

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

HOPE GAS, INC.,

Petitioner,

v.

Civil Action No. _____

WEST VIRGINIA BOARD OF PUBLIC WORKS, and

**THE HONORABLE MATTHEW IRBY,
West Virginia State Tax Commissioner,**

Respondents.

VERIFIED PETITION

COMES NOW Petitioner Hope Gas, Inc. (“Hope Gas”), by counsel Steptoe & Johnson PLLC, and hereby files this verified petition for appeal from the Tax Year 2024 final assessment of Hope Gas’s public utility property for *ad valorem* property taxation by the West Virginia Board of Public Works (“BPW”) pursuant to West Virginia Code § 11-6-12 (the “Petition”). In support of the Petition, Hope Gas states as follows:

I. PARTIES

1. Hope Gas, Inc. (“Hope Gas”) is a duly licensed public service corporation chartered and incorporated in West Virginia which owns taxable public utility property in the State of West Virginia.

2. The West Virginia Board of Public Works (“BPW”) is a West Virginia governmental corporation (pursuant to West Virginia Code § 5-4-1(a)), having the duties and powers prescribed for it by law, including the duty to make final assessments of public utility company properties for purposes of *ad valorem* taxation under W. Va. Code §§ 11-6-1, *et seq.*

3. The Honorable Matthew Irby, as West Virginia State Tax Commissioner (“Tax Commissioner”), is the chief executive officer of the West Virginia State Tax Division, who has

the statutory duty to form a tentative assessment for the West Virginia Board of Public Works by the fifteenth day of September each year, pursuant to West Virginia Code § 11-6-9(e).

II. JURISDICTION

4. This Court has jurisdiction over this appeal pursuant to West Virginia Code § 11-6-12. This appeal was timely-filed, duly verified, and filed in the circuit court of the county in which the largest assessment of Hope Gas's property from the next preceding year, that being Wood County in Tax Year 2023.

III. STATEMENT OF THE CASE

A. Hope Gas Tax Returns for Tax Year 2024

5. This appeal arises out of a dispute concerning the appraised value of Hope Gas's public utility property for Tax Year 2024.

6. Pursuant to West Virginia Code § 11-6-1, Hope Gas filed a tax return for public utility property for Tax Year 2024 identifying information required by the forms prescribed by the BPW. *See Exhibit 1*, "Annual Report," executed by William J. Kurz, Assistant Controller, Dominion Energy Services, Inc. as Agent for Hope Gas, Inc., June 7, 2023.

7. Tax returns required by West Virginia Code § 11-6-1 cover the year ending on December 31, next preceding the date of the return, which is used by the Tax Division to calculate an appraised valuation and recommended tentative assessment. The BPW later finalizes the assessment of such public utility property, for *ad valorem* property taxation, in the following tax year.

8. In this case, the Annual Report at issue, **Exhibit 1**, pertains to operations ending on December 31, 2022 for the calculation of Hope Gas's *ad valorem* property tax liability for Tax Year 2024.

9. The BPW's Annual Report forms solicit financial data and other information pertinent to the Tax Commissioner's discharge of his duty to prepare recommendations for tentative assessments of public utility properties, based on the application generally accepted appraisal methods and three generally accepted approaches to value: (A) cost, (B) income, and (C) market data. W. Va. Code St. R. § 110-1M-4.2.

10. The BPW Annual Report form for "Gas – Large" public service corporations collects information to appraise the value of the public utility properties using a combination of the cost and income approaches.¹

11. When the cost approach is used in the valuation process, original cost less applicable depreciation shall be employed, considering three types of depreciation: (a) physical deterioration, (b) functional obsolescence, and (c) economic obsolescence. W. Va. Code St. R. § 110-1M-4.2.1.

12. When the income approach is used in the valuation process, the Tax Commissioner estimates capitalization rates, considering the interrelationship of the income to be capitalized and the capitalization rate. In this regard, net operating income after taxes, but before interest on long-term debt, shall be given primary consideration as the point on the income stream to be capitalized. W. Va. Code St. R. § 110-1M-4.2.2.

13. "Operating property" means utility property used for purposes immediately connected with providing the respective utility service. The Tax Commissioner construes "purposes immediately connected with providing utility service" to be synonymous with properties considered by regulatory bodies in constructing the utility rate base for rate making purposes. The Tax Commissioner therefore gives primary consideration to whether property is included in utility

¹ <https://tax.wv.gov/Documents/PropertyTax/PublicUtilities/Gas-Large.BoardOfPublicWorks.pdf>.

operating property classification as reflected in the applicable uniform system of accounts when deciding operating non-operating property issues. W. Va. Code St. R. § 110-1M-2.12.

B. The Tax Division's Preliminary Value

14. Following the June 2023 Annual Report submission, on September 6, 2023, the Tax Division, by Ms. Ting Zhu sent an e-mail to Hope Gas stating,

This email is being sent to provide you with a **preliminary** WV property tax public utility assessment for the 2024 tax year. This is in accordance with WV law to reflect an assessed valuation issued at 60% of the estimated market value of taxable property and has been calculated using preliminary capitalization rates and information by you on your annual return. The preliminary value is **\$234,213,900.**

Please contact me with any questions or concerns. Tentative valuation, which are recommendations to our Board of Public Works, will be mailed to you on September 15th, 2023.

Exhibit 2 (emphasis added).

15. This \$234,213,900 “preliminary value” represented a 24.8% increase from the BPW’s assessed value of \$187,658,100 for Tax Year 2023, and \$176,682,000 for Tax Year 2022.

Exhibit 3.

16. Consistent with prior practice with the Tax Division, Hope Gas interpreted the “preliminary value” e-mail as an invitation to discuss the valuation, before the Tax Division’s September 15 tentative assessments were reported to the BPW.

17. Thus, Hope Gas requested the working papers showing the Tax Division’s calculations, which were produced on September 11, 2023. **Exhibit 3.**

18. The “working paper” produced in prior years was a separate document from the Tax Division’s tentative assessment, which is a document executed by the Tax Commissioner advising that the BPW of the Tax Division’s recommended appraisal value. *Compare* **Exhibit 4**

(working paper for Tax Year 2023), with **Exhibit 5** (tentative assessments for Tax Years 2021 and 2022).

19. Hope Gas never received a tentative valuation for Tax Year 2023 by U.S. Mail. In January 2024, the Tax Department e-mailed a copy of a tentative assessment per Hope Gas's request. **Exhibit 6**.

20. In the interim, Hope Gas reviewed the working paper and, upon comparing with the Annual Report for Tax Year 2024 and related Annual Reports for Tax Year 2023 and 2022, Hope Gas determined that the preliminary value appears to have mistakenly added an asset owned by the Hope Gas Pension Plan (the "overfunded pension"), which is a separate entity. See **Exhibits 7, 8** (Annual Reports for Tax Year 2022, 2023).

C. The Hope Gas Pension Plan

21. The Tax Division's calculation included the value of an overfunded pension owned by the Hope Gas Pension Plan ("HGPP") which pays a pension benefit to Hope Gas's retired employees.

22. The legal owner of the overfunded pension is HGPP, which is a separate entity from Hope Gas, with a separate taxpayer identification number.

23. The HGPP is a trust administered by Tempo Holding Company LLC d/b/a Alight.

24. The trustee of the HGPP is Northern Trust Corporation.

25. Hope Gas is only the "Plan Sponsor" within the meaning of Employee Retirement Income Security Act of 1974, as amended ("ERISA"), which means that it makes contributions to the HGPP trust, but it does not own the trust, is not the beneficiary of the trust, does not serve as trustee, and does not administer the trust.

26. A pension plan is considered “overfunded” when the deduced value of plan assets surpass the present value of its liabilities, including the planned benefit obligations to pensioners.

27. The non-service cost portion of a Plan Sponsor expense is reported below the operating income line in Generally Accepted Accounting Principles (GAAP) financial statements, pursuant to Hope Gas’s Statement of Financial Accounting Standards No. 87 adopted in 1986.

28. However, while the overfunded pension value is reported as a “negative” expense on GAAP financial statements for accounting reasons, it is not net income that can be utilized by Hope Gas because the overfunded pension belongs to the HGPP.

29. Thus, because the Annual Report incorporates Hope Gas’s GAAP financial statements submitted to the Public Service Commission, Hope Gas’s net operating expense is artificially inflated by the value of the overfunded pension owned by HGPP.

30. As in prior years, Hope Gas appended a footnote to its Tax Year 2024 Annual Report on page 6 (“From page 124 of the FERC Form”), regarding the “Pension Program,” explaining,

All union employees of the respondent are covered under qualified noncontributory defined benefit retirement plans maintained by the Hope Gas Pension Plan (HGPP). Benefits payable under the plans are based primarily on each employee’s years of service, age, and base compensation. Hope’s funding policy is to contribute annually the amount that is in accordance with the provision of the Employee Retirement Income Security Act of 1974. The pension program also includes the payment of supplemental pension benefits to certain retirees depending on retirement dates. Hope salaried employees were previously covered under qualified noncontributory defined benefit retirement plans maintained by Dominion² and its subsidiaries but those benefits were frozen as of the date of the sale.

² Hope Gas was sold by Dominion Energy, Inc., effective August 31, 2022, to an indirect subsidiary of Hearthstone Holdings, Inc., which now does business as Hope Utilities, Inc. Due to the acquisition, Hope Gas’s Annual Report to the BPW was submitted in care of Hope Utilities’ predecessor Dominion Energy Services, Inc.

In 1986, the respondent adopted Statement of Financial Accounting Standards No. 87, “Employers’ Accounting for Pensions”. Pension costs of the year were actually determined under the provisions of Statement No. 87. The total pension credit was (\$16.5M) and (\$15.7M) for 2022 and 2021, respectively.

31. Given the unique circumstance presented by the HGPP overfunded pension, and Hope Gas’s GAAP financial statement reporting methods, in prior tax years the Tax Division adjusted Hope Gas’s operating income based on the values disclosed in similar footnotes.

32. For Tax Year 2024, however, the Tax Division did not make adjustments before issuing its preliminary value.

C. Communications with the Tax Division

33. Upon discovering the Tax Division’s mistake, Hope Gas requested a meeting to discuss an adjustment to the preliminary value, resulting in a conference call on November 6, 2023. Following that meeting, Hope Gas provided additional information and highlighted the values reported in its Annual Report in e-mails to the Tax Division. **Exhibit 2.**

34. On November 22, 2023, Ms. Zhu advised by e-mail, “I would like to provide with an update. Upon discussing with the management, I was advised the pension credit is not being granted at this time. If you have any other questions or concerns, please feel free to contact us.” **Exhibit 9.**

35. However, even after Ms. Zhu’s November 22, 2023 email, the Tax Division still had not mailed a tentative assessment and, thus, Hope Gas continued in its attempts to discuss the valuation with the Tax Division.

36. After failed attempts to schedule a follow up conference call, on January 2, 2024, Ms. Zhu replied to Ms. Bilskiy’s December 21, 2023 e-mail asking for a status update on the tentative assessment, stating that “I have attached a copy of the tentative assessment that was

mailed to Hope Gas on September 15th. We had updated the address as you requested previously. Please let us know if you have any other concerns or questions.” **Exhibit 6.**

37. Hope Gas never received a copy of the tentative assessment prior to January 2, 2024 and still, to this date, has not received a copy via U.S. Mail.

38. Thus, Hope Gas, by counsel, e-mailed and mailed a letter on January 9, 2024 addressed to Frank H. Capehart, Assistant Director of the Property Tax Division, outlining these issues and requesting an opportunity to be heard before the assessment was finalized by the BPW. **Exhibit 10.**

39. The Tax Division then agreed to meet with Hope Gas to discuss these issues, which were presented in a virtual meeting on February 12, 2024.

40. Hope Gas’s consultants explained the issues in detail (through discussion and a slideshow presentation) to the meeting attendees: Frank Capehart, Terry Headley, and Ting Zhu. **Exhibit 11.**

41. Following the meeting, Terry Headley e-mailed Hope Gas’s consultant Ryan Ivey on February 21, 2024, less than twenty-four hours before the BPW’s February 22, 2024 meeting, providing “the final values for the companies we have discussed,” including Hope Gas with an adjustment from \$234,213,900 to \$223,681,500 for a difference of \$10,532,400. **Exhibit 12.**

42. The revised assessment remains significantly higher than the final 2023 assessment of \$187,658,100.

43. On February 22, 2024, the BPW adopted the Tax Division’s recommended tentative assessment—which was reported among the list of “Tax Year 2024 final assessed values” reported by the West Virginia Secretary of State. **Exhibit 13.**

44. Although Hope Gas has yet to receive the final assessment by U.S. Mail, pursuant to an e-mail from the Secretary of State's Office, upon information and belief, the final assessment was mailed on March 1, 2024. *Id.*

45. Hope Gas, through consultant Mr. Ivey, has since requested the working papers from the Tax Division, which would presumably show the calculations for the adjustment. Hope Gas has yet to receive the working papers.

46. Based on Mr. Ivey's own calculations, it appears that the Tax Division's adjustment reflects the subtraction of the overfunded pension from net operating income for the year ending in December 31, 2022, but fails to reflect the subtraction of the overfunded pension from net operating income for the remaining two preceding years of net operating income which are used in calculating the appraised value of Hope Gas's public utility property.

47. Assuming Mr. Ivey's analysis accurately reflects the basis for the Tax Division's calculations, Hope Gas contends that this adjusted calculation is in error because it relies upon the same flawed appraisal methodology applied to calculate net operating income in prior years.

48. It was improper to include an overfunded pension in calculating net operating expenses in the year ending December 31, 2022; and it is also error, for the same reasons, to include similar values in calculating net operating expenses for the years ending December 31, 2021 and 2020, respectively.

IV. ASSIGNMENTS OF ERROR

49. Hope Gas files this appeal from the BPW's final assessment raising the following assignments of error, and respectfully requests a *de novo* hearing on each of these issues:³

³ In *Western Md. R.R. v. Board of Pub. Works*, the West Virginia Supreme Court of Appeals held that West Virginia Code § 11-6-12 requires that the circuit court hold a *de novo* hearing for appeals brought under that section. 124 W. Va. 539, 545, 21 S.E.2d 683, 685.

- i. The BPW’s final assessment erroneously incorporates the valuation of an overfunded pension that is not owned by Hope Gas.
- ii. The BPW’s final assessment erroneously incorporates the valuation of an overfunded pension because plan earnings are not “operating earnings” in the rate making setting.
- iii. The BPW’s final assessment violates regulatory requirements to consider prior returns in which the overfunded pension’s value was adjusted or eliminated.
- iv. Taxing an overfunded pension governed by ERISA violates federal law.
- v. Taxing Hope Gas for the value of HGPP’s overfunded pension violates the “equal and uniform” requirements the West Virginia Code and West Virginia Constitution by targeting Hope Gas for disparate tax treatment.

V. ARGUMENT

50. Hope Gas incorporates its statements set forth in Paragraph 1–49, above, as if restated herein verbatim.

A. The HGPP Assets Should Not Be Included in the BPW’s Final Assessment Because They Are Not Owned by Hope Gas.

51. As shown by the Form 5500 Annual Return/Report of Employee Benefit Plan for tax year 2022 produced with Hope Gas’s January 9, 2024 letter, **Exhibit 10**, Hope Gas does not own the overfunded pension.

52. The “owner” of real property subject to assessment is “deemed” to be “the person who by himself or his tenants has the freehold in his possession, whether in fee or in life,” or in the context of personal property, “the party who has the possession[.]” W. Va. Code § 11-3-8.

53. Hope Gas does not possess the pension fund assets; it is the “plan sponsor.” The pension fund, however, is owned and, thus, “possessed” by the HGPP, not Hope Gas.

54. Moreover, the pension asset should not be included under the income approach, under which the Tax Division must give “primary consideration” to “net operating income after taxes” in calculating the income stream to be capitalized. W. Va. Code St. R. § 110-1M-4.2.2.

55. The HGPP investment earnings are not part of the “net operating income after taxes” within the meaning of this regulation because Hope Gas’s tax returns do not reflect pension fund assets.

56. The HGPP files separate returns with respect to pension fund assets. Thus, the Tax Department failed to observe its regulatory requirement to give “primary consideration” only to net operating income of Hope Gas, after taxes.

57. Finally, adding the value of the HGPP’s overfunded pension to Hope Gas’s property assessment violates the required “Unit Rule.” *Id.* § 110-1-11.12(d)(1).

58. Appraised property “must be valued as an integrated unit; the individual components can be considered **only to the extent they effect [sic.] that value.** An appraiser **cannot merely add the components together** to arrive at a value.” *W. Va. Dep’t of Trans. v. CDS Fam. Tr., LLC*, 240 W. Va. 109, 122, 807 S.E.2d 780, 793 (2017) (Ketchum, J., concurring) (emphasis added).

59. The Tax Department’s valuation violates the Unit Rule because it values a separate element associated with Hope Gas’s property—an overfunded pension it does not own—and adds that component together with other appraised value of Hope Gas property, even though the pension asset does not affect the value of Hope Gas’s property.

60. Indeed, as discussed below, the PSC recently determined that Hope Gas is not *allowed* to derive value from this pension asset for rate making purposes, reinforcing that it should not be included in the appraisal under the Unit Rule.

B. Pension Plan Earnings Are Not “Operating Earnings” in the Rate Making Setting.

61. Hope Gas is a West Virginia gas utility regulated by the Public Service Commission of West Virginia (“PSC”).

62. This means that the rates it is authorized to charge customers for gas service are reviewed and approved by the PSC and must be based on Hope Gas’s cost of service, which is its cost of doing business plus a reasonable rate of return on its invested capital.

63. Thus, in determining Hope Gas’s cost of service (and the rates it may charge for regulated services), the PSC takes into account all of Hope Gas’s revenue sources that can be used toward payment of its costs, all of its costs of doing business, plus a reasonable rate of return on its invested capital.

64. In Hope Gas’s ratemaking proceedings before the PSC, the PSC has held that investment earnings within the HGPP are not revenue or operating income available to Hope Gas for its free use; that is, such earnings (or losses) do not constitute Hope Gas operating income (or operating losses) as such earnings are restricted and to be used only for those purposes for which the HGPP was created as required by applicable federal law, being the payment of the pension or health benefits for which the plan was created.

65. In Hope Gas’s most recent rate case proceeding before the PSC, this precise question was at issue and litigated. A party advocated that Hope Gas should be *required* to use earnings from within the HGPP as operating income to reduce Hope Gas’s overall cost of service when calculating rates for its services. The PSC entirely *rejected* that argument. The PSC recognized that the earnings and income within the Pension Plan do *not* provide cash to Hope Gas, are *restricted* and can only be used to pay pension benefits to Hope Gas’s retirees, and “is not an

appropriate item to include in ratemaking revenue” *Hope Gas, Inc., et al.*, Case No. 20-0746-G-42T at 49 (Comm. Ord., July 27, 2021).

C. Changing Methodology Violates Board Requirements to Consider Prior Returns

66. Changing the Tax Division’s calculation methodology for Tax Year 2024 violates the statutory imperative to give consideration to “returns which may have been previously made by such owner or operator.” W. Va. Code § 11-6-11.

67. In prior tax years, the Tax Division excluded, in whole or in part, the HGPP’s overfunded pension from Hope Gas’s income valuation by way of what it called a “pension credit,” when the unique issue of Hope Gas’s GAAP financial statement reporting the “negative” expense was called to the Tax Division’s attention.

68. This credit, granted in prior tax years, is consistent with the Tax Division’s obligation to make adjustments to the reported financial data included with returns using the Board’s form. *See id.* (“In ascertaining such value the board shall consider the return, if any, made by the owner or operator, and any return which may have been previously made by such owner or operator, the work sheets and tentative assessment recommended by the Tax Commissioner, such evidence or information as may be offered by such owner or operator, such further evidence or information as may be required by the board of such owner or operator, and any other pertinent evidence, information and data.”).

69. Due to the statutory admonition to consider “any return which may have been previously made,” the Tax Division is not permitted to alter its methods for valuation of pension assets from year to year, absent legislative change.

70. Generally accepted appraisal methods do not change annually, so the characterization of property should not change from one tax year to the next absent a change in the law.

71. In that respect, the regulations require the Tax Division to follow a methodology that is objective and not susceptible to change when reviewed by new appraisal personnel within the Tax Division.

72. It is also inappropriate to consider the HGPP overfunded pension simply because pension assets appear in a different capacity under a different statutory regime on financial disclosures to the PSC.

73. Although PSC financial reports are attached to the Annual Report form, as required by the Board of Public Works for “Gas – Large” utilities,⁴ PSC reports disclose financial information for different purposes than taxation. They are not a description of taxable public utility properties pursuant to W. Va. Code §§ 11-6-1, *et seq.*

74. Finally, insofar as the Tax Division appears to acknowledge that including the HGPP’s asset is inappropriate in calculating Hope Gas’s net operating expenses for the year ending December 31, 2022, it is inappropriate to include them in calculating net operating expenses for the two years preceding as well for the same reason.

75. So, while the February 21, 2024 revised assessment partially corrects the error, it appears to rely, still, on calculations that are inconsistent from year to year in a way that violates the BPW’s statutory imperative to consider not only prior returns and assessments, but also the

⁴ <https://tax.wv.gov/Documents/PropertyTax/PublicUtilities/BoardOfPublicWorks.AnnualReport.Gas-Large.pdf>.

work sheet calculations underlying those assessments which were flawed as described herein and explained in Hope Gas's January 9 letter. *See* W. Va. Code § 11-6-11.

D. Taxing a Pension Fund Governed by ERISA Violates Federal Law.

76. Federal law prohibits states from taxing ERISA pension plans.

77. Hope Gas sponsors the HGPP, a pension plan qualified under Section 401(a) of the Internal Revenue Code of 1986, as amended (the “*Tax Code*”) and governed by the ERISA.

78. Hope Gas, as the HGPP sponsor, is required to make contributions to a trust maintained for the *sole* purpose of providing benefits to participants in the Pension Plan (and their beneficiaries). Such trust is tax-exempt under Code Section 501(a).

79. Section 403 of ERISA requires that the trust be administered for the benefit of the Pension Plan participants and their beneficiaries. Both Tax Code Section 401(a) and ERISA Section 403(c)(1) strictly *prohibit* Hope Gas from benefiting from the assets of the trust, even where the trust is overfunded.

80. Accordingly, the assets of the HGPP are neither owned by, nor accessible to, Hope Gas. Consequently, they cannot be considered by the Tax Department in calculating Hope Gas's assessable tax base.

81. The value of the HGPP trust fluctuates with changes in the market, as well as changes in actuarial assumptions and employee population. As a result, the funded status of the trust will rise and fall throughout its term.

82. As the HGPP sponsor, Hope Gas is required, in accordance with generally accepted accounting principles, to report its net periodic pension cost on its financial statements. A credit reflects that the HGPP's trust is overfunded—i.e., that the value of the HGPP's assets exceeds the current value of the HGPP's liabilities.

83. Although this is considered an asset for accrual accounting purposes, it is neither a physical asset that Hope Gas can access, nor a source for Hope Gas to generate operational income.

84. The Tax Department's erroneous inclusion of the pension credit artificially inflates Hope Gas's capitalized income used by the Tax Department to make its recommended assessment.

85. An exemption of the tax credit is further mandated by W. Va. Code § 11-3-9(3) of the West Virginia Tax Code, which states that "any other property or security exempted by *any other provision of law*" shall be exempt from taxation.

86. As mentioned, the trust is tax-exempt under Code Section 501(a). A tax assessable on the net periodic pension cost is effectively a tax on a HGPP trust that is exempt from tax under federal law.

87. Support for the exemption of pension assets is further provided in Section 3.3.4.b of the applicable legislative rule, W. Va. Code St. R. § 110-3-3.3.4.b, which states that "intangible personal property subject to *ad valorem* property taxation shall not include money, bank deposits or other investments determined by the Legislature to be in the nature of deposits in a bank or other financial institution, *or upon pensions, monies or investments determined by the Legislature to be in lieu of or otherwise in the nature of pensions.*" (emphasis added).

88. The Tax Department's inclusion of the pension credit in Hope Gas's capitalized income is nothing more than a tax on the value of pension assets, which directly conflicts with this Legislative Rule.

89. Even ignoring the Legislative Rule, the Respondents cannot ignore the fact that a state tax on the HGPP's assets is preempted by ERISA.

90. ERISA expressly preempts any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan, and the U.S. Supreme Court has specified that ERISA’s preemption provision is to be construed broadly.

91. Although state insurance, banking and securities laws are specifically saved from ERISA preemption, such protection does not extend to state tax laws. *See* 29 U.S.C. § 1144(b)(2).

92. It is impossible for the Tax Division to ignore that the tax at issue “relate[s] to” pension and benefit plans.

93. The tax is computed on the basis of the HGPP’s assets, *i.e.*, reference to plan activities in computing the tax is unavoidable.

94. The tax imposed by the state will substantially impact relationships among the HGPP, Hope Gas, and the participants and beneficiaries because the HGPP is funded by Hope Gas for the benefit of the participants and beneficiaries.

95. This tax has the effect of promoting a reduction in the funded status of pension plans. To permit this to occur would fly in the face of ERISA’s goal of assuring the financial soundness of such plans and would potentially harm retirees.

E. Taxing a Pension Fund Governed by ERISA Violates Federal Law.

96. Finally, taxing pension fund assets results in property taxation that is not equal and uniform.

97. During the November 6, 2023, call, Hope Gas requested information concerning the calculation of capitalization rates, and the Tax Division represented that its capitalization rate methods are proprietary and thus, in effect, confidential.

98. The government cannot assess taxes based on secret methods. For that reason, Hope Gas served Freedom of Information Act requests for this information on December 13, 2023 and January 24, 2024

99. To date, Hope Gas has received objections to its FOIA requests, but no substantive response.

100. Hope Gas is highly concerned that the Tax Division is unwilling to share its methods and, for that reason, suspects that other public utility property owners and operators are not being assessed in the same fashion.

101. Inasmuch as the Tax Division has excluded these values in prior tax years by subtracting pension credits from the calculation of Hope Gas's tentative assessments, Hope Gas suspects that the Tax Division has treated taxpayers dissimilarly.

102. Given the abrupt change in the Tax Division's recommended assessment calculations, and the recent change in ownership of Hope Gas, *supra* n.3, Hope Gas suspects that the new methodology is calculated to target a new West Virginia taxpayer for disparate treatment.

103. As a regulated gas utility, Hope Gas is permitted by the PSC to collect through its rates its payment of property taxes.

104. Ultimately, contrary to express determinations by the PSC regarding appropriate cost of service components, this means that Hope Gas's customers will pay increased rates for increased property taxes, impeding economic development and unfairly taking additional funds from the public through increased gas utility rates.

105. That is not fair to Hope Gas or its customers, and it is inconsistent not only with federal and state preemption laws and the PSC's rulings but also with requirements under the West Virginia Code and West Virginia Constitution to ensure that its taxation is equal and uniform and

reflective of the true and actual value of the properties assessed. W. Va. Code § 11-6-1(e) (requiring BPW to determine “the true and actual value of the properties of the owners or operators”); W. Va. Const., art. X, § 1 (“[T]axation shall be equal and uniform throughout the state, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law.”).

VI. COMPLIANCE

106. Consistent with the requirements of W. Va. Code §§ 11-6-11, -12, Hope Gas has timely filed this petition by applying to this Court within fifteen days from the date the notice of assessment was purportedly deposited in the U.S. Mail⁵ on March 1, 2024.

107. The requisite verification of the facts asserted herein is attached herein and filed along with this application to petition for appeal pursuant to W. Va. Code § 11-6-12, along with a verified copy of records produced to the Tax Division and BPW pursuant to *id.* § 11-6-11.

108. Petitioner certifies herein that service of process will be effectuated by mailing copies of this Petition by registered mail to the West Virginia Secretary of State and West Virginia Tax Commissioner, consistent with the requirements of *id.* § 11-6-12.

VII. PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Petitioner Hope Gas, Inc. respectfully submits this appeal and requests the following relief:

A. Enter a final order determining the BPW’s final assessment of public utility property for purposes of *ad valorem* property taxation was too high and correcting the final

⁵ Hope Gas has been advised by the West Virginia Secretary of State’s Office that the final assessment was deposited in the U.S. Mail on March 1, 2024; however, Hope Gas has yet to receive a copy by mail. The final assessment attached as **Exhibit 13** was provided to Hope Gas by e-mail as a courtesy.

assessment's appraised value by changing from \$223.7M to \$177.2M pursuant to W. Va. Code § 11-6-11;

B. Serve a notice certifying such corrected valuation to the West Virginia State Auditor and to the West Virginia Secretary of State, *id.*;

C. Enter a scheduling order setting deadlines for discovery, pre-trial motions, and a date and time for a *de novo hearing* to “hear all such legal evidence as shall be offered on behalf of the state or any other county, district or municipal corporation interested, or on behalf of the appealing owner or operator,” *id.*, and such other scheduling order deadlines necessary to the full and fair litigation of this case pursuant to the West Virginia Rules of Civil Procedure; and

D. Conferring such other and further relief as necessary to prevent prejudice.

Respectfully submitted this 15th day of March, 2024,

PETITIONER HOPE GAS, INC.
By counsel,

/s/ Devon J. Stewart

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VERIFICATION

STATE OF _____

COUNTY OF _____

I, _____, of Hope Gas, Inc., after being duly sworn, state that I have read the foregoing "Verified Petition," and verify herein that the allegations contained therein are true, except so far as they are stated to be on information and belief, and that insofar as they are stated to be on information and belief, I believe them to be true, and that the exhibit attachments to the Verified Petition are true and correct copies of the same as they were presented and received to and from Hope Gas, Inc. with the parties as described herein.

Hope Gas, Inc.

By: _____

Its: _____

Taken, sworn to and subscribe before me this ____ day of March 2024.

My commission expires _____.

NOTARY PUBLIC