IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
NO. 24-ICA-438

SCOTT LEMLEY, in his capacity as Assessor of Wetzel County, West Virginia,

Petitioner/Respondent Below,

v.

Appeal from Office of Tax Appeals
Docket No. 23-1355 Commercial

MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, MARKWEST ETHANE PIPELINE, LLC, and MARKWEST LIBERTY NGL PIPELINE, LLC,

Respondents/Petitioners Below.

Petitioner's Brief

Caleb B. David, Esq. (WVSB #12732)
Shuman McCuskey Slicer PLLC
1411 Virginia Street, East, Suite 200
PO Box 3953
Charleston WV 25339-3953
(t): 304-345-1400
(f): 304-343-1286
cdavid@shumanlaw.com

Michael D. Dunham, Esq. (WVSB #12533)
Shuman McCuskey Slicer PLLC
116 S. Stewart St.
Winchester, VA 22601
(t): 540-486-4195
(f): 540:486:4912
mdunham@shumanlaw.com
Counsel for Petitioner Scott Lemley

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2. The Office of Tax Appeals erred by, and was clearly wrong in, not requiring MarkWest to appraise or otherwise provide an opinion of value for its pipeline assets.

3. The Office of Tax Appeals erred by, and was arbitrary and capricious in, taking judicial notice "of the effect the COVID pandemic had on the U.S. economy" without facts showing the pandemic's effect on the natural gas liquids market or on MarkWest's income.

4. The Office of Tax Appeals erred by, and was arbitrary and capricious in, accepting MarkWest's "inutility" or "throughput deficiency" argument as a basis for economic obsolescence while simultaneously acknowledging that it is not an income approach to value required to be used to prove economic obsolescence.

5. The Office of Tax Appeals erred by, and was arbitrary and capricious in, relying upon MarkWest's expert's capitalization of income loss methodology.

6. The Office of Tax Appeals erred by, and was arbitrary and capricious in, selecting the economic obsolescence percentage MarkWest's expert attributed to his capitalization of income loss methodology because his ultimate opinion was that the correct percentage was a blend of four methodologies, three of which the Office of Tax Appeals rejected.

7. The Office of Tax Appeals erred by, and was clearly wrong and arbitrary and capricious in, applying the 35% economic obsolescence reduction to the assessor's appraised value because MarkWest's expert testified that the 35% reduction was applicable to MarkWest's net book value reported on FERC filings.

STATEMENT OF THE CASE

I. Introduction

This matter stems from an appeal by MarkWest Liberty Midstream & Resources, L.L.C., MarkWest Liberty Ethane Pipeline, L.L.C., and MarkWest Liberty NGL Pipeline, L.L.C. ("MarkWest" or "Taxpayers"), filed before the Office of Tax Appeals ("OTA"), challenging Assessor Scott Lemley's appraisal of certain pipeline assets owned by MarkWest. Taxpayers concede that Lemley correctly valued their commercial personal property pursuant to the cost approach to value prescribed by applicable statutes and legislative rules. MarkWest takes issue, however, with Lemley's consideration of economic obsolescence, which is defined as "a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships." W. Va. Code St. R. § 110-1P-2.5. It is undisputed that Lemley considered economic obsolescence, which is all that is required by the regulations, and simply arrived a different conclusion. The Taxpayers in this case appealed that conclusion to OTA.

Before OTA, MarkWest did not provide a competing appraisal. The lack of a competing appraisal, alone, should have been dispositive of MarkWest's appeal. MarkWest has never provided Lemley or OTA with a definitive fair market value of its property. Instead, MarkWest, through its expert, presented four methodologies for determination and calculation of economic obsolescence. Those methodologies do not comport with West Virginia law. West Virginia law states that, to measure economic obsolescence, "an income approach is normally used."[1] W. Va. Code St. R. § 110-1P-3.5.2. An "income approach" is defined as "the appraisal process of

[1] The legislative rule also provides that "a market approach method may be used where the specific facts and circumstances would indicate that that method would achieve a more accurate measure of value." W. Va. Code St. R. § 110-1P-3.5.2. No one has suggested that those facts and circumstances exist here.

discounting an estimate of future income into an expression of present worth." W. Va. Code St. R. § 110-1P-2.12. MarkWest's expert admits that only one of his four methods could be considered to meet the definition of an income approach. As explained herein, that method—referred to as the "capitalization of income loss method"—as applied by MarkWest's expert, is a tortured analysis of cherrypicked data that does not calculate a loss in value, only an alleged loss of what MarkWest desires its value to be. MarkWest cannot lose value that never existed, and it cannot prove a loss in value without providing both an appraisal in the absence of alleged obsolescence and an appraisal accounting for alleged obsolescence. Without a benchmark, an economic obsolescence analysis is meaningless. Without establishing a value first, a *loss in value* cannot be established. MarkWest had the burden of proof before OTA. Instead of determining whether MarkWest met that burden, OTA reached a conclusion of what it believed the correct answer to be and worked backwards, using judicial notice to fill the insurmountable, dispositive holes in the evidence.

MarkWest did not present evidence of or proffer an opinion of value. To be clear, in this tax appeal, Taxpayers never provided the tribunal with a valuation. There is no competing appraisal. Rather, MarkWest introduced the opinions of an expert witness, Daniel Kistler of KE Andrews, who provided testimony that MarkWest's assets suffered from economic obsolescence due to effects of the COVID-19 pandemic. Mr. Kistler's opinions were based solely upon hearsay assertions of MarkWest representatives, who testified that natural gas producers had told someone at MarkWest that they anticipated ramping up production, which caused MarkWest to build a twenty-inch pipeline to transport natural gas liquids. Despite presenting no data, no projections, no supporting emails or documents, and no supporting financial statements, MarkWest claimed that the COVID-19 pandemic was the reason that its new twenty-inch pipeline was not full as of July 1, 2022. The pipeline not being full on the lien date was the basis for MarkWest's obsolescence

claim; however, it was undisputed that the pipeline had never been full, and MarkWest produced no evidence of its pre-pandemic expectations for when it would reach full capacity.

OTA acknowledged as much but disregarded it, taking judicial notice "of the effect the COVID pandemic had on the U.S. economy" and, as a result, finding that the "property owner experienced supply disruption which resulted in throughput deficiencies in its [natural gas liquids] lines on July 1, 2022." With these assumptions and findings as its basis, the tribunal accepted Kistler's sole methodology for determining economic obsolescence that could be considered an income approach to value despite significant flaws. Kistler determined a percentage, not a value, finding that the twenty-inch pipeline had experienced a 35% reduction from its net book value reported to FERC. Without any explanation as to how that relates to the Assessor's appraisal, the tribunal determined that the Assessor's appraised values should be modified "to reflect new values consistent with … a 35% reduction to reflect economic obsolescence." D.R.0042.

MarkWest has not proven that any adjustment should be made for economic obsolescence because MarkWest has not proven a loss in value and has not proven that an alleged loss in value was caused by outside forces. Because MarkWest failed to meet its burden of proof, the OTA decision should be reversed and remanded with instructions that OTA enter an order finding that MarkWest's subject property was appropriately appraised at a fair market value of $232,093,549 total and, specifically, that MarkWest's twenty-inch NGL pipeline property was appropriately appraised at $120,906,465. Alternatively, this Court should remand the case back to OTA for further proceedings on the evidentiary gaps identified by OTA in its decision and addressed herein.

II. Statement of Facts

MarkWest Liberty Midstream & Resources, LLC, MarkWest Liberty Ethane Pipeline, LLC, and MarkWest Liberty NGL Pipeline, LLC own pipeline property in Wetzel County, West

Virginia.[2] For taxation purposes, those pipeline assets are separated into different accounts based on ownership and tax district. The following chart shows the pipeline assets at issue by account number, tax district, year built (put in service), size (diameter), original use, current use, and conversion date, if applicable:

Acct. No.	Tax Dist.	Year Built	Size	Original Use	Current Use	Conversion Date
22820	Grant	2013	8”	NGL	Ethane	2015/2016
22820	Grant	2012	10”	NGL	Ethane	2015/2016
22820	Grant	2021	10”	Ethane	Ethane	N/A
22820	Grant	2021	8”	Ethane	Ethane	N/A
22821	Center	2012	10”	NGL	Ethane	2015/2016
22821	Center	2021	10”	Ethane	Ethane	N/A
20823	Center	2015	12”	NGL	Ethane	2019/2020
20824	Grant	2015	12”	NGL	Ethane	2019/2020
25826	Grant	2019	20”	NGL	NGL	N/A
25826	Grant	2021	20”	NGL	NGL	N/A
25827	Grant	2020	20”	NGL	NGL	N/A
25828	Center	2020	20”	NGL	NGL	N/A

While the history of all of MarkWest’s pipelines is important to this case, only three account numbers in the chart above are at issue here, 25826, 25827, and 25828. Following the close of evidence in this matter, Assessor Lemley moved the tribunal to reopen the record based upon MarkWest’s filing of revised reports to FERC related to MarkWest’s eight-inch, ten-inch, and twelve-inch ethane lines, which significantly changed their values. D.R.0048-0049. MarkWest withdrew its appeal related to those ethane lines. D.R.0050-0051. Thus, while the ethane lines are discussed herein, only the natural gas liquids (“NGL”) lines are at issue.

MarkWest, through its representative, Camille Arend, testified that MPLX LP, the parent company of MarkWest, owns processing plants throughout West Virginia and in Ohio and

[2] In 2021, MarkWest Liberty Midstream & Resources, LLC sold its remaining pipeline assets to MarkWest Liberty Ethane Pipeline, LLC. Thus, as of the assessment date of July 1, 2022, MarkWest Liberty Ethane Pipeline, LLC owned all 8-inch, 10-inch, and 12-inch lines discussed herein, and MarkWest Liberty NGL Pipeline, LLC owned all 20-inch lines discussed herein.

Pennsylvania. D.R.0912. MarkWest's pipelines run from a processing plant in Sherwood, Doddridge County, to a processing plant in Mobley, Wetzel County, where it collects additional gas/liquids volume, then runs to a plant in Fort Beeler/Majorsville, Marshall County. D.R.0965-0966. From Marshall County, the NGLs and ethane are then transported either to Pennsylvania or to Ohio. D.R.0965-0966.

The 8" and 10" lines are one pipeline, flowing from south to north with the 8" segment in the south feeding into the 10" segment in the northern part of Wetzel County, exiting from the Mobley plant. D.R.0930. The 8"/10" pipeline was initially built in 2012/2013 for NGL service from West Virginia to Ohio and Pennsylvania. D.R.0919. In 2015/2016, MarkWest completed construction of a 12" pipeline, and, when the larger pipeline came into service, the 8"/10" pipeline was converted to ethane service, and the 12" pipeline was used for NGL service. D.R.0919-0920. In 2019/2020, MarkWest completed construction of a 20" pipeline, and, when the larger pipeline came into service, the 12" pipeline was converted to ethane service, and the 20" pipeline was used for NGL service. D.R.0921-0923.

In 2018, MarkWest began construction of 20" NGL lines because they could not accommodate their volumes using a 12" line and because they anticipated additional volume in the future. D.R.0918. MarkWest's engineer, Tim Wheeling, testified that he does not know the design capacity of the 8" or 10" lines. D.R.0938. He testified that he does not know what the design capacity was for the 12" line when it was in NGL service. D.R.0938. He testified that he does not know the difference in design capacities between a 12" NGL line and a 20" NGL line, though he agreed that the increase in capacity would be "significant." D.R.0939. No one at MarkWest has testified to the expected throughputs on the 20" NGL lines at the time construction was planned. No one at MarkWest has testified to the date that 100% design capacity usage was expected to

occur following completion of construction. Wheeling testified that he has no knowledge of the pre-pandemic forecast for NGL liquids on the 20" line. D.R.0941. Wheeling testified that volumes have increased over the years: "That was the reason we built the 20-inch line, because the 12-inch was maxed out. We needed more capacity, and the eight/ten-inch line was transporting ethane. Those services have switched now, so now we have two ethane lines, a ten and a 12, to replace what was being done in a ten. Ethane volumes have increased since then, certainly yes." D.R.0941.

The historical timeline of MarkWest's construction is important. In 2012 and 2013, the 8-inch/10-inch line was put into NGL service. D.R.0919. In 2015, the 12-inch line was put into service to accommodate the NGLs that were on the 8-inch/10-inch line, and the 8-inch/10-inch line was converted to ethane. D.R.0942. From 2018 to 2020, there was construction of the 20-inch line because the 12-inch line could no longer accommodate the NGL volume. D.R.0942. The 20-inch line had not reached full capacity as of July 1, 2022. D.R.0942. MarkWest's economic obsolescence claim is based on the allegation that, after significantly increasing their design capacity for both ethane (adding the design capacity for an entire 12" pipeline) and NGLs (increasing design capacity from 12" pipeline to 20" pipeline), Taxpayers were not operating at 100% of design capacity in fewer than 24 months.

MarkWest does not argue or claim that it had a decline in revenues. MarkWest doesn't claim that its throughput volumes have decreased. MarkWest doesn't claim that, as of July 1, 2022, its economic outlook was bleak. MarkWest argues only that it's not making as much money as it would be making if its pipelines were entirely full.

MarkWest admits that ongoing construction projects will increase their flow volumes. Wheeling testified that the Mobley processing facility in Wetzel County is currently operating at approximately 50% capacity. D.R.0942. Wheeling testified, "We've got a project going on down

there that should be wrapping up midway next year to hopefully get that plant filled up." D.R.0942. The Mobley plant has never been fully utilized, and MarkWest did not provide any testimony to suggest that the volumes at the Mobley plant have ever decreased. D.R.0942-0943. If the Mobley plant operates at 100%, the 20-inch NGL pipeline still will not reach full design capacity. D.R.0943. As of July 1, 2022, the Mobley plant added 9% to 15% of the NGL volumes on the 20-inch line. D.R.0965.

MarkWest has never provided Assessor Lemley or OTA with the forecasted volumes from prior to the pandemic. In other words, there is no evidence in the record to show when MarkWest anticipated that the 20" NGL line would reach 100% design capacity post-construction. There is also no evidence in the record to show when MarkWest anticipated that the 12" ethane line would reach 100% design capacity post-conversion.

In August 2022, MarkWest timely submitted its commercial personal property tax returns. D.R.0362-0367. Assessor Lemley testified that, upon receipt of MarkWest's returns, the Assessor's Office looked at the reported acquisition costs, trended those costs up according to trend tables provided by the State to arrive at a replacement cost new, and depreciated those trended values down according to depreciation tables provided by the State to arrive at a replacement cost new less depreciation, which Lemley testified is the true and actual fair market value for commercial personal property. D.R.1023. All parties agree that Assessor Lemley properly applied the State-mandated methodology for the cost approach to value to MarkWest's property.

On its tax returns, MarkWest requested economic obsolescence based on inutility, ascribing a requested percentage reduction to their line-itemed assets but not providing any additional information. D.R.0362-0367. In December 2022, MarkWest requested an adjustment for economic obsolescence and provided Assessor Lemley with a report from KE Andrews. D.R.0903-0903;

D.R.0368. On January 30, 2023, Assessor Lemley responded to MarkWest's request for economic obsolescence, stating that he considered the request for adjustments and the report prepared by KE Andrews and was denying the request "because the Taxpayers have failed to show that alleged throughput deficiencies are a form of economic obsolescence." D.R.0369-0370. Lemley explained his reasoning: "The Taxpayers have not provided any information to demonstrate that external forces have caused the alleged throughput deficiencies or that the throughputs are deficient at all. Instead, the throughput 'deficiency' appears to be based upon the Taxpayers' assets not operating at 100% of capacity at all times. There is no evidence that the pipelines previously operated at 100% capacity at all times." D.R.0369-0370. In addition to his own opinions and reasoning, Assessor Lemley provided MarkWest with reports from experts Lisa Hobart and Jerry Wisdom. Following receipt of Lemley's denial, MarkWest appealed the denial to OTA.

Following the first day of the evidentiary hearing before OTA in this matter, MarkWest provided Assessor Lemley with FERC-6 form filings, which include income information. MarkWest Liberty NGL's FERC-6 filings show that, from 2019 through 2022, their revenues increased every year, from $97,443,723 in 2019 to $111,194,645 in 2020 to $116,386,720 in 2021 to $118,682,971 in 2022. D.R.0778. These figures are consistent with the figures presented in MarkWest's expert's report. MarkWest retained KE Andrews to provide an economic obsolescence analysis ("KE Andrews Report"), and Daniel Kistler from KE Andrews provided testimony in support of MarkWest's obsolescence claim. The KE Andrews Report also includes three-year compound average growth rates for various measures of operating performance from 2019 to 2021. For MarkWest Liberty NGL, KE Andrews found a 9.29% average growth in revenue, 26.26% average growth in net income, 26.26% average growth in earnings before interest and taxes,

27.76% average growth in earnings before interest, taxes, depreciation, and amortization, 9.82% average growth in total assets, and 7.8% average growth in total tangible property. D.R.0436-0444.

Despite the positive growth in every metric analyzed by KE Andrews, MarkWest claims to have a loss in value due to "demand destruction" allegedly caused by the COVID-19 pandemic. D.R.0214; D.R.0398-0399; D.R.0956. Other than asserting that "demand destruction" exists and was caused by the COVID-19 pandemic, MarkWest did not provide any data to support its theory. On the contrary, data from the U.S. Energy Information Administration shows increases in U.S. monthly ethane demand every year since 2014, shows an increase in demand of 9% in 2022, and shows the peak of the U.S. monthly ethane demand being July 2022, the applicable assessment date in this case. D.R.0761.[3] Additionally, the composite price of NGLs in the United States in June 2022 was $12.48 per million BTU, which was the highest price since 2012. D.R.0353.

Despite the positive growth in every metric analyzed by KE Andrews and despite the annual increased market demand for the products shipped through its pipelines, MarkWest still maintained that a loss in value occurred based upon four analyses included in the KE Andrews Report, which are the inutility method, the rate of return (on capital) method, the capitalization of income loss method, and the blue-chip method. D.R.0401-0409. Kistler admitted that only the capitalization of income loss method discounts an estimate of future income into an expression of present worth. D.R.0344. Despite only one of these methodologies possibly meeting the definition of an income approach under West Virginia law, Kistler further diluted the only potentially valid methodology by blending it with the other three admittedly invalid methodologies to arrive at a

[3] D.R.0761 (citing "U.S. ethane demand grew by 9% in 2022, driven by petrochemical capacity additions," Petroleum Supply Monthly, U.S. Energy Information Administration, available at https://www.eia.gov/todayinenergy/detail.php?id=55780#:~:text=March%2013%2C%202023-,U.S.%20ethane%20demand%20grew%209%25%20in%202022,driven%20by%20petrochemical%20capacity%20additions&text=In%202022%2C%20U.S.%20ethane%20demand,to%20our%20Petroleum%20Supply%20Monthly).

"blended rate or blended percentage of economic obsolescence." D.R.0999. Kistler then opined that the blended percentage should be applied to the net book value reported to FERC. D.R.0353. MarkWest's expert did not appraise the fair market value of the property. D.R.0999

III. Office of Tax Appeals Decision

On October 9, 2024, OTA issued its final decision. The OTA decision's errors are derived from a misunderstanding of economic obsolescence and the burden of proof. The tribunal believed it to be "critical to note that this decision's ruling is based upon two facts. First that the pipelines at issue suffered from economic obsolescence on July 1, 2022, and second, how much loss in value resulted from the economic obsolescence." D.R.0021. The tribunal opened its "Discussion" section of its decision by stating the same: "There are two (2) issues in this matter. First, was the property owner's pipeline suffering from economic obsolescence on July 1, 2022? Second, if economic obsolescence was present on that date, how much did it reduce the value of the subject property?" D.R.0014. This demonstrates a fundamental misunderstanding. "Economic obsolescence" is defined by legislative rule as "a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships." W. Va. Code St. R. § 110-1P-2.5. The tribunal cannot first determine that economic obsolescence exists and then go looking for a loss in value. The loss in value must be proven for economic obsolescence to exist. But the tribunal did just that; it determined that MarkWest's pipelines had economic obsolescence based on "inutility" of the pipelines and then worked backwards to determine the amount of the loss in value and its cause.

To determine that MarkWest "suffered" economic obsolescence OTA took judicial notice "of the effect the COVID pandemic had on the U.S. economy" without first establishing a loss in value. D.R.0038. Based on the improper assumption of this overgeneralized statement, OTA found

that MarkWest experienced "supply disruption which resulted in throughput deficiencies in its NGL lines on July 1, 2022." D.R.0038. OTA found that the "supply and demand relationship change was the result of outside forces" and was incurable. D.R.0038. OTA determined that MarkWest's expert's capitalization of income loss methodology was credible and determined that the Assessor's expert's various calculations were not credible. D.R.0038-0039. OTA found that MarkWest's expert's other methodologies for calculating economic obsolescence were not income approaches to value as defined by West Virginia law and, therefore, were invalid. D.R.0020. OTA adopted MarkWest's expert's capitalization of income loss methodology but applied it differently than MarkWest's expert. D.R.0021-0038. MarkWest's expert's ultimate opinion was a percentage reduction based on all four of his methodologies blended together. D.R.0409. OTA selected one methodology from the four and used only the percentage attributed to that methodology. D.R.0042. While MarkWest's expert applied his blended economic obsolescence percentage to the FERC net book value, OTA applied it to the Assessor's valuation. D.R.0042. The OTA decision does not include a fair market value of the subject property expressed in terms of money. D.R.0042.

SUMMARY OF ARGUMENT

OTA committed several errors and acted arbitrarily and capriciously in reaching its findings of fact and conclusions of law. MarkWest claims that its pipeline assets suffer from economic obsolescence, which is defined as "a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships." W. Va. Code St. R. § 110-1P-2.5. It is undisputed that Lemley considered economic obsolescence, which is all that is required by legislative rule, and simply arrived a different conclusion. MarkWest appealed that conclusion to OTA.

Based on the plain language of the definition of economic obsolescence, a taxpayer must prove three elements to show obsolescence: (1) the value of the property; (2) a loss in value of the property; and (3) outside forces caused the loss in value. MarkWest failed to meet its burden of proof at each step, and OTA missed the forest for the trees by failing to require proof of the most foundational fact, the value of the property. The tribunal focused on which expert it found more credible instead of ensuring that the party with the burden of proof actually proved its case. OTA then backfilled the evidentiary gaps in MarkWest's case.

OTA committed clear legal error by failing to require MarkWest to appraise or provide an opinion of value for its pipeline assets. MarkWest never proffered an opinion of the fair market value of the pipeline assets. The Assessor is required by law to determine the fair market value and did so by utilizing the State's mandated methodology. MarkWest cannot meet its burden of proving the Assessor's valuation is wrong without presenting evidence of the property's value.

OTA erred by, and was clearly wrong in, finding that Lemley was required to do more than consider MarkWest's claim for economic obsolescence. This error ignores decades of law only requiring an assessing officer to consider, not to apply, economic obsolescence. It is undisputed that the Assessor considered obsolescence, and that is all that was required of him.

OTA erred by, and was clearly wrong in, not requiring MarkWest to appraise or otherwise provide an opinion of value for its pipeline assets. MarkWest is required to prove the fair market value of its property. It did not, however, present an appraisal or opinion of value expressed in terms of money. Without a fair market value, MarkWest failed to meet its burden of proof.

OTA erred by, and was arbitrary and capricious in, taking judicial notice "of the effect the covid pandemic had on the U.S. economy" without any supporting facts or analysis of the pandemic's effect on the natural gas liquids market or on MarkWest's income. The "facts" subject

to the tribunal's judicial notice are not facts at all. Rather, they are generalizations applied to fill in gaps in the record where MarkWest failed to provide evidence. The tribunal's generalization of the economy is not susceptible to judicial notice.

OTA erred by, and was arbitrary and capricious in, accepting MarkWest's "inutility" or "throughput deficiency" argument as a basis for economic obsolescence while simultaneously acknowledging that it is not an income approach to value required to be used to prove economic obsolescence. OTA rejected the inutility method for the purpose of proving the amount of obsolescence, but OTA relied entirely on alleged inutility to find that economic obsolescence exists. These are inconsistencies not supported by West Virginia law or the record.

OTA erred by, and was arbitrary and capricious in, relying upon MarkWest's expert's capitalization of income loss methodology. This methodology is based, in part, on oil and gas producers' volatility, which is significantly different than that of MarkWest's volatility, which is tempered by FERC regulations. This methodology also applies a market-based capitalization rate and an asset-specific growth rate, which are unsupported by the record and inconsistent.

OTA erred by, and was arbitrary and capricious in, selecting the economic obsolescence percentage MarkWest's expert attributed to his capitalization of income loss method because his ultimate opinion was that the correct percentage was a blend of four methods, three of which OTA rejected. Despite MarkWest's expert's opinion that a blended percentage of his methods was appropriate, OTA selected a single method and relied entirely upon that method's conclusion. No party or expert argued that OTA's conclusion reached a fair market value.

Finally, OTA erred by, and was clearly wrong and arbitrary and capricious in, applying the 35% economic obsolescence reduction to the assessor's appraised value because MarkWest's expert testified that the 35% reduction was applicable to MarkWest's net book value reported to

FERC. MarkWest's expert's economic obsolescence percentage was meant to be applied to the net book value reported by MarkWest to FERC. OTA arbitrarily decided to apply that percentage to the Assessor's value. This is entirely unsupported by the record and by West Virginia law.

MarkWest has not proven that any adjustment should be made for economic obsolescence because MarkWest has not proven a loss in value and has not proven that an alleged loss in value was caused by outside forces. Because MarkWest failed to meet its burden of proof, the OTA decision should be reversed and remanded with instructions that OTA enter an order finding that MarkWest's subject property was appropriately appraised at a fair market value of $232,093,549 total and, specifically, that MarkWest's twenty-inch NGL pipeline property was appropriately appraised at $120,906,465. Alternatively, this Court should remand the case back to OTA for further proceedings on the evidentiary gaps identified by OTA in its decision and addressed herein.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes that oral argument is appropriate under either Rule 19 or Rule 20. This case involves assignments of error in the application of settled law and a claim of insufficient evidence or a result against the weight of the evidence. This case also appears to involve an issue of first impression under the relatively new tax appeals procedures for commercial personal property. Petitioner does not believe a memorandum decision is appropriate.

ARGUMENT

I. Standard

This appeal is governed by the following standard of review:

> The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision, or order are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;

> (3) Made upon unlawful procedures;
> (4) Affected by other error of law;
> (5) Clearly wrong in view of the reliable, probative, and substantial evidence on the whole record; or
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Bryan W. v. W. Va. Dep't of Health & Human Res., No. 23-ICA-16, 2023 W. Va. App. LEXIS 284 *5, 2023 WL 7202957 (W. Va. Ct. App. Nov. 1, 2023) (quoting W. Va. Code § 29A-5-4(g)). "The 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume the agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis." *Id.* at *6 (quoting Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996) (internal quotation marks omitted)).

"Further, an appellate court is required to give deference to an administrative decision unless it is clearly wrong." *Id.* (citing Syl. Pt. 1, in part, *Muscatell v. Cline*, 196 W. Va. 588, 590, 474 S.E.2d 518, 520 (1996) ("findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong.")). "If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is *de novo*." Syl. Pt. 3, in part, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

Further, regarding reviews of OTA decisions, the Supreme Court of Appeals of West Virginia states:

> In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act.... Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law de novo. Syllabus Point 1, *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012).

Statoil USA Onshore Props., Inc. v. Irby, 249 W. Va. 424, 428, 895 S.E.2d 827, 831 (W. Va. Ct. App. 2023) (quoting Syl. Pt. 1, *Antero Res. Corp. v. Steager*, 244 W. Va. 81, 851 S.E.2d 527 (2020)).

II. Discussion

A. Valuation of Commercial Personal Property in West Virginia.

i. Legal Standards

All property in West Virginia is assessed annually at its true and actual value. W. Va. Code § 11-3-1. Commercial personal property is appraised and assessed by County Assessors. W. Va. Code § 11-3-12. The Constitution of West Virginia provides that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." W. Va. Const. Art. X, § 1. "[I]n order to assure achievement of the constitutional mandate, assessment values must be determined at 100 percent of the market value as represented by the appraisal value. Any system which permits the setting of assessments at lower than 100 percent of 'true and actual value' violates article 10, section 1 of the West Virginia Constitution." *Killen v. Logan County Comm'n*, 170 W. Va. 602, 614, 295 S.E.2d 689, 701 (1982), *overruled on other grounds*, *In re Tax Assessment of Foster Foundation's Woodlands Ret. Cmty.*, 223 W. Va. 14, 672 S.E.2d 150 (2008). "Fair market value" is defined as "the ***highest*** price in terms of money that a property will bring in a competitive and open market, assuming that the buyer and seller are acting prudently and knowledgeably, allowing sufficient time for the sale and assuming that the price is not affected by undue stimulations." W. Va. Code St. R. § 110-1P-2.7 (emphasis added).

When determining the fair market value of property, "[i]t is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct." Syl. Pt. 7, in part,

In re Tax Assessments Against Pocahontas Land Co., 172 W. Va. 53, 303 S.E.2d 691 (1983). To overcome that presumption, "the standard of proof which a taxpayer must meet at all levels of review and appeal … shall be a preponderance of the evidence standard." W. Va. Code § 11-3-23a(e). "A preponderance of the evidence means that the party with that burden must prove its case by 'greater weight.'" *Frazier v. Gaither*, 248 W. Va. 420, 425, 888 S.E.2d 920, 925 (2023) (citing 2 Louis J. Palmer, Jr., Handbook on Evidence for West Virginia Lawyers § 1301.03[2], at 640 (7th ed. 2021)). "Where the evidence equally supports both sides, a party has not met its burden of proof by a preponderance of the evidence." *Id.* (citation omitted) (internal quotation marks omitted).

ii. State's Valuation Methodology

The Tax Commissioner has promulgated legislative rules for the valuation of commercial personal property. *See* W. Va. Code St. R. §§ 110-1P-1 to 110-1P-3. Addressing the procedure to be followed in valuing commercial personal property, legislative rules provide that the "[t]hree (3) approaches to fair value considered and used in estimating fair market value are: (A) cost, (B) income, and (C) market." W. Va. Code St. R. § 110-1P-3.4.3.1. The legislative rules further provide,

> Once generated, consider the various estimates of value when estimating final value. Of the three (3) approaches to value, the cost approach may apply most consistently to machinery, equipment, furniture, fixtures, and leasehold improvements because of the availability of data. The market approach is used less frequently, principally due to a lack of meaningful sales. The income approach is not normally used because of the difficulty in estimating future net benefits to be derived except in the case of certain kinds of leased equipment.

W. Va. Code St. R. § 110-1P-3.4.3.2. The legislative rules further provide for consideration of adjustments to valuations: "When physically inspecting commercial and industrial personal property for appraisal, three (3) types of depreciation ***should be considered***: physical deterioration

depreciation, economic obsolescence and functional obsolescence." W. Va. Code St. R. § 110-1P-3.4.3 (cleaned up) (emphasis added).

Interpreting this requirement, the Supreme Court of Appeals of West Virginia has stated that it

> [D]oes not require the Tax Commissioner to make any adjustment to the valuations made regarding property because of physical deterioration, functional obsolescence and economic obsolescence. Rather, ***all that is required*** of the Tax Commissioner in applying the cost approach to valuation ***is that the Tax Commissioner will think about or contemplate*** three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.

Berkeley Cnty. Council v. Gov't Props. Income Trust LLC, 247 W. Va. 395, 407, 880 S.E.2d 487, 499 (2022) (quoting *Century Aluminum of W. Virginia, Inc. v. Jackson Cnty. Comm'n*, 229 W. Va. 215, 224-25, 728 S.E.2d 99, 108-09 (2012) (citations omitted)) (emphasis added). The Supreme Court held that this regulation confers broad discretion to the Assessor:

> Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.

Id. (quoting Syl. Pt. 5, *In re Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000)). "When possible, the Tax Commissioner should use the most accurate form of appraisal, but because of the difficulty in obtaining necessary data from the taxpayer, or due to the lack of comparable commercial or industrial properties, the choice between the alternative appraisal methods may be limited." W. Va. Code St. R. § 110-1P-3.2.2.a. In such cases, the Supreme Court has previously concluded that "[a]n Assessor need not perform a useless act of considering an appraisal method where the assessor does not have sufficient data to perform that appraisal method." *Lee Trace, LLC v. Raynes*, 232 W. Va. 183, 193, 751 S.E.2d 703, 713 (2013).

Here, the Assessor ultimately developed the cost approach to determine the value of the Taxpayers' properties, which is what the legislative rules recommend. All parties agree that sufficient information does not exist to perform a market approach to value because comparable sales data does not exist. At the time of the Assessor's appraisal, he did not possess income and/or expense information to perform an income approach to value. Thus, consistent with the legislative rules, Assessor Lemley used the cost approach to value and was not required to perform appraisals using approaches to value for which he had insufficient information. Once income and expense data became available during the pendency of this appeal, the Assessor undertook to perform an income approach to value, which greatly exceeded the appraisal value using the cost approach.

iii. Economic Obsolescence

It is undisputed that the Assessor considered economic obsolescence. "Economic obsolescence" is defined in West Virginia law as "***a loss in value of property*** **arising from outside forces** such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships." W. Va. Code St. R. § 110-1P-2.5 (emphasis added). The legislative rules specifically provide that "[e]conomic obsolescence can best be measured by either a market approach method or an income method. Due to the lack of sales volume for comparable commercial or industrial properties, ***an income approach is normally used***. However a market approach method may be used where the specific facts and circumstances would indicate that that method would achieve a more accurate measure of value." W. Va. Code St. R. § 110-1P-3.5.2 (emphasis added). An "income approach" is defined as "the appraisal process of discounting an estimate of ***future income*** into an expression of present worth." W. Va. Code St. R. § 110-1P-2.12 (emphasis added).

West Virginia has little case law discussing the application of economic obsolescence. The law that exists, however, favors the use of an income approach to calculate economic obsolescence. *See Bayer MaterialScience, LLC v. State Tax Comm'r*, 223 W. Va. 38, 54, 672 S.E.2d 174, 190 (2008) (discussing Tax Commissioner's use of income approach to determine existence of and to calculate economic obsolescence and upholding Tax Commissioner's choice as within his discretion); *see also Bayer MaterialScience LLC v. Helton*, Civil Action No. 07-MISC-105, 2007 W.V. Cir. LEXIS 49 *11 (Cir. Ct. Kan. Cnty. Oct. 23, 2007) ("The Court finds that the legislative regulations for evaluation of industrial real and personal property are devoid of any reference to the Scale Factor and the Inutility Model …."); *Bayer Crop Sci., USA, LP v. Helton*, Civil Action No. 06-MISC-94, 2007 W.V. Cir. LEXIS 55 *6 (Cir. Ct. Kan. Cnty. Oct. 3, 2007) (same). The legislative rules now recommend the use of an income approach to value. W. Va. Code St. R. § 110-1P-3.5.2.

The use of an income approach to value makes perfect sense. The cost to build a pipeline that will operate at 70% capacity is the same as the cost to build a pipeline that will operate at 100% capacity, assuming the same location and pipeline size. The real question is whether the pipeline has lost value due to external factors, and that may be determined by an income approach to value, which discounts an estimate of future income into an expression of present worth.

As expert witness Lisa A. Hobart, CAE, PPS, FIAAO, ASA, explains in her report:

> External Obsolescence is the loss in value due to economic forces that exist outside of the property itself. External Obsolescence may exist because of the enactment of laws, health and welfare issues, and environmental issues. External Obsolescence is generally considered incurable. Permanent loss in production capacity may influence the market value of equipment. However, emphasis is placed on the fact that it <u>*may*</u> be a measure of the loss in value. The operating level of an asset or an entire plant can be affected by influences other than economic obsolescence that influence a lessening capability. Internal management deficiencies, labor challenges, consumer demand, etc. can influence the usage of assets or a body of assets, without reducing the assets' market value. A simple calculation of lessening

> production does not account for other influences affecting production. External Obsolescence is properly applied by the assessor/appraiser when the external forces influencing value are permanent and all considerations for adaptability for alternative uses have been eliminated.

D.R.0579 (emphasis in original). Ms. Hobart testified that external obsolescence is permanent when valuing personal property. D.R.0220. She explained why, when valuing personal property, economic obsolescence is permanent: "There are normal market fluctuations in use of property. Just in general. Properties close, prices go up, prices go down. A permanent loss in value to personal property creates uniformity and equity in the assessment process. If you were to look at external obsolescence being profitability based, well that could vary every year. And quite frankly, that's an income tax, not a property tax. So, in the arena of personal property, external obsolescence is always incurable." D.R.0220. Ms. Hobart's explanation is consistent with the text of *Property Assessment Valuation* published by the International Association of Assessing Officers, which states "[e]conomic obsolescence is considered to be a permanent loss in value from outside sources." D.R.0564.

MarkWest and OTA disagree with Ms. Hobart and *Property Assessment Valuation* regarding the requirement that a loss in value be permanent to constitute economic obsolescence. Even the American Society of Appraisers, the appraisal organization favored by MarkWest and its expert, recognizes that time constraints are important in this context: "[w]henever the operating level of a plant or an asset is significantly less than its rated design capability, ***and the condition is expected to exist for some time***, the asset is less valuable than it would otherwise be." D.R.0173 (citing Am. Soc'y of Appraisers, Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, p. 68 (4th ed. 2020)) (emphasis added). Some courts have found that economic obsolescence must be permanent, or incurable. *See Midwest Processing Co. v. McHenry County*, 467 N.W.2d 895, 898 (N.D. 1991) ("Economic obsolescence may result

from a number of different factors, but an element of incurable or permanent impairment prevails throughout all of the potential causes."); *see also Governours Square Apts. v. State Bd. of Tax Comm'rs*, 528 N.E.2d 864, 866 (Ind. Tx. Ct. 1987) ("The condition is generally incurable in that the causes lie outside the property owner's realm of control.").[4]

West Virginia has not included temporal language in its statutes or legislative rules. Regardless of whether this Court chooses to use IAAO's permanency standard, ASA's "for some time" standard, or some other standard, it is undisputed that a loss in value from external forces must exist for a finding of economic obsolescence and that an income approach must be used to determine whether a loss in value exists. MarkWest failed to meet this burden.

B. The Office of Tax Appeals erred by, and was clearly wrong in, finding that the Assessor was required to do more than consider MarkWest's claim for economic obsolescence.

West Virginia law provides assessing officers with discretion in the application of economic obsolescence. The legislative rules state that the assessing officer should ***consider*** economic obsolescence. W. Va. Code St. R. § 110-1P-3.4.3. The Supreme Court of Appeals of West Virginia has interpreted this rule to mean that "***all that is required*** of the Tax Commissioner in applying the cost approach to valuation ***is that the Tax Commissioner will think about or contemplate*** three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence." *Berkeley Cnty. Council*, 247 W. Va. at 407, 880 S.E.2d at 499 (quoting *Century Aluminum*, 229 W. Va. at 224-25, 728 S.E.2d at 108-09 (citations omitted)) (emphasis added). The Supreme Court held that this regulation confers broad discretion to the Assessor:

> Title 110, Series 1P of the West Virginia Code of State Rules confers upon the State Tax Commissioner discretion in choosing and applying the most accurate method of appraising commercial and industrial properties. The exercise of such discretion will not be disturbed upon judicial review absent a showing of abuse of discretion.

[4] The language in *Governours Square Apts.* is included in the statutory text of Indiana's law.

Id. (quoting Syl. Pt. 5, *In re Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000)).

It is undisputed that the Assessor considered economic obsolescence. On January 30, 2023, Assessor Lemley responded to Taxpayers' request for economic obsolescence, stating that he considered the request for adjustments and the report prepared by KE Andrews and was denying the request "because the Taxpayers have failed to show that alleged throughput deficiencies are a form of economic obsolescence." D.R.0369-0370. Assessor Lemley explained his reasoning: "The Taxpayers have not provided any information to demonstrate that external forces have caused the alleged throughput deficiencies or that the throughputs are deficient at all. Instead, the throughput 'deficiency' appears to be based upon the Taxpayers' assets not operating at 100% of capacity at all times. There is no evidence that the pipelines previously operated at 100% capacity at all times." D.R.0369-0370. In addition to his own opinions and reasoning, Assessor Lemley provided MarkWest with reports from experts Lisa Hobart and Jerry Wisdom.

This consideration is all that is required under West Virginia law. Absent an abuse of discretion by the Assessor, he is entitled to deference, and his decision should not have been disturbed by OTA. To do so was clearly wrong, and the OTA decision should be reversed.

C. The Office of Tax Appeals erred by, and was clearly wrong in, not requiring MarkWest to appraise or otherwise provide an opinion of value for its pipeline assets.

All property in West Virginia is assessed annually at its true and actual value. W. Va. Code § 11-3-1. "[A]ssessment values must be determined at 100 percent of the market value as represented by the ***appraisal value***." *Killen*, 170 W. Va. at 614, 295 S.E.2d at 701 (emphasis added). "Fair market value" is defined as "the ***highest*** price in terms of money that a property will bring in a competitive and open market…." W. Va. Code St. R. § 110-1P-2.7 (emphasis added).

Fair market value is expressed "in terms of money[.]" W. Va. Code St. R. § 110-1P-2.7. This is why an actual appraisal is essential.

MarkWest is challenging the Assessor's appraisal, but MarkWest's expert did not appraise the pipelines himself. D.R. 0999. He did not determine a fair market value. D.R. 0999. MarkWest's evidence is that, when compared to its FERC net book value, there should be a percentage reduction to the appraised value. However, a percentage, in isolation, does not equate to a specific monetary amount. It does not reflect the highest price in terms of money that a property will command in a competitive and open market. A percentage does not represent fair market value. To prevail, MarkWest should have been required to present and defend a fair market value. MarkWest's failure to do so is dispositive, and OTA's failure to require an appraisal, or at least an opinion of value, was clearly wrong.

D. The Office of Tax Appeals erred by, and was arbitrary and capricious in, taking judicial notice "of the effect the COVID pandemic had on the U.S. economy" without facts showing the pandemic's effect on the natural gas liquids market or on MarkWest's income.

OTA's failure to require an appraisal resulted in further errors. For starters, OTA did not require MarkWest to demonstrate that its operation of its pipeline at less than design capacity was caused by alleged "demand destruction." To prove economic obsolescence, MarkWest must demonstrate that a loss in value to its property arises from *outside forces* rather than MarkWest's own internal business decisions and speculations. MarkWest failed to make that showing.

MarkWest's representative testified that, for the time period of July 1, 2021, to June 30, 2022, MarkWest's throughput volumes were "not materially different" than prior years, and she did not recall the throughput volumes decreasing. D.R. 0909-0910. MarkWest Liberty NGL's FERC-6 filings show that, from 2019 through 2022, their revenues increased every year, from

$97,443,723 in 2019 to $111,194,645 in 2020 to $116,386,720 in 2021 to $118,682,971 in 2022. D.R.0778.

MarkWest's representative testified that the twenty-inch pipeline was built to accommodate throughput volumes that could not be accommodated on the twelve-inch lines. D.R.0918. This testimony was confirmed by MarkWest's engineer, who testified that the twelve-inch line was built when the eight-inch/ten-inch line could no longer accommodate their volumes. D.R.0942. Essentially, as MarkWest's business and throughput volumes grew, so did its need for a larger capacity to move natural gas liquids.

Despite the evidence showing increased value year-over-year and despite the lack of evidence of any downturn in throughput volumes, MarkWest claimed obsolescence based on the COVID-19 pandemic. MarkWest's representative testified that, "as a result of the impact of COVID-19 pandemic and the related economic downturn, what we found is that the producers slowed their production and it never ramped back up." D.R.0905. This is inconsistent with her testimony that throughput volumes remained steady in the years leading up to July 1, 2022. This is also inconsistent with the FERC-6 filings that show increasing revenues year-over-year. But MarkWest stated that its parent company, MPLX, intended to build an additional plant prior to COVID and that the project was placed on hold indefinitely. D.R.0905. MarkWest did not present any evidence—no data, no projections, no supporting emails or documents, no supporting financial statements—demonstrating that the pandemic resulted in a market downturn as of July 1, 2022, or that future incomes after July 1, 2022, were forecasted to decrease.

There is nothing in the record, beyond one person's testimony of what unnamed "producers" told others at MarkWest, showing that the COVID-19 pandemic had any effect on the value of MarkWest's pipelines. This, once again, is dispositive because MarkWest is required to

prove that its alleged loss in value is caused by external forces. But OTA resolved this dispositive evidentiary issue for MarkWest by taking "judicial notice of the effect the COVID pandemic had on the U.S. economy." D.R.0038. The tribunal cannot take judicial notice of non-specific "facts."

Although OTA is not constrained by the West Virginia Rules of Evidence, W. Va. Code St. R. § 121-1-38.1, its procedural rules also do not provide it with a mechanism to take judicial notice of facts. *See generally* W. Va. Code St. R. § 121-1-1, *et seq.* Rule 201 of the West Virginia Rules of Evidence permits a court to take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." W. Va. R. Evid. 201(b). The "effect the COVID pandemic had on the U.S. economy" is neither susceptible to judicial notice nor relevant to meeting MarkWest's burden.

The fact that a pandemic occurred is certainly susceptible to judicial notice, but the pandemic did not affect all businesses equally. For example, Zoom (ZM) had its highest ever stock closing price in October 2020, in the midst of the pandemic.[5] No tribunal could take judicial notice that the pandemic had a negative effect on Zoom's business or on its assets. The same is true for MarkWest. The tribunal could have taken judicial notice that MPLX, MarkWest's parent company, had a closing price of $26.95 on January 10, 2020.[6] The tribunal could have also taken judicial notice that MPLX had a closing price of $29.66 on July 1, 2022, a 10% increase.[7] The tribunal could have also taken judicial notice of government reports of rising demand for ethane, which is

[5] *See* Zoom Communications, Inc. Class A Common Stock (ZM) Historical Quotes, Nasdaq, available at https://www.nasdaq.com/market-activity/stocks/zm/historical?page=3&rows_per_page=10&timeline=y5.
[6] Stock Quote and Chart, MPLX, available at https://ir.mplx.com/CorporateProfile/stock-information/stock-quote-and-chart/default.aspx.
[7] *Id.*

a natural gas liquid.[8] The tribunal also could have taken judicial notice of government reports of the composite price of NGLs in the United States in June 2022, which was $12.48 per million BTU, which MarkWest's expert acknowledged was the highest price in a decade.[9] These are discrete facts that can be readily determined from sources whose accuracy cannot reasonably be questioned.

Simply accepting as an adjudicated truth that the economy was bad is not appropriate. It's even less appropriate in light of MarkWest's burden of proving external forces caused its alleged loss in value. The Fourth Circuit, among other courts, has stated that "[o]nly indisputable facts are susceptible to judicial notice." *Nolte v. Capital One Fin. Corp.*, 390 F.3d 311, 317, n. (4th Cir. 2004) (citing Fed. R. Evid. 201(b)); *see also United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003); *United States v. Burch*, 169 F.3d 666, 672 (10th Cir. 1999); *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 831-32 (5th Cir. 1998); *International Star Class Yacht Racing Ass'n v. Tommy Hilfiger U.S.A.*, 146 F.3d 66, 70-71 (2d Cir. 1998). The statement that the U.S. economy experienced a downturn is not an indisputable fact. It's an overgeneralization, and that overgeneralization of the entire U.S. economy is being used by OTA to specifically demonstrate why MarkWest had not reached 100% design capacity on its pipeline in Wetzel County, West Virginia by July 1, 2022. That's arbitrary and capricious, and MarkWest was required to present evidence to support that conclusion. Because it did not, and because the tribunal's judicial notice

[8] D.R.0761 (citing "U.S. ethane demand grew by 9% in 2022, driven by petrochemical capacity additions," Petroleum Supply Monthly, U.S. Energy Information Administration, available at https://www.eia.gov/todayinenergy/detail.php?id=55780#:~:text=March%2013%2C%202023-,U.S.%20ethane%20demand%20grew%209%25%20in%202022,driven%20by%20petrochemical%20capacity%20additions&text=In%202022%2C%20U.S.%20ethane%20demand,to%20our%20Petroleum%20Supply%20Monthly.

[9] D.R.0353. *See also* "U.S. Natural Gas Liquid Composite Price," U.S. Energy Information Administration, available at https://www.eia.gov/dnav/ng/hist/ngm_epg0_plc_nus_dmmbtum.htm.

was improper, MarkWest failed to prove that external forces caused its alleged loss in value. The OTA decision should be reversed.

E. The Office of Tax Appeals erred by, and was arbitrary and capricious in, accepting MarkWest's "inutility" or "throughput deficiency" argument as a basis for economic obsolescence while simultaneously acknowledging that it is not an income approach to value required to be used to prove economic obsolescence.

OTA appropriately limited MarkWest's expert's methodologies but still relied upon the invalid inutility method as evidence of economic obsolescence. MarkWest's expert proffered an opinion based upon the "inutility" method of calculating economic obsolescence. OTA found that methodology did not meet the legislative rule's definition of an income approach, so OTA did not rely upon the inutility method to determine the amount of economic obsolescence. D.R.0021. Because it did not rely upon the inutility method, OTA disregarded the Assessor's arguments regarding the unreliability and misleading nature of MarkWest's alleged throughput deficiencies. D.R.0021. But those throughput deficiencies, or inutility of the pipeline, are the bases for MarkWest's economic obsolescence claim and OTA's finding that economic obsolescence exists. D.R.0011. OTA specifically acknowledged this: "Rather, Mr. Kistler, after examining the data provided by the property owner, established that due to throughput deficiencies, economic obsolescence existed. He then quantified that economic obsolescence by utilizing (among other methods) the capitalization of income loss method." D.R.0022. OTA found "that the pipelines in question were underutilized as of the assessment date of July 1, 2022." D.R.0011. Inutility does not measure value. Inutility does not consider income. If throughput volumes decrease but prices increase, utility may have an inverse relationship with value. OTA found that economic obsolescence existed because MarkWest provided testimony that inutility existed as of July 1, 2022. That is clear legal error, and the OTA decision should be reversed on that basis alone.

Not only did OTA err in accepting inutility as evidence of a loss in value, but OTA also erred in disregarding the Assessor's evidence and arguments discrediting MarkWest's inutility claim and its reliability and propriety as a measure of economic obsolescence. OTA "noted that while there was some cross examination regarding the existence and amount of these throughput deficiencies, the Assessor does not seriously suggest that the property owner is lying about the underutilization of its pipeline, in order to lower its property tax bill." D.R.0019.

The tribunal is correct on one point. The Assessor is not stating that MarkWest is lying about the underutilization of its pipeline for the purpose of lowering its property tax bill. But, regardless of what it's called, MarkWest has the burden of proving that its inutility, underutilization, or throughput deficiency shows a loss in value *and* is caused by an external force, not by MarkWest's own business decisions or some other internal factor. OTA may have taken MarkWest at its word, but MarkWest failed to meet this burden with actual verifiable evidence.

In addition to being clearly wrong, OTA's reliance on the alleged inutility of the pipeline was arbitrary and capricious. OTA used the allegation as evidence that economic obsolescence existed. Again, economic obsolescence is a loss in *value*. Utilization of a particular asset does not necessarily correlate with value, and, more importantly, identification of a utilization percentage on a particular date does not show a *loss* in value. The evidence in the record suggests the opposite. The evidence in the record shows a pattern of growth in MarkWest's utilization of both ethane and NGL lines and shows that the operation of the twenty-inch pipeline at less than 100% capacity was a business decision made to accommodate future market growth.

In 2018, Taxpayers began construction of 20" NGL lines because they could not accommodate their volumes using a 12" line and because they anticipated additional volume in the future. D.R.0918. Taxpayers' engineer, Tim Wheeling, testified that he does not know the

design capacity of the 8" or 10" lines. D.R.0938. He testified that he does not know what the design capacity was for the 12" line when it was in NGL service. D.R.0938. He testified that he does not know the difference in design capacities between a 12" NGL line and a 20" NGL line, though he agreed that the increase in capacity would be "significant." D.R.0939. No one at MarkWest has testified to the expected throughputs on the 20" NGL lines at the time construction was planned. No one at MarkWest has testified to the date that 100% design capacity usage was expected to occur following completion of construction. Wheeling testified that he has no knowledge of the pre-pandemic forecast for NGL liquids on the 20" line. D.R.0941. Wheeling testified that volumes have increased over the years: "That was the reason we built the 20-inch line, because the 12-inch was maxed out. We needed more capacity, and the eight/ten-inch line was transporting ethane. Those services have switched now, so now we have two ethane lines, a ten and a 12, to replace what was being done in a ten. Ethane volumes have increased since then, certainly yes." D.R.0941.

This testimony is critical. Over the decade from the time MarkWest began operations in West Virginia to the lien date of July 1, 2022, MarkWest has continued to expand its service. While it started flowing NGLs in 2012 through a combined 8-inch/10-inch line, MarkWest had to build a 12-inch line in 2015 to accommodate increased NGL volumes. It then had to build a 20-inch line in 2020 to accommodate increased NGL volumes that "maxed out" the 12-inch line. MarkWest has admittedly continued to increase their NGL volumes but has not yet "maxed out" the 20-inch line. Increases in volumes contradict a claim of loss of value.

Additionally, MarkWest can never achieve 100% design capacity in its lines in Wetzel County. MarkWest's pipelines run from a processing plant in Sherwood, Doddridge County, to a processing plant in Mobley, Wetzel County, where it collects additional gas/liquids volume, then runs to a plant in Fort Beeler/Majorsville, Marshall County. D.R.0965-0966. From there, the NGLs

and ethane are transported either to Pennsylvania or to Ohio. D.R.0965-0966. As of July 1, 2022, the Mobley plant added 9% to 15% of the NGL volumes on the 20-inch line. D.R.0965. While there is no testimony in the record regarding the volume added at the Fort Beeler/Majorsville plant, it hardly strains credulity that additional volumes are added there. The importance of this is plain: if additional volume is expected to be added at the Mobley plant, then the upstream segments of pipeline between Sherwood and Mobley cannot achieve 100% design capacity; otherwise, they would not be able to pick up additional volume at the Mobley plant. Furthermore, if additional volume is expected to be added at the Fort Beeler/Majorsville plant, then the upstream segments of pipeline between Mobley and Fort Beeler/Majorsville cannot achieve 100% design capacity; otherwise, they would not be able to pick up additional volume at the Fort Beeler/Majorsville plant. Thus, 100% design capacity is a fallacy subject to the volatility of added volumes at downstream plants and cannot be considered as a basis for economic obsolescence.

MarkWest's economic obsolescence claim is based on the fact that, after significantly increasing their design capacity for both ethane (adding the design capacity for an entire 12" pipeline) and NGLs (increasing design capacity from 12" pipeline to 20" pipeline), the pipelines were not operating at 100% of design capacity in fewer than 24 months. MarkWest never provided Assessor Lemley or OTA with the forecasted volumes from prior to the pandemic. In other words, there is no evidence in the record to show when MarkWest anticipated that the 20" NGL line would reach 100% design capacity post-construction. There is also no evidence in the record to show when MarkWest anticipated that the 12" ethane line would reach 100% design capacity post-conversion. The record is thus insufficient to make a finding that a loss in value occurred based solely upon throughput volumes on a particular day without regard for past or future volumes.

On the other hand, expert witness Jerry Wisdom's report includes a citation to *Pipeline Rule of Thumb*, which states, "A new pipeline for crude oil or products services should be sized to carry 2/3 of its ultimate capacity." D.R.0610. This guideline makes sense and is consistent with the history of MarkWest's business. A company should build a pipeline with the intent to immediately flow 2/3 of its design capacity, reserving 1/3 of its design capacity for future growth. This reduces the likelihood that a company will be required to build a new, larger pipeline immediately after beginning service and allows the company to grow its volumes to fill out the pipeline. MarkWest has done this repeatedly, beginning with only NGL service in 2012/2013, growing into a larger NGL pipeline in 2015, beginning ethane service in 2015, and growing into a larger NGL pipeline and an additional, larger ethane pipeline in 2020. Again, this contradicts the inutility method, suggesting that pipeline companies anticipate a period of time in which flow volumes will not be at 100% design capacity to allow the company to grow without additional capital expenditure.

MarkWest representatives testified that they expect to continue to grow their volumes. Wheeling testified that the Mobley processing facility in Wetzel County is currently operating at approximately 50% capacity. D.R.0942. Wheeling testified, "We've got a project going on down there that should be wrapping up midway next year to hopefully get that plant filled up." D.R.0942. Ms. Arend testified that, as of July 1, 2022, Taxpayers anticipated that a de-ethanizer plant and ethane cracker plant were coming online. D.R.0911. These facts again suggest that MarkWest anticipated additional volumes after they began NGL service on the 20-inch line and began ethane service on the 12-inch line. Because there is no evidence in the record to show that MarkWest anticipated usage of its pipeline assets at 100% of design capacity immediately upon putting them

in service, the inutility argument improperly assumes a loss in value based upon expectations that never existed or were entirely infeasible.

OTA disregarded this evidence and these arguments. OTA acknowledged the Assessor's arguments, stating, "[e]ssentially, the Assessor argues (regarding Mr. Kistler's inutility method) that the record is not clear on how much gas the pipelines are designed to carry, and that the record is not clear on when the pipelines would reach the final utilization levels anticipated by the property owner." D.R.0021. Because, however, the tribunal gave "no weight" to MarkWest's expert's inutility method as a means to *calculate* the amount of economic obsolescence, the tribunal cast aside these evidentiary lapses. MarkWest failed to present sufficient evidence to demonstrate that its alleged underutilization of the pipelines as of July 1, 2022, showed a loss in value from outside sources. Therefore, the OTA decision should be reversed. Alternatively, this matter should be remanded for further proceedings requiring MarkWest to present evidence that, at a minimum, its throughput volumes decreased.[10]

F. The Office of Tax Appeals erred by, and was arbitrary and capricious in, relying upon MarkWest's expert's capitalization of income loss methodology.

While it gave no weight to three of the methodologies employed by MarkWest's expert, OTA relied upon the capitalization of income loss method included in the KE Andrews Report. As the KE Andrews Report describes, this methodology is applied in three steps:

> First, the subject [companies'] respective annual enterprise level after-tax debt free cash flows are determined. Then, these cashflows are capitalized at the ***industry level*** weighted average cost of capital (WACC) of 12.59%. Third, the net shortfall, or difference between the ***net book value*** and the capitalized cash flows is calculated as being determinative of economic obsolescence on an ***enterprise level***.

[10] MarkWest provided throughput projections to KE Andrews but not to the Assessor's Office, and those projections are not in the record. D.R.0908-0909.

D.R.0404 (emphasis added). "The Capitalization of Income Loss method is selected because it is based on a comparison to ***peer*** financial performance." D.R.0404 (emphasis added). This methodology is flawed, and OTA's reliance upon it to the exclusion of the Assessor's evidence was arbitrary and capricious.

First, in the KE Andrews Report, Kistler develops a weighted average cost of capital ("WACC") based upon the financial performance of 24 guideline companies, which he states is a "peer group" to Taxpayers. D.R.0404-0405. Several of those "peer" companies are not peers at all. For example, CNX Resources Corporation, EQT, Southwestern Energy Co., and the Williams Companies, Inc. are all minerals producers. Kistler testified, "There are producers in there that either have pipelines or are tied closely to the production of the assets." D.R.0986. When asked if, within the 24 guideline companies, there are "peers" that are just like Taxpayers, who only transport NGLs and ethane, Kistler responded, "Yes, there are a few." D.R.0987. Kistler admits that producers are generally more volatile than FERC regulated pipeline companies. D.R.0987-0988. Despite that recognition, Kistler used producers within his guideline companies, which skews his WACC. Kistler also included exploration companies, like EOG Resources, which are not "peers" to MarkWest, who claims that its only assets are regulated pipelines and rights-of-way in the land in which they are situated.[11] The KE Andrews Report does not explain how or why the guideline companies were chosen. Kistler explained that he chose to analyze companies that are more diversified than MarkWest or that are engaged in different aspects of the oil and gas industry because MarkWest has a "non-diversified asset" and investors are "looking at risk," so that's what KE Andrews is "doing with a discount rate or capitalization rate." D.R.0987.

[11] *See* EOG Resources, Forbes Profile ("EOG Resources, Inc. engages in the exploration, development, production and marketing of crude oil and natural gas.") *available at* https://www.forbes.com/companies/eog-resources/?sh=6d0a042d4274.

Kistler and KE Andrews are, however, looking outside of MarkWest to "look at the risk" of investing in MarkWest. Kistler has developed a WACC of 12.59% based, in part, on the market volatility of the 24 guideline companies as well as other market metrics. MarkWest reports its own WACC to FERC annually. D.R.0820; D.R.0860. MarkWest Liberty Ethane reported a "Rate of Return – Weighted Average Cost of Capital" of 8.6% in 2021 and 8.16% in 2022. D.R.0820. MarkWest Liberty NGL reported a "Rate of Return – Weighted Average Cost of Capital" of 8.48% in 2021 and 8.08% in 2022. D.R.0860. Kistler testified that he did not use MarkWest's reported WACCs because he is "looking at what the investors would require." D.R.0344-0346. This is not an adequate explanation of why his WACC is approximately 50% higher than MarkWest's reported rates.

Additionally, Kistler and KE Andrews inappropriately use a 0.0% growth rate for MarkWest Liberty NGL. D.R.0426. To determine a value under the capitalization of income loss method, Kistler took MarkWest's after-tax net operating income (which also included depreciation expense) and rounded it to the nearest million dollars. D.R.0426; D.R.0983-0984. He then took his own WACC and subtracted a growth rate from that WACC to arrive at a capitalization rate less growth. D.R.0426; D.R.0991. Kistler acknowledges that MarkWest anticipates increased volumes in the future, but he claims, without further explanation, "that is the anticipated net income effect." D.R.0992.

This contradicts the growth statistics in the KE Andrews Report itself. The KE Andrews Report includes three-year compound average growth rates for measures of operating performance from 2019 to 2021. For MarkWest Liberty NGL, KE Andrews found a 9.29% average growth in revenue, 26.26% average growth in net income, 26.26% average growth in earnings before interest and taxes, 27.76% average growth in earnings before interest, taxes, depreciation, and

amortization, 9.82% average growth in total assets, and 7.8% average growth in total tangible property. D.R.0436-0444. Despite positive growth in excess of 0% in every metric, and despite the testimony from MarkWest's representatives that, as of the lien date, they anticipated additional volumes in the future, Mr. Kistler chose to use a 0% growth rate for the NGL lines, mixing and matching market-based and asset-based metrics when beneficial to MarkWest.

The significance of the growth rate cannot be understated. The higher the growth rate, the higher the valuation using the capitalization of income loss method. D.R.0994. Using a higher WACC causes a lower valuation, and using a lower growth rate causes a lower valuation. Kistler did both, which exacerbates another fatal flaw in his methodology, applying the percentage derived from the capitalization of income loss method to the FERC net book value, as discussed further below. For these reasons, the capitalization of income loss method should have been disregarded, and OTA committed clear legal error and acted arbitrarily and capriciously in relying upon the capitalization of income loss method. The OTA decision notes that "the record is somewhat confusing" as it relates to growth rates. The Assessor's expert, Mr. Wisdom, stated that the appropriate growth rate was the market rate of 2.9%. D.R.0780. The tribunal stated that it had "no explanation in the record" as to what that represents or from where the number was derived. D.R.0034. Given the disparity in the growth figures published in the KE Andrews report and the 0.0% growth rate utilized by Kistler, and given OTA's perceived lack of support for Mr. Wisdom's growth rate, OTA should have, at a minimum, remanded the case for further proceedings. The Assessor asks for that relief now, in the alternative.

G. The Office of Tax Appeals erred by, and was arbitrary and capricious in, selecting the economic obsolescence percentage MarkWest's expert attributed to his capitalization of income loss methodology because his ultimate opinion was that the correct percentage was a blend of four methodologies, three of which the Office of Tax Appeals rejected.

Further compounding errors, OTA arbitrarily selected and used an obsolescence percentage that was not even MarkWest's expert's ultimate opinion. Despite only one of his methodologies possibly meeting the definition of an income approach under West Virginia law, Mr. Kistler further diluted the only potentially valid methodology by blending it with the other three admittedly invalid methodologies to arrive at a "blended rate or blended percentage of economic obsolescence." D.R.0999. Mr. Kistler weighted his methodologies by applying 30% weight to each of the inutility method, rate of return on capital method, and capitalization of income loss method and by applying 10% weight to the blue-chip method because it was an "outlier." D.R.1010-1011. This results in 70% of Mr. Kistler's ultimate opinion being reliant upon methodologies that admittedly do not comport with West Virginia law. An ultimate opinion that is, at best, 30% valid under West Virginia law cannot overcome the presumption of correctness afforded the Assessor. Thirty percent is not a preponderance of the evidence. Thirty percent is not a greater weight of the evidence. MarkWest failed to meet its burden of proof.

But OTA selected only the percentage derived from the capitalization of income loss method in the KE Andrews Report. No one—not the Assessor, not the Assessor's experts, not MarkWest, not MarkWest's expert—opined that MarkWest's pipeline's value should be reduced by 35%. That percentage was cherry-picked from the KE Andrews Report and arbitrarily applied to the Assessor's value, even though, as discussed below, the percentage is not applicable to the Assessor's value. OTA acted arbitrarily and capriciously, and its decision should be reversed.

H. The Office of Tax Appeals erred by, and was clearly wrong and arbitrary and capricious in, applying the 35% economic obsolescence reduction to the Assessor's appraised value because MarkWest's expert testified that the 35% reduction was applicable to MarkWest's net book value reported on FERC filings.

The KE Andrews Report's economic obsolescence percentage exists without context to the Assessor's fair market value. Instead, the Kistler applies the percentage to the FERC net book value, which Kistler admits is not a fair market value. D.R.0970-0971. Kistler's testimony closes the door on any usefulness of the obsolescence percentage he determined:

> Q. Just to close the loop on your income to capitalization loss or capitalization of income loss method, sorry. On page 13 you conclude that there would be 9% obsolescence for the ethane line and 35% obsolescence for the NGL line. Is that correct?
> A. Correct.
> Q. Where do we apply --- that's 9% of what?
> A. **So, that's 9% of the FERC net cost**. Which is why we also say that to use differing levels of --- if the West Virginia composite tables have that higher, that's a conservative number because that number is based upon investment. That number is based upon the FERC data.

D.R.0353 (emphasis added). Kistler testified that his obsolescence percentage should be applied to the *FERC net cost*, in other words, the net book value he analyzed in his methodology. The net book value is not the same as the Assessor's value. The net book value is not a fair market value. The net book value was not derived using the State's mandated method. The net book value is a meaningless figure under West Virginia law, and MarkWest cannot simply substitute an unequal value into a mathematical formula created for another value. Thirty-five percent of the net book value is not thirty-five percent of the Assessor's value. Thus, even if Kistler correctly determined obsolescence in the context of net book value, it is meaningless in the context of the Assessor's value, and his percentage cannot be applied to the Assessor's value without mathematical errors.

Because MarkWest does not compare its sole potential income method to the Assessor's valuation, MarkWest cannot determine that the Assessor's valuation was higher than MarkWest's income approach. If the Assessor's valuation is lower than MarkWest's income approach, MarkWest cannot claim that their income approach shows obsolescence and/or a lower fair market value than the Assessor found.

MarkWest has not presented an appraisal. The only conclusion that can be reached by MarkWest's evidence is that the value of its pipeline is 35% less the book value it reports to FERC. That does not prove that the fair market value of its pipeline is less than the appraised value assigned by the Assessor. But OTA applied a 35% reduction to the Assessor's value despite that percentage's lack of relationship to the Assessor's value. That's clearly wrong, arbitrary, and capricious. The OTA decision should be reversed.

CONCLUSION

Petitioner Scott Lemley respectfully requests that this Court reverse the decision of the Office of Tax Appeals and remand this matter with instructions that OTA enter an order finding that MarkWest's subject property was appropriately appraised at a fair market value of $232,093,549 total and, specifically, that MarkWest's twenty-inch NGL pipeline was appropriately appraised at $120,906,465. Alternatively, this Court should remand the case back to OTA for further proceedings on the evidentiary gaps identified by OTA in its decision and addressed herein.

/s/ Caleb B. David
Caleb B. David, Esq. (WVSB #12732)
Shuman McCuskey Slicer PLLC
1411 Virginia Street, East, Suite 200
PO Box 3953
Charleston WV 25339-3953
(t): 304-345-1400
(f): 304-343-1286
cdavid@shumanlaw.com

Michael D. Dunham, Esq. (WVSB #12533)
Shuman McCuskey Slicer PLLC
116 S. Stewart St.
Winchester, VA 22601
(t): 540-486-4195
(f): 540:486:4912
mdunham@shumanlaw.com
Counsel for Petitioner Scott Lemley

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
NO. 24-ICA-438

SCOTT LEMLEY, in his capacity as Assessor of Wetzel County, West Virginia,

Respondent Below/Petitioner,

v.

Appeal from Office of Tax Appeals
Docket No. 23-1355 Commercial

MARKWEST LIBERTY MIDSTREAM & RESOURCES, LLC, MARKWEST ETHANE PIPELINE, LLC, and MARKWEST LIBERTY NGL PIPELINE, LLC,

Petitioners Below/Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel for the Respondents, hereby certifies that a true and correct copy of the foregoing ***Petitioner's Brief*** has been served upon the parties and counsel of record via File & ServeXpress, this 9th day of January, 2025.

Craig A. Griffith, Esquire
Frost Brown Todd LLC
500 Virginia Street, East
Charleston, WV 25301-2117
Counsel for Respondents

/s/ Caleb B. David
Caleb B. David (WVSB #12732)
Michael D. Dunham (WVSB #12533)