisible from their influence on the value of the underlying tangible assets," and have no separate, distinguishable, [sic] market value apart from the tangible assets they adhere to."¹ However, even most proponents of this position, save for perhaps specific individuals, acknowledge that goodwill is an intangible. Aside from the fact that this limited interpretation is only applied by a sub-segment of the professional community, there is a significant flaw in this line of reasoning. That is, with two exceptions stated below, neither of which is relevant to this case, there is no evidence anywhere that goodwill has any direct relationship with tangible property at all.

The first exception, under the accounting goodwill concept, would hypothetically occur where a business or firm purchases only tangible property. If the purchase price were in excess of the allocated market value, the excess would have to be identified on the firm's financial statements as goodwill. In this case, however, although goodwill could be directly attributable to tangible property, an assessment would inherently be based on a value that is above market value. Any transaction involving more than tangible property, e.g., the purchase of a business, requires that goodwill be valued as the "excess of fair

¹ National Conference of Unit Valuation States, *Unit Valuation Standards* I. F. 3.

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value of the reporting unit over the amounts assigned to its assets and liabilities. That is to say, goodwill is attributable to the firm, not the tangible property of the firm. Thus, ascribing value to goodwill associated with tangible property is meaningless.

The second example, is not really goodwill at all, but is similar to the economic goodwill concept. That is where intangible value (read goodwill) is intrinsic to tangible property. This occurs with a Rembrandt painting, a Frank Lloyd Wright home, or other types of uniquely designed property where the value is attributable as much to the name of the designer and the uniqueness of the property as to its quality of workmanship. Here the value is imbedded in the property and cannot be separated. However, to reiterate, this is not goodwill.

The single argument for goodwill to be taxed in association with tangible property is that the assemblage of the tangible property under a single operating unit creates excess or enhanced value. However, this has not been established in this case. Rather the Division has assessed the goodwill for the entire reporting unit. There is no evidence whatsoever, nor would there ever be, that the intangible asset - goodwill - is attributable to tangible assets under the FAS reporting requirements. It is always attributed to the “acquired entity.”

One final point regarding goodwill needs to be observed. Under FAS standards, assets acquired by a firm should be accounted for at market value. As stated previously, by definition goodwill is the “excess of the fair value” over the other assets.

Legislative History, Intangible Property, and Goodwill

In 1998 the Utah legislature redefined “property” under § 59-2-102(25), which excluded goodwill, to mean “property that is subject to taxation,” but that “does not include intangible property.” The legislature also established a definition of intangible property under subparagraph (17), which required separate private ownership, and omitted any reference to goodwill. It is unclear whether the legislature intended to classify goodwill as tangible property, create a class of taxable property that is intangible but not “capable of private ownership separate from tangible property,” or leave it to be

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determined by specific facts and circumstances. (It is clear, however, that the Legislature deleted statutory language specifically identifying “goodwill” as an example of intangible property.) At the same time, subparagraph (17) provides that intangible property includes other types of property other than those listed. Thus it is absolutely clear that goodwill is not taxable in its entirety. It is also unclear whether taxable goodwill, if it is taxable at all, is subject to an imposition statute under § 59-2-102 (25) and 103 (1), or subject to consideration for exemption under § 59-2-1101 (1) (g).

Division Practice

Prior to 1998, the Division did not proactively assess goodwill that was listed on the accounting records of business subject to central assessment. Sometime after the 1998 statutory change, but apparently no earlier than 2001, the Division changed its practice, and began assessing goodwill as taxable property. (Also, around the time, the Division implemented its new practices, the accounting treatment for goodwill under the new FAS standards were made.) The Division argues that this practice is consistent with legislative intent. (Tr. 450 (APPRAISER 3). By so doing the decision is now assessing value for an asset that is present only when a business acquisition occurs.

Utah Constitution

Art. XIII, Sec. 2 (1) requires tangible property to be assessed at fair market value. Paragraph 5 does allow that:

[t]he Legislature may by statute determine the manner and extent of taxing or exempting intangible property, except that any property tax on intangible property may not exceed .005 of its fair market value. If any intangible property is taxed under the property tax, the income from that property may not also be taxed.

Conclusion

There are major concerns that raise doubt as to whether this decision is consistent with the Constitution of Utah. These concerns are:

1. Goodwill is intangible property.
2. There is no evidence on the record that any goodwill is or even could be attributable to tangible property.

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3. Even assuming that goodwill is an intangible “enhancement” of tangible property, under the Commission’s decision goodwill is more than two thirds of the value of tangible property. This is more than an enhancement.
4. Only businesses that are acquired are subject to assessment for goodwill. Consequently there may be an equity issue between acquired entities and existing entities that have nearly identical property.
5. No allowance is made for either the .005 assessment rate or the reduction of income taxes for PETITIONER, as required under the Constitution for taxing intangible property.
6. By assessing an “excess of fair value,” the constitutional and statutory fair market value standard may have been violated.

Nonetheless, in spite of these concerns, under State v. Mooney, 2004 UT 49, ¶ 12, 98 P.3d 420 (2004), the Commission has no choice but to interpret § 59-2-102 (17) to be consistent with the Constitution, and to make its decision accordingly.

Marc B. Johnson
Commissioner