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

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**SCOTT LEMLEY, in his capacity as**  
**ASSESSOR OF WETZEL COUNTY, WEST VIRGINIA,**

*Respondent Below, Petitioner,*

**vs.**

**MARKWEST LIBERTY MIDSTREAM & RESOURCES, L.L.C.,**  
**MARKWEST LIBERTY ETHANE PIPELINE, L.L.C., and**  
**MARKWEST LIBERTY NGL PIPELINE, L.L.C.,**

*Petitioners Below, Respondents.*

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**BRIEF OF THE RESPONDENTS AND CROSS ASSIGNMENT OF ERROR**

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## **I. CROSS-ASSIGNMENT OF ERROR**

This cross-assignment of error is advanced pursuant to Rule 10(f) of the West Virginia Rules of Appellate Procedure.

The West Virginia Office of Tax Appeals (the “WVOTA”) erred in holding that only one economic obsolescence method used by MarkWest Liberty NGL Pipeline, L.L.C. (“MarkWest Liberty NGL”)<sup>1</sup> was a valid method under West Virginia law to evaluate whether the value of its natural gas liquid (hereinafter “NGL”) pipelines should be adjusted for economic obsolescence. As addressed in detail below, this decision was in direct contravention of the plain language of W. Va. Code St. R. § 110-1P-3.5.2, which expressly permits, and in no manner restricts, multiple economic obsolescence methodologies—including all of those used by MarkWest Liberty NGL.

## **II. STATEMENT OF THE CASE**

Notwithstanding the limited cross-assignment of error, the WVOTA correctly held that MarkWest Liberty NGL proved by a preponderance of the evidence that, for purposes of tax year 2023 ad valorem property taxes, the Petitioner overvalued its NGL pipeline property in Wetzel County through his failure to adjust the value of the pipelines based on economic obsolescence. The WVOTA fundamentally understood and correctly applied the concept of economic obsolescence. In turn, the WVOTA applied economic obsolescence in line with the requisite burden of proof, correctly deciding MarkWest Liberty NGL met its burden after extensive evidentiary findings. In turn, the WVOTA soundly rejected Petitioner’s overvaluation, concluding that it was not supported by fact or Petitioner’s purported “expert” testimony.

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<sup>1</sup> As noted in footnote 1 of the WVOTA opinion, appeals for the ethane lines owned and operated by MarkWest Liberty Midstream & Resources, L.L.C. and MarkWest Liberty Ethane Pipeline, L.L.C. were withdrawn, and economic obsolescence was granted only for MarkWest Liberty NGL’s pipelines. D.R.0008. This brief will refer to MarkWest Liberty NGL throughout, rather than all three MarkWest entities.

Now, just as before the WVOTA, Petitioner demonstrates his lack of understanding of economic obsolescence by fundamentally claiming that the WVOTA “cannot first determine that economic obsolescence exists and then go looking for a loss in value.” Pet. Br. at 11. This is backwards. Economic obsolescence drives valuation. Appreciating this, after determining that an external factor necessitated an adjusted value for the NGL lines based on the presence of economic obsolescence, the WVOTA correctly quantified that obsolescence in the value to which Petitioner now objects.

\* \* \*

In his introduction section, the Petitioner sets the stage for the various arguments that he addresses later in his brief. MarkWest Liberty NGL will address the infirmity of those arguments in its argument section and will address the myriad reasons why the WVOTA correctly held on behalf of MarkWest Liberty NGL, below. Given the extensive record in this case, MarkWest Liberty NGL will correct and supplement necessary facts in tandem with its argument.<sup>2</sup>

### **III. SUMMARY OF ARGUMENT**

The WVOTA correctly determined that MarkWest Liberty NGL established by a preponderance of the evidence that its NGL pipelines were overvalued for ad valorem property tax purposes based on Petitioner’s failure to account for the presence of economic obsolescence, and Petitioner’s failure to rebut MarkWest Liberty NGL’s evidence.

During the WVOTA proceeding, MarkWest Liberty NGL offered probative evidence of all three relevant prongs to establish the existence of economic obsolescence: 1) The onset of the COVID-19 pandemic in 2020, and related economic slowdown, led to a shift in the oil and gas industry, with producers slowing their production of natural gas. 2) A detailed economic

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<sup>2</sup> As a general matter, Petitioner sets the factual and procedural stage in a reasonable manner in his opening briefing, notwithstanding the corrections and additions specified below.

obsolescence report quantifying the amount of economic obsolescence using four generally accepted methods was provided by MarkWest Liberty NGL. 3) The external factors causing the economic obsolescence impacted the ability of MarkWest Liberty NGL to use its NGL pipelines at or near design capacity. The WVOTA evaluated the veracity of this evidence, applied it against applicable authorities, and correctly concluded Petitioner had prevailed “by a preponderance of the evidence that the Wetzel County Assessor was incorrect in his assertions that the pipelines at issue did not suffer from economic obsolescence.” D.R. 0042. Just the same, the WVOTA pointedly rejected the patently flawed methodologies of Petitioner’s purported experts, making conclusive findings of credibility. *Id.* at 0031, 0034-35, 0037.

This Court should affirm the final decision of the WVOTA.

#### **IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

MarkWest Liberty NGL requests oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure as this matter represents the first appeal of a property tax decision issued by the West Virginia Office of Tax Appeals and the first appeal of a property tax matter under the new “preponderance of the evidence” burden of proof standard (addressed *infra*). Argument under Rule 19 is not appropriate because, *inter alia*, the issues are not contrary to the application of settled law and the decision below was supported by the weight of the evidence, including the WVOTA’s sound determination that Petitioner’s evidentiary showing lacked weight and credibility.

## V. STANDARD OF REVIEW

Administrative appeals from state agencies are reviewed using a *de novo* standard of review for questions of law.<sup>3</sup> Otherwise, under the Administrative Procedures Act, the Intermediate Court of Appeals

may affirm the order or decision of [a state] 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***.

W. Va. Code § 29A-5-4(g) (emphasis added).<sup>4</sup>

“The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an administrative agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.”<sup>5</sup> Furthermore, per W. Va.

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<sup>3</sup> See *Appalachian Power Co. v. State Tax Dep't of W. Va.*, 195 W. Va. 573, 466 S.E.2d 424 (1995) (“Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review”); Syl. pt. 1, *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 671 S.E.2d 682 (2008) (“Where the issue on an appeal. . . is clearly a question of law or involving the interpretation of a statute, [the West Virginia Supreme Court of Appeals] appl[ies] a *de novo* standard of review” (Quoting Syl. pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995)); and Syl. pt. 1, *Antero Res. Corp. v. Steager*, 244 W. Va. 81, 851 S.E.2d 81 (2020) (““In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, [the West Virginia Supreme Court of Appeals reviews the matter] pursuant to the standards of review in the State Administrative Procedures Act set forth in *W. Va. Code*, 29A-5-4(g) [1988]. 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*.’ Syl. pt. 1, *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012).”).

<sup>4</sup> See *Minnie Hamilton Health Care Center, Inc. v. Hosp. Dev. Co. & W. Va. Health Care Auth.*, 2023 WL 2424614 (W. Va. Ct. App. 2023).

<sup>5</sup> Syl. pt. 2, *Antero Res. Corp. v. Steager*, 244 W. Va. 81, 851 S.E.2d 81 (2020) (citing Syl. pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996)). See also *West Virginia Div. of Highways v. Scott*, 2023 WL 2365786 (W. Va. Ct. App. 2023).

Code §§ 11-3-23a(e) and 11-10A-19(h), “the standard of proof which a taxpayer must meet at all levels of review and appeal [for property tax valuation matters] shall be a preponderance of the evidence standard.” “‘Preponderance of the evidence’ is defined as that degree of evidence that is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not.” *Frazier v. Gaither*, 248 W. Va. 420, 425, 888 S.E.2d 920, 925 (2023) (quoting *Suhr v. Okorn*, 83 S.W.3d 119, 121 (Mo. Ct. App. 2002)). The “preponderance of the evidence” standard of proof is a result of recent legislative changes and is a lesser burden of proof than the former “clear and convincing evidence” standard.

The WVOTA’s decision ordering the Petitioner to adjust the value of MarkWest Liberty NGL’s pipeline property to account for economic obsolescence is supported by substantial evidence and by a rational basis. In turn, the WVOTA correctly determined that MarkWest Liberty NGL satisfied its preponderance of the evidence standard of proof.

Common law provisions establish that there is a presumption of correctness of an assessor’s appraisal:

As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct.... The burden is on the taxpayer challenging the assessment to demonstrate. . . that the tax assessment is erroneous. Syllabus point 2, in part, *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W.Va. 322, 431 S.E.2d 661 (1993).

Syl. pt. 5, *Stone Brooke Limited Partnership v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009); *see also Century Aluminum of West Virginia v. Jackson County Comm’n*, 229 W. Va. 215, 728 S.E.2d 99 (2012) and *BRG Associates, LLC v. Hess*, 2017 WL 656999 (W. Va. S. Ct. 2017).

Neither the West Virginia Supreme Court of Appeals nor the West Virginia Intermediate Court of Appeals has had an opportunity to address the impact of the new “preponderance of the



evidence” standard on the presumption of correctness. Nevertheless, the “presumption of correctness” of an assessor’s valuations are not a given, as the West Virginia Supreme Court of Appeals mandates that “there must be a proper assessment before there can be a presumption that the assessment is correct, and where it appears that there was no proper assessment there can be no presumption in favor of the correctness of the assessment.” *In Re Pocahontas Land Co.*, 172 W. Va. at 61, 303 S.E.2d at 699. “[O]nce a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer’s evidence.” *Mountain Am. LLC v. Huffman*, 224 W. Va. 669, 786 n. 23, 687 S.E.2d 768, 785 n. 23 (2009) (citing *In Re Pocahontas Land*).

Here, MarkWest Liberty NGL demonstrated by a preponderance of the evidence that the Petitioner did not properly assess its NGL pipeline property, and the WVOTA correctly held that the presumption of correctness was overcome. This Court is required to defer to factual findings of the WVOTA in the underlying action unless clearly wrong.<sup>6</sup>

## VI. ARGUMENT

### A. VALUATION OF COMMERCIAL PROPERTY IN WEST VIRGINIA

The West Virginia Constitution 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 (emphasis added). All property in the State of West Virginia is required to “be assessed annually at its *true and actual value*[.]” W. Va. Code § 11-3-1 (emphasis added). County assessors are charged with “appraising all real and personal property in their jurisdiction at *fair market value*[.]”<sup>7</sup>

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<sup>6</sup> *W. Va. State Police v. Walker*, 246 W. Va. 77, 84, 866 S.E.2d 142, 149 (2021) (quoting W. Va. Code § 29A-5-4(g)(5)); *see also* Syl. pt. 1, *Muscatell v. Cline*, 196 W. Va. 588, 474 S.E.2d 518, (1996).

<sup>7</sup> “‘Value’, ‘market value’ and ‘true and actual value’ shall have the same meaning and shall mean the price at or for which a particular parcel or species of property would sell if it were sold to a willing buyer

W. Va. Code § 11-1C-7(a) (emphasis added). This obligation applies to property not appraised by the Tax Department, including commercial personal property.

West Virginia Code St. R. § 110-1P-1 *et seq.* (generally referred to as the “Legislative Rule” throughout this brief) provides guidance on the methodologies used to value commercial and industrial real and personal property for ad valorem property tax purposes. Assessors are required to abide by the provisions of the Legislative Rule when valuing commercial property located in their counties.

The Legislative Rule discusses three methodologies for valuing property, including the income approach<sup>8</sup>, market approach<sup>9</sup>, and cost approach, noting that, “[o]f the three (3) approaches to value, the cost approach may apply most consistently to machinery [and] equipment[.]” W. Va. Code St. R. § 110-1P-3.4.3.2. The “cost approach” is the “appraisal process in which replacement cost of improvements, *less all types of depreciation*” is used to estimate the fair market value of property. W. Va. Code St. R. § 110-1P-2.4 (emphasis added).<sup>10</sup>

Use of the cost approach is reflected in West Virginia State Tax Department Administrative Notice 2021-12, in which the Tax Commissioner states that the Tax Department primarily relies upon the cost approach in valuing industrial machinery and equipment. While the administrative notice focuses on industrial property, it is undisputed that the Petitioner relied on the cost approach for valuing the NGL pipelines in this matter. The Tax Department annually provides “trend and percent good tables” to assessors for purposes of valuing commercial

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by a willing seller in an arm's length transaction without either the buyer or the seller being under any compulsion to buy or sell.” W. Va. Code § 11-1A-3(i).

<sup>8</sup> An “income approach” is the appraisal process of discounting an estimate of future income into an expression of net worth. W. Va. Code St. R. § 110-1P-2.12.

<sup>9</sup> A “market approach” is the appraisal process of examining sales data and translating the data into an estimate or present worth. W. Va. Code St. R. § 110-1P-2.17.

<sup>10</sup> While the definition discusses the cost approach for valuing real property, the provisions of the Legislative Rule make it clear that the cost approach also applies to personal property.

properties, with physical depreciation accounted for in the “percent good tables.” Per the administrative notice, “[t]he Tax Commissioner uses the *Marshall Valuation Service*, an appraisal guide, as the source of information for the trend and depreciation tables and provides this information to all fifty-five counties as a guide for the appraisal of personal property.”

Under the cost approach, assessors are required to consider three types of depreciation when physically inspecting and valuing commercial personal property: physical deterioration depreciation, economic obsolescence, and functional obsolescence. W. Va. Code St. R. § 110-1P-3.4.3.3. “Physical depreciation” means “a loss in value due to natural wear and tear of property resulting from age, use, abuse, etc.” W. Va. Code St. R. § 110-1P-2.20. “Economic obsolescence” means “a loss in value of property arising from outside forces such as changes in use, legislation that restricts or impairs property rights, or changes in supply and demand relationships.” W. Va. Code St. R. § 110-1P-2.5. “Functional obsolescence” is defined as the “loss of value due to factors such as excess capacity, changes in technology, flow of material, seasonal use, part-time use, or other like factors. Functional obsolescence includes loss of value due to the inability of an item to perform adequately the function for which the item was designed.” W. Va. Code St. R. § 110-1P-2.8.<sup>11</sup>

The West Virginia Supreme Court of Appeals addressed both economic and functional obsolescence in *Century Aluminum of West Virginia, Inc. v. Jackson County Commission*, 229

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<sup>11</sup> Functional obsolescence may either be curable or incurable, and can be based on “superadequacy,” *e.g.*, the property has unnecessary or excess productive capacity such that the commercial or industrial property is underutilized, or where the property or a portion or component of the property adds no value based on the current use of the property or anticipated future use of the property or a “deficiency,” *e.g.*, property has a capacity or quality that is less than current market standards or industry standards, and which requires additional investment in repairs, or in substitution or replacement of property or installation of additional property, to bring the subject property to current standards and improve the income producing capacity or productivity of the property. W. Va. Code St. R. §§ 110-1P-3.5.3.1.1 and 3.5.3.2. Functional obsolescence is curable if it is economically feasible to fix the superadequacy or deficiency. *Id.*

W. Va. 215, 728 S.E.2d 99 (2012). In a per curiam<sup>12</sup> opinion, the Court held that the Legislative Rule provisions regarding obsolescence “[do] not require. . . any adjustment to the valuations made regarding property because of physical depreciation, functional obsolescence and economic obsolescence[.] Rather, all that is required. . . in applying the cost approach valuation is that [one] will think [carefully] about or contemplate [the] three types of depreciation[.]” *Id.* at 229 W. Va. at 224-25, 728 S.E.2d at 108-09.<sup>13</sup> Notably, the Tax Department reduced the cost method based valuation of Century Aluminum’s machinery and equipment by 50% based on obsolescence. The Court stated that absent from Century Aluminum’s argument at the hearing was “**any suggestion that the Tax Department deviated from any standardized principles of appraising property** in using a mathematically-derived fifty percent reduction in Century

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<sup>12</sup> See *Walker v. Doe*, 210 W. Va. 490, 496, 558 S.E.2d 290, 296 (2001) for a discussion of the precedential impact of per curiam decisions. (“Per curiam opinions may also be relied upon to argue that previously announced points of law set forth in syllabus points should nonetheless apply to alternate factual scenarios, which may significantly parallel but still partially diverge from the facts of the previously decided opinion.”). Notably, the syllabus in *Century Aluminum* does not reference obsolescence and instead focuses on the presumption of correctness of an assessor’s valuation and the discretion afforded the Tax Commissioner under the Legislative Rule in appraising commercial and industrial properties. No signed West Virginia Supreme Court cases that discuss economic obsolescence include a holding regarding economic obsolescence in the syllabus of the Court, with the focus of those decisions generally being on the “discretion” afforded the Tax Commissioner or assessors in valuing property. See, e.g., *Bayer MaterialScience, LLC v. State Tax Commissioner*, 223 W. Va. 38, 54, 672 S.E.2d 174, 190 (2008) (the Tax Commissioner’s use of the income approach in evaluating economic obsolescence satisfied his duty to “choos[e] and apply[] the most accurate method of appraising commercial and industrial properties,” citing Syl. Pt. 7, in part, *In re Tax Assessment of Foster Foundation’s Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008). The Supreme Court’s opinion in *Foster Foundation* references economic obsolescence only once, with syllabus points 5-8 focusing on the former “clear and convincing evidence” burden of proof and the presumption of correctness of the Tax Commissioner’s or assessor’ values. See also Syl. pts. 5-6, *Stone Brooke Ltd. Partnership v. Sisinni*, 224 W. Va. 691, 688 S.E.2d 300 (2009) (the concurrence notes that there was no mention of economic obsolescence in the record) and Syl. pts. 1-3 and 5, *Berkeley County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 880 S.E.2d 487 (2022) (discussing the presumption of correctness, the former clear and convincing evidence burden of proof, and the discretion of the Tax Commissioner in choosing appraisal methods). .

<sup>13</sup> The Court’s analysis was based on the use of the term “consider” and its definition of in *Random House Webster’s Unabridged Dictionary* 434 (2d ed.1998). See also *In re: Tax Assessment Against American Bituminous Power Partners*, 208 W.Va. 250, 256, 539 S.E.2d 757, 763 (2000).

Aluminum's machinery and equipment to account for functional and economic obsolescence.” *Id.* at 229 W. Va. at 226, 728 S.E.2d at 110 (emphasis added).

Justices Ketchum and Benjamin dissented based on their belief that the Tax Commissioner had failed to properly consider obsolescence in valuing Century Aluminum's inventory, machinery, and equipment. Because obsolescence was not properly considered, “the Commissioner's evaluation was incomplete and arbitrary. Although the Commissioner has discretion in choosing the method of appraising commercial and industrial property, the method chosen must be the ‘most accurate.’ Syl. pt. 5, *In re: Tax Assessment Against American Bituminous Power Partners*, 208 W.Va. 250, 539 S.E.2d 757 (2000).” *Id.* at 229 W. Va. at 226-27, 728 S.E.2d at 110-11.

The majority opinion in *Century Aluminum* noted that “[a]bsent from the legislative rule requiring the Tax Commissioner to consider functional and economic obsolescence is any directive regarding how the Tax Commissioner must go about ‘considering’ economic and functional obsolescence. [*Citation to old version of legislative rule omitted.*]” *Id.* 229 W. Va. at 224, 728 S.E.2d at 108. This statement was accurate based on the version of the Legislative Rule that was in effect during the pendency of the *Century Aluminum* case, with the Legislative Rule at issue having been in effect since 1991. That version of the Legislative Rule merely required “consideration” of physical deterioration, economic obsolescence, and functional obsolescence, with definitions included for the terms. There was no guidance for how the Tax Department or assessors were to “consider” physical depreciation, economic obsolescence, or functional obsolescence, which resulted in the Supreme Court setting a low bar for the Tax Department and assessors to clear to demonstrate compliance with the Legislative Rule when “considering” the three types of depreciation.

However, following the *Century Aluminum* decision, the bar was raised when the Tax Department filed an updated version of the Legislative Rule that specifically addresses the steps the Tax Department and assessors must undertake in their consideration of physical depreciation, economic obsolescence, and functional obsolescence. For physical depreciation, the *Marshall Valuation Service* is specified as the source guide for West Virginia’s depreciation tables. W. Va. Code St. R. § 110–1P-3.5.1. *See* West Virginia State Tax Department Administrative Notice 2021-12, *supra*, which also establishes that the *Marshall Valuation Service* is used as a source guide for the trend tables that are used to calculate a “replacement cost new” of commercial property. The Legislative Rule was also amended to provide that economic obsolescence is best measured through application of either a market approach method or an income approach method<sup>14</sup>, with an income approach method normally used. W. Va. Code St. R. § 110–1P-3.5.2. Finally, the Legislative Rule was updated to provide that “some” functional obsolescence is accounted for in the *Marshall Valuation Service*, with a “cost to cure” analysis suggested for “curable” functional obsolescence<sup>15</sup> and either a market approach method or income approach method used in measuring “incurable” functional obsolescence.<sup>16</sup>

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<sup>14</sup> As MarkWest Liberty NGL will establish in its counterargument, use of an income approach or market approach is not mandated.

<sup>15</sup> Curable functional obsolescence is measured using the cost to cure method. Cost to cure means the cost of repairs, the cost of investment in substitution or replacement property, and the cost of additional property, including installation costs, necessary to bring a subject property to current market standards or industry standards and optimize the value of the property. W. Va. Code St. R. § 110-1P-3.5.3

<sup>16</sup> Due to the lack of sales volume for comparable commercial or industrial properties, an income approach method is the most prevalent option. W. Va. Code St. R. § 110-1P-3.5.3.

**B. THE WVOTA’S DECISION WAS CORRECT THAT THE PETITIONER DID NOT REBUT MARKWEST LIBERTY NGL’S ECONOMIC OBSOLESCENCE EVIDENCE AND DID NOT SATISFY HIS DUTY TO CONSIDER ECONOMIC OBSOLESCENCE**

MarkWest Liberty NGL demonstrated by a preponderance of the evidence that an adjustment to account for economic obsolescence was warranted, and the WVOTA decision that the Petitioner did not rebut MarkWest Liberty NGL’s evidence is supported by substantial evidence and by a rational basis. D.R.0018-19. The Petitioner’s failure to apply economic obsolescence led to him improperly calculating the “true and actual” or “fair market value” of MarkWest Liberty NGL’s pipeline property for tax year 2023 as required by W. Va. Const. Art. X, § 1 and W. Va. Code §§ 11-3-1(a) and 11-1C-7(a).

While the Petitioner has discretion to select the appraisal method that he determines will provide the most accurate valuation of personal property, once he chooses a method, he must apply it correctly. *Century Aluminum of West Virginia, Inc. v. Jackson County Commission*, 229 W. Va. 215, 226-27, 728 S.E.2d 99, 110-11 (2012), *supra*, citing Syl. pt. 5, *In re: Tax Assessment Against American Bituminous Power Partners*, 208 W.Va. 250, 539 S.E.2d 757 (2000).

Petitioner cites the recent West Virginia Supreme Court decision of *Berkeley County Council v. Government Properties Income Trust LLC*, 247 W. Va. 395, 880 S.E.2d 487 (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) for the proposition that the Petitioner merely needs to “think about or contemplate” economic obsolescence. The Court in *Government Properties* heavily relied upon the Court’s decision in *Century Aluminum* in addressing the “contemplation” of economic obsolescence. However, Petitioner’s brief fails to address key language from the *Century Aluminum* decision stating that “[a]bsent from [the taxpayer’s experts’] testimony is any

suggestion that the Tax Department deviated from any standardized principles of appraising property . . . to account for functional and economic obsolescence.” *Id.* at 229 W. Va. at 226, 728 S.E.2d at 110.<sup>17</sup> Additionally, the Court in *Government Properties* noted that the Berkeley County Assessor “sought and was unable to obtain necessary data to develop either the income or market approaches.” *Id.* at 247 W. Va. at 407, 880 S.E.2d at 499.

Here, unlike the *Century Aluminum* case, Petitioner and his consultants **repeatedly** deviated from standardized principles for appraising property (failing to follow the Legislative Rule or administrative guidance issued by the Tax Department) resulting in a failure to assess MarkWest Liberty NGL’s pipelines at their “true and actual value” or “fair market value.” Additionally, unlike the *Government Properties* case, the Petitioner (via one of his consultants) employed **three** separate income-based approaches in a feeble attempt to determine whether economic obsolescence should be applied to MarkWest Liberty NGL’s pipelines<sup>18</sup>, and the approaches were deemed by the WVOTA to lack credibility.

Petitioner testified at the WVOTA hearing that economic obsolescence is a new concept for him. Thus, upon his receipt of MarkWest Liberty NGL’s request for an adjustment based on economic obsolescence, and the obsolescence report drafted by Daniel Kistler, an accredited senior appraiser of the American Society of Appraisers and Vice President for KE Andrews, in support of the request, the Petitioner collaborated with two independent consultants, Jerry Wisdom and Lisa Hobart, to review the economic obsolescence request. D.R.0161, 0565-0740, 1030-31.

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<sup>17</sup> Note that both *Century Aluminum* and *Government Properties Income Trust LLC* were decided under the former “clear and convincing” evidence burden of proof standard and not the current preponderance of the evidence standard.

<sup>18</sup> The Petitioner took the position that there are no external factors that warrant an adjustment for economic obsolescence. D.R.1027. Despite this, he had one of his consultants perform multiple appraisals, and the consulted concluded that substantial economic obsolescence was **already present** in the Petitioner’s original cost-based appraisal. Both positions cannot be true.



Petitioner is authorized to seek outside assistance in carrying out his duties. However, Mr. Wisdom and Ms. Hobart have little to no experience evaluating whether economic obsolescence applies to pipelines regulated by the Federal Energy Regulatory Commission (“FERC”). This was borne out in their written reports and testimony, both of which “deviated from standardized principles for appraising property.” D.R.0229-0230, 0271.

Mr. Wisdom prepared two separate reports in which he attempted to analyze economic obsolescence using a cost-based methodology and three separate income-based methods, including an income capitalization method, a discounted cash flow method, and a direct capitalization method. D.R.0600-0866. The steps that Mr. Wisdom undertook in employing these methodologies are nowhere to be found in Petitioner’s brief<sup>19</sup>, with the only references to his reports being a citation to a *Pipeline Rule of Thumb*<sup>20</sup> publication and a citation to a growth rate that Mr. Wisdom used under one of his methods. Pet. Br. pp. 33, 37. If Petitioner believed that these reports satisfied the standardized principles for appraising property, surely he would have expounded those arguments in his brief. Instead, Petitioner argues that an assessor satisfies the “contemplation of economic obsolescence” standard regardless of how misguided his or her analysis may be. According to Petitioner’s interpretation of West Virginia case law, the concept of economic obsolescence would be meaningless as any assessor could claim that he or she “contemplated or thought about” economic obsolescence and prevail on appeal, even if (as is the case in this matter) his or her “contemplation” violated the standardized principles for appraising property at every turn.

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<sup>19</sup> As noted by the WVOTA “in his post-hearing brief, the Assessor does not rely as heavily on Mr. Wisdom’s report[s] as one might expect.” D.R.0031.

<sup>20</sup> Mr. Wisdom’s initial report includes several references to the *Pipeline Rule of Thumb*, but fails to list the date of the publication, the person or entity that published it, or a citation that would allow MarkWest Liberty NGL or this Court to access and review the document. D.R.0610-11, 0706.

Per the WVOTA, Ms. Hobart's primary argument that "there is no economic obsolescence in the property" is based on the position that the "situation/economic obsolescence must be permanent." D.R.0024, 0220, 0228, 0230-31, 0581. As noted by Mr. Kistler, economic obsolescence is caused by an outside force and is something the taxpayer has no ability to control, but that does not mean that it is permanent. D.R.0952. The WVOTA agreed with Mr. Kistler's analysis, noting that "[i]n his post-hearing brief, the Assessor abandons Ms. Hobart's contention that economic obsolescence must be permanent, and instead provides citation to three authorities that acknowledge the permanent or incurable nature of economic obsolescence." D.R.0025. The WVOTA rejected the Petitioner's position, noting that West Virginia law "clearly contemplates the permanent versus incurable distinction argued by the parties," and includes multiple examples of conditions that lead to economic obsolescence that are not permanent, including changes in supply and demand and legislative restrictions. D.R.0025. The WVOTA, in disagreeing with Ms. Hobart, rightly found "that the loss in value is attributable to changes in the supply and demand relationship," to be an incurable, but not permanent, condition. D.R.0025.

In his brief to this Court, Petitioner attempts to resurrect Ms. Hobart's argument, citing to an American Society of Appraisers publication and case law that simply do not stand for the proposition that economic obsolescence is permanent. *See* Pet. Brief, pp. 21-22. The American Society of Appraisers ("ASA") very clearly states that when the operating level of an asset is significantly less than its design capacity and the condition is "expected to exist for *some time*," such inutility can be a measure of obsolescence. Am. Soc'y of Appraisers, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets*, p. 68 (4<sup>th</sup> ed. 2020) (emphasis added). The ASA clearly does not state that the inutility must be

“permanent.”<sup>21</sup> MarkWest Liberty NGL’s pipelines have operated well below design capacity<sup>22</sup> for several years, and economic obsolescence has been requested for tax years 2021-24 – clearly the condition has existed for “some time.” D.R.1063. Petitioner invokes the ASA language in his brief, but does not make a serious argument that the “for some time” language equates to “permanence.”

The two cases cited by Petitioner in arguing that economic obsolescence must be permanent are not persuasive. While the Court in *Midwest Processing* states that “an element of incurable or permanent impairment prevails throughout all of the potential causes” for economic obsolescence, the Court acknowledges in footnote 2 that “[w]e recognize that an increase in the future production of sunflower seeds may result in a reduction or even the elimination of economic obsolescence. [Citation omitted.] While this may seem contrary to what we have just noted concerning incurable permanent nature of obsolescence, it is not so when we consider that the initial determination is based upon a *reasonable belief that the economic obsolescence is*

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<sup>21</sup> See also International Association of Assessing Officers’ Glossary for Property Appraisal and Assessment, 3<sup>rd</sup> Ed. (2022) for the proposition that “[e]xternal obsolescence is a type of **temporary or permanent depreciation** caused by negative factors outside of the property” (emphasis added). Notably, Ms. Hobart is a member of the IAAO and was listed as its chair on the 2022 glossary. Petitioner cites to an earlier document from the International Association for Assessing Officers’ that states that “[e]conomic obsolescence is considered to be a permanent loss in value from outside sources.” D.R. 0564. This language pre-dates the 2022 glossary, and goes against scads of other authorities that provide that economic obsolescence can be temporary **or** permanent.

<sup>22</sup> In his brief, Petitioner acknowledges that MarkWest Liberty NGL’s pipelines were operating below their design capacity as of the assessment date. Pet. Br. p. 29. Instead, he focuses on the testimony of Tim Wheeling, a Marathon petroleum and natural gas engineer, regarding design capacity of the lines for prior years. Pet. Br. pp. 6-7, 30-31. Part of Mr. Wheeling’s duties as an engineer is to identify throughput deficiencies and advise management on projects that should be considered to ensure that Marathon’s pipelines and processing facilities are operating as intended. D.R.0933-34. Mr. Wheeling’s process to determine if there were throughput deficiencies as of the July 1, 2022, assessment date involved tracking and metering the number of barrels that were run through various pipeline segments from July 1, 2021, to June 30, 2022, and comparing those figures to the design capacity for each line. D.R.0932, 0935, 0946-47. The misguided focus on Mr. Wheeling’s testimony regarding prior years is a red herring. Mr. Wheeling testified regarding design capacity and throughput deficiencies for the lines for the 12-month period prior to the July 1, 2022, assessment date, which is the pertinent date for purposes of tax year 2023.

*incurable.*” *Midwest Processing Co. v. McHenry County*, 467 N.W.2d 895, 898, fn. 2 (N.D. 1991) (emphasis added). Thus, the *MidWest Processing* court acknowledges the difference between permanence and incurability. The *Governours Square Apts.* case cited by the Petitioner also stands for the proposition that economic obsolescence is not curable but does not state that it is permanent, and the language from the case quoted by Petitioner says precisely that. *Governours Square Apts. v. State Bd. Of Tax Comm’rs*, 528 N.E.2d 864, 866 (Ind. Tx. Ct. 1987).

As noted above, Mr. Wisdom undertook a cost-based analysis review of economic obsolescence. His conclusion under that method was that the trend and physical depreciation tables used throughout the state of West Virginia are “lenient” with economic obsolescence “baked into” the tables.<sup>23</sup> D.R.0608-09, 0612-13. Mr. Wisdom used an alternate trend table and his own depreciation schedule in determining that the NGL pipelines were undervalued via the Petitioner’s use of the *Marshall Valuation Service*<sup>24</sup> trend and depreciation tables, concluding that this demonstrates that substantial “economic obsolescence” is included in the valuation model used by assessors throughout West Virginia. Specifically, he hand-picked the Handy-Whitman Index of Public Utility Construction – which are used to value public utility pipelines,

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<sup>23</sup> Mr. Wisdom said as much in his testimony, stating that under the West Virginia cost approach to value there is a “14.8% measurement” of economic obsolescence in using the *Marshall Valuation Service* to calculate a “replacement cost new.” D.R.0273, 0278, 0608-09, 0612-13. Ultimately, Mr. Wisdom calculated a fair market value of approximately \$344MM for the pipelines owned by the three MarkWest entities in Wetzel County, over \$112MM higher than the Assessor’s state mandated cost-based valuation, and higher than the historical-installed cost of the lines. D.R.0278, 0613. Mr. Wisdom concluded that the approximately \$112MM difference between its cost-based methodology value and the Assessor’s cost-based methodology value represented 32.56% of economic obsolescence being “baked in” to West Virginia’s model. D.R.0278, 0613. However, the Assessor, while relying heavily on Mr. Wisdom for economic obsolescence purposes, stood by his appraised value of approximately \$232MM. D.R.1026.

<sup>24</sup> To tax industrial and commercial machinery and equipment “in proportion to its value” the Legislature, via the Legislative Rule, directed that the *Marshall Valuation Service* serve as the source guide for trending and physically depreciating such property. See Article X, § 1 of the Constitution of West Virginia which provides that property be “taxed in proportion to its value as to be ascertained as directed by law.” The Legislative Rule is the primary law used to determine the value of industrial and commercial properties throughout the state, but Mr. Wisdom chose to ignore it.

among other types of public utility property and are not referenced under West Virginia law - as the trend table to calculate a “replacement cost new” of MarkWest Liberty NGL’s pipelines. D.R.0273. More egregiously, and to compound his error, Mr. Wisdom decided to physically depreciate (without any citation to an outside authority)<sup>25</sup> MarkWest Liberty NGL’s pipelines at 1% per year for an indefinite period, presumably 80-100 years. D.R.0274. The “Depreciation” discussion portion of the *Marshall Valuation Service*<sup>26</sup> includes a life expectancy range of 17.5 to 26.5 years for “pipeline transportation” property, and West Virginia’s 20-year depreciation timeline for large, plant-to-plant transmission lines reflects the life expectancy asset range published by the *Marshall Valuation Service*.<sup>27</sup>

Mr. Wisdom’s conclusion that the “undervaluation” of the NGL pipelines by the Petitioner, based on legislatively mandated *Marshall Valuation Service* trend and physical depreciation tables, means that economic obsolescence is automatically factored into the value of the pipelines is completely unsupported by West Virginia law.<sup>28</sup> Mr. Wisdom backed into a

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<sup>25</sup> The lack of citation is not by accident: there are no physical depreciation schedules that MarkWest Liberty NGL have located that physically depreciate any type of property in the United States at 1% per year for 80 to 100 years. See D.R.0275, 0277, 0321-22. In fact, the longest depreciation time frame in West Virginia for any type of commercial or industrial property is 30 years, with pipeline transportation property physically depreciated over 20 years.

<sup>26</sup> Mr. Wisdom confoundingly asserts that the *Marshall Valuation Service* – which is used by multiple states to calculate physical depreciation – “is not a physical depreciation table.” D.R.0243, 0274-75. The California Board of Equalization includes the tables on its website. The tables includes life expectancy guidelines for various types of property for purposes of physically depreciating those properties. See <https://www.boe.ca.gov/CountyPortal/Training/Uploads/Course%20002B/Class%20Materials/Marshall%20and%20Swift/Marshall%20&%20Swift.pdf>, section 97, pp. 10-21. See also D.R.0320-21 for Mr. Kistler’s discussion of the loss in value caused by physical depreciation of property.

<sup>27</sup> *Marshall Valuation Service*, section 97, page 21, accessible at <https://www.boe.ca.gov/CountyPortal/Training/Uploads/Course%20002B/Class%20Materials/Marshall%20and%20Swift/Marshall%20&%20Swift.pdf>

<sup>28</sup> There is no reference in the Legislative Rule indicating that economic obsolescence is factored into the *Marshall Valuation Service* trend and depreciation tables used by the Petitioner. However, “some” functional obsolescence is accounted for in the *Marshall Valuation Service* depreciation tables. W. Va. Code St. R. § 110-1P-3.5.3. Mr. Wisdom testified that the *Marshall Valuation Service* physical depreciation tables account for economic obsolescence. D.R.0277, 0279, 0305. However, section 97, page 1 of the Marshall and Swift Depreciation materials could not be clearer: “[e]xternal, locational or

calculation of economic obsolescence by using trend and depreciation tables that are not used in West Virginia to calculate a value significantly higher than the Petitioner's appraised value, then concluding that this higher value means that economic obsolescence is "baked into" West Virginia's model.<sup>29</sup>

As noted by the WVOTA, Petitioner backpedaled from Mr. Wisdom's cost-based economic obsolescence analysis at the WVOTA appeal level, concluding that "regardless of whether Mr. Wisdom's opinion is correct on this point, the effect is the same [no adjustment for obsolescence is warranted]." D.R.0029. Petitioner does not attempt to justify Mr. Wisdom's cost-based analysis in his brief to this Court, and the WVOTA's decision to discard this method was supported by substantial evidence and by a rational basis.

Mr. Wisdom's initial report also includes an "Income Capitalization Method" in which he determined that a small amount of economic obsolescence existed for the MarkWest Liberty NGL lines, concluding that the value of the NGL lines was \$701,672,144. D.R.0736. The WVOTA notes that this initial "income based" methodology was apparently "jettisoned" in favor of two subsequent income-based analyses. D.R.0037. WVOTA determined that the initial income-based analysis "undermines Mr. Wisdom's overall credibility, while simultaneously showing that Mr. Kistler's capitalization of income loss method was sound." D.R.0037-38.<sup>30</sup>

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economic obsolescence is loss in value due to causes outside the property and independent of it, ***and is not directly included in the [depreciation] tables.***" (emphasis added). See D.R.0319-20.

<sup>29</sup> Mr. Wisdom's cost-based analysis of economic obsolescence suggests that economic obsolescence is accounted for *in every commercial pipeline* in West Virginia, regardless of whether there is an outside force that adversely affects the value of the pipelines. Based on his alternate cost-based appraisal analysis, a pipeline operating at 100% capacity has the same amount of built in economic obsolescence as a pipeline operating at 10% capacity. D.R.0279. The analysis is absurd on its face.

<sup>30</sup> Mr. Wisdom's credibility as an expert has been called into question in a recent case in Arkansas. See *Merit Energy Midcon v. Dana Baker, Pope County Assessor, et al.*, Circuit Court of Pope County, Arkansas, 3<sup>rd</sup> Division, Case No. 58CV-2021-525 (April 2, 2024), available at <https://caseinfonew.arcourts.gov/opad> (search under 58CV-21-525, with the entry of judgment included under the Docket Entries category). The circuit court judge in that matter notes that "[a]lthough the Court

This determination is supported by substantial evidence and by a rational basis. Petitioner does not attempt to justify Mr. Wisdom’s “Income Capitalization Method” in his brief to this Court.

Following the initial day of the WVOTA hearing, Mr. Wisdom was permitted to submit a second report that attempted to analyze economic obsolescence using a direct capitalization approach and a discounted cash flow method, neither of which Mr. Wisdom had used to value FERC regulated pipelines before, as noted by the WVOTA.<sup>31</sup> D.R.0038, 0249, 0293, 0741.

Mr. Wisdom relied upon his direct capitalization method and a discounted cash flow method to again determine that no adjustment for economic obsolescence was warranted for MarkWest Liberty NGL’s pipelines. D.R.0263, 0269, 0777-82. Incredibly, his valuation of the NGL lines jumped from approximately \$701MM using the income capitalization method in his first report, to approximately \$1.3BB using the direct capitalization approach or \$1.2BB using the discounted cash flow analysis, per his second report. D.R.0338, 0736, 0778.

Mr. Kistler testified that in his experience he had never seen a FERC regulated pipeline valued in the manner that Mr. Wisdom used in his second report.<sup>32</sup> D.R.0334. Mr. Kistler’s conclusion reflects Mr. Wisdom’s complete lack of experience in calculating economic

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allowed Mr. Wisdom to testify as an expert, for the reasons set forth herein, the Court finds that ***Mr. Wisdom’s testimony and [his] Report were contradictory, not credible, and not supported by sound or recognized appraisal methodology or data.***” (emphasis added). *Id.* at p. 8. The judge proceeded to state that, “Mr. Wisdom’s testimony and [his] Report in this case reflect overt bias in favor of the Assessors and against the taxpayer Merit and in such a manner that violates the dictates of USPAP’s Ethics Rule [which prohibits biased or predetermined results]. The Court further finds that this bias limits the relevance and any persuasiveness of [his] Report.” *Id.* at 17.

<sup>31</sup> The Petitioner states in his brief to this tribunal that “[o]nce 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 using the cost approach.” Pet. Br. p. 20. However, FERC information, including FERC Form 6, is publicly available information that was ***always available*** a fact that Mr. Wisdom was not aware of despite holding himself out as an expert on economic obsolescence and the valuation of FERC-regulated pipelines. D.R.0181.

<sup>32</sup> Mr. Wisdom had never valued FERC pipelines using the two methods he employed in his second report. D.R.0014, 0293.

obsolescence using the direct capitalization or discounted cash flow approach, a point reached by the WVOTA: “[w]e find Mr. Wisdom’s two income method calculations (direct capitalization & discounted cash flow) in his second report to be unconvincing [based on] his admission that he had never before calculated economic obsolescence utilizing these methods,” and, “[f]urthermore, Mr. Wisdom’s methods in his second report suffered from numerous omissions and unexplained anomalies, thereby rendering them unconvincing.” D.R.0039

The WVOTA’s holding that the Petitioner was “incorrect in his reliance on the economic obsolescence determinations contained in the Hobart and Wisdom reports” is supported by substantial evidence and by a rational basis. D.R.0042.

**C. WEST VIRGINIA LAW DOES NOT REQUIRE A TAXPAYER TO PERFORM AN ALTERNATE APPRAISAL IN CONJUNCTION WITH A REQUEST FOR THE APPLICATION OF ECONOMIC OBsolescence AND THE WVOTA'S DECISION NOT TO IMPOSE SUCH A REQUIREMENT WAS CORRECT**

MarkWest Liberty NGL has never taken exception with the Petitioner’s application of the cost methodology to value its NGL pipelines, or with the Petitioner’s use of the *Marshall Valuation Service* trend and depreciation tables. D.R. 0319-20, 0907, 0949-50. MarkWest Liberty NGL only took exception to the Petitioner’s failure to consider economic obsolescence once the cost methodology was used to value the NGL pipelines.

In his introduction, the Petitioner states that MarkWest Liberty NGL “cannot lose value [it] never had,” arguing that MarkWest Liberty needed to provide appraisals (both in the absence of economic obsolescence and with an accounting for economic obsolescence) for the Petitioner to consider economic obsolescence.

The WVOTA’s decision not to address this argument was supported by substantial evidence and by a rational basis because there is no requirement under West Virginia law that a taxpayer request an adjustment for economic obsolescence to first perform an alternate appraisal



of the property, a point conceded by one of the Petitioner’s consultants. D.R.0282-83. The Petitioner calculated a “replacement cost new” for MarkWest Liberty NGL’s pipelines and then physically depreciated them, and Petitioner does not, and cannot, cite to any authority – West Virginia or otherwise – providing that a taxpayer’s request for economic obsolescence may only be considered if the taxpayer first performs its own appraisal.

Quite simply, if the cost approach is used in West Virginia, assessors are to use the *Marshall Valuation Service* trend and depreciation tables.<sup>33</sup> MarkWest Liberty NGL acknowledged the regulatory constraints imposed on the Petitioner and instead focused its analysis on calculating an economic obsolescence percentage adjustment based on approaches commonly employed in the appraisal industry, including the inutility method, rate of return on capital method, capitalization of income method, and the blue-chip method. An alternate appraisal was not performed because that is not a necessary step in the consideration of economic obsolescence.

**D. THE WVOTA'S DECISION WAS CORRECT IN OBSERVING COVID'S IMPACT ON SUPPLY AND DEMAND BETWEEN MARKWEST LIBERTY NGL AND ITS CUSTOMERS**

Contrary to the position taken by the Petitioner in his brief, WVOTA’s determination regarding the external factors that mandated an economic obsolescence adjustment for the NGL lines was not based on the broad impact of the COVID-19 impact on the global economy, but on the specific impact that the pandemic had on the production of natural gas, and on MarkWest Liberty NGL and its customers. WVOTA accurately details the specific external causes impacting the utilization of the NGL lines in its decision: 1) beginning in 2018, MarkWest

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<sup>33</sup> See W. Va. Code St. R. § 110–1P-3.5.1. See West Virginia State Tax Department Administrative Notice 2021-12, “Property Tax: State Tax Commissioner’s Statement Concerning Primary Reliance on the Cost Approach to Value for Appraisals of Industrial Personal Property (I.E. Machinery, Equipment, Furniture, Fixtures, and Leasehold Improvements) Pursuant to § 110 CSR 1P-2.5.3.1.”

Liberty NGL began installing 20-inch NGL lines in anticipation of carrying an increase in production of NGLs in the region; 2) the expected increase did not occur “in large part” because of the economic downturn occasioned by COVID, which lessened demand for the NGLs traveling through MarkWest Liberty NGL’s pipelines, causing investors to pull back and to demand that producers reallocate profits in order to provide a greater return for investors, rather than to continue to increase natural gas reserves; 3) the lessened demand for NGLs led to a scaling back of the construction of planned natural gas processing facilities; and 4) the throughput deficiencies for the NGL lines resulting from the scaling back in natural gas production were a direct result of changes in supply and demand relationships between MarkWest Liberty NGL and its customers. D.R.0011-12.

As noted by WVOTA, *the hearing for this matter lasted twelve hours and the parties submitted hundreds of pages of exhibits and post-hearing briefs.* D.R.0019. A significant portion of the hearing focused on the external factors that caused the NGL lines to operate well below design capacity, and WVOTA relied upon that information in its decision. In other words, WVOTA took judicial notice of the impact of COVID on the global economy, but analyzed the *specific impact* the downturn had on MarkWest Liberty NGL’s pipelines. This analysis was supported by substantial evidence and by a rational basis.

In fact, Mr. Kistler’s report – the primary document introduced and relied upon by MarkWest Liberty NGL in arguing for an economic obsolescence adjustment – addresses this issue head on, explaining that the *entire oil and natural gas market shifted* at the outset of the COVID-19 pandemic: “[l]ike many industries, the effects of the global reaction to COVID-19 had significant implications on the oil and natural gas industry. Investment was halted, demand crashed and [at] one point during 2020, oil traded at a negative level for the first time in history.

The resulting ripple effect has caused volumes to be significantly lower than initially modeled when the decision to invest [in the natural gas liquid (“NGL”) lines] took place. This is especially true with the recently constructed 20” NGL pipeline. As a result of this reduced demand, the anticipated volumes that the subject pipelines carry have been reduced.” D.R.0398. As Mr. Kistler noted in his economic obsolescence report, the “reduction in anticipated volumes is usually an indicator that there is some form of economic obsolescence which requires analysis.” D.R.0399.

In support of this point, MarkWest Liberty NGL provided extensive evidence to address the external factors causing the throughput deficiencies of its pipelines in Wetzel County and the necessity for the application of economic obsolescence in appraising the NGL pipelines for property tax purposes for tax year 2023. D.R.0905, 0214-15, 0316-18. As reflected in the WVOTA’s decision, the slowdown in the production of natural gas resulted in MPLX LP – a master limited partnership affiliated with Marathon Petroleum Corporation and MarkWest Liberty NGL - to delay construction projects for several planned processing facilities to be constructed to process NGLs transported by larger, 20” NGL pipelines installed by MarkWest Liberty NGL. D.R.0212, 0214, 0905, 0926-27, 0929, 0933.

Petitioner’s focus on a lack of decrease or slowly improving increase in volumes for the NGL lines, slowly increasing revenues, or a healthy composite price of NGLs evidences his continued lack of understanding of the concept of economic obsolescence. Pet. Br. pp. 9-10, 27-31. As noted by Mr. Kistler, he analyzed “Volume Forecasts” for MarkWest Liberty NGL’s lines and noted that the flow for NGLs will remain relatively flat into the near future. D.R.0447-48, 0966-67. As the flow for NGLs increases, the amount of economic obsolescence is *likely* to lessen. However, a lack of decrease or slowly improving increase in volumes, slowly improving

revenues, or a healthy composite price for NGLs does not mean that economic obsolescence issues are immediately eradicated, and Petitioner cannot and does not cite to any authority for that proposition.<sup>34</sup>

**E. THE WVOTA DID NOT RELY UPON MARKWEST LIBERTY NGL'S "INUTILITY" OR "THROUGHPUT DEFICIENCIES" AS THE SOLE BASIS FOR ITS ANALYSIS OF ECONOMIC OBSOLESCENCE, AND THE WVOTA'S RELIANCE ON AN INCOME-BASED APPROACH TO QUANTIFY ECONOMIC OBSOLESCENCE WAS CORRECT**

In its decision, the WVOTA notes that the Assessor devoted five pages to address perceived errors in Mr. Kistler's inutility method.<sup>35</sup> D.R.0021. In his initial brief to this Court, the Petitioner devotes six pages to its argument that the WVOTA erred in "relying on" inutility or throughput deficiencies in evaluating economic obsolescence. Pet. Br. pp.29-34 However, the WVOTA decision clearly indicates that the throughput deficiencies were the "starting off point for Mr. Kistler's economic obsolescence calculations" and "that as of July 1, 2022, the assessment date in this matter, the three 20-inch NGL lines were being utilized at 28%, 36%, and 47% of their design capacity, respectively."<sup>36</sup> D.R.0020.

However, the WVOTA did not use Mr. Kistler's inutility analysis in quantifying the amount of economic obsolescence, clearly stating that "Mr. Kistler's capitalization of income loss

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<sup>34</sup> Obviously, that the stock price of Zoom Communications, Inc. does not factor into the analysis of whether an asset located in Wetzel County, West Virginia should have its value adjusted to account for economic obsolescence. Additionally, the stock price of MPLX LP – which owns billions of dollars of assets throughout the United States – is hardly determinative of whether a specific segment of pipeline in West Virginia suffers from economic obsolescence. See Pet. Br. p. 27.

<sup>35</sup> Despite multiple authorities establishing inutility as a valid measure of economic obsolescence, the Petitioner once again claims that inutility cannot be used as a tool to measure it. See Pet. Br. p. 29, D.R.0173-75 (citing the American Society of Appraisers and multiple cases that state that inutility is often a form of economic obsolescence). Regardless, the WVOTA clearly did not rely on Mr. Kistler's inutility analysis in quantifying economic obsolescence.

<sup>36</sup> As noted by Marathon engineer Tim Wheeling, design capacity does not anticipate that each line operates at 100% capacity, and that the actual number of barrels that each line could handle is larger than the design capacity. The amount NGLs transported through the lines is a function of how much product natural gas producers are supplying to be processed at MarkWest processing facilities. D.R.0932, 0935.

method does not arrive at an economic obsolescence percentage based upon simply taking, for example, the 28% utilization of the [NGL] line from Sherwood to Mobley and saying, as a result, the economic obsolescence percentage is 72%.” D.R.0022. Rather, after reviewing the throughput deficiency issues associated with the lines and determining the economic obsolescence likely existed, Mr. Kistler quantified the amount of economic obsolescence using multiple generally accepted methods. As such, per the WVOTA “the Assessor’s arguments about the percentages of inutility or throughput deficiencies are not determinative to our decision, *because Mr. Kistler’s capitalization of income loss method did not utilize those numbers.*” D.R.0021-22.<sup>37</sup> (Emphasis added). This holding is supported by substantial evidence and on a rational basis.

#### **F. THE WVOTA’S RELIANCE ON MARKWEST LIBERTY NGL’S CAPITALIZATION OF INCOME LOSS METHOD TO QUANTIFY ECONOMIC OBSOLESCENCE WAS CORRECT**

The capitalization of income loss method is a generally accepted economic obsolescence measurement method that involves an analysis of one or more property-specific income metrics (profit margin or rate of return); a selection of corresponding benchmark income metrics (e.g., historical, projected, industry, comparable property); a calculation of the difference between the property-specific actual income metric and the benchmark income metric; and application of the difference in the income metrics to the subject unit property. *See* “Best Practices for Economic Obsolescence Measurements,” Robert F. Reilly, CPA (2023).<sup>38</sup>

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<sup>37</sup> As established before the WVOTA, MarkWest Liberty NGL built out its 20-inch NGL lines with the anticipation of increased volumes filling those lines. The Petitioner tepidly asserts that “MarkWest’s own business decisions or some other internal factor” has caused the lines to operate at *less than 50% of design capacity for several years*. The WVOTA correctly determined – after hearing hours of testimony and reviewing thousands of pages of exhibits – that an external factor resulted in the economic obsolescence of the lines, not a business decision to save over 50% of the capacity of the lines for “future growth.”

<sup>38</sup> [https://citizenscommercial.com/923/BP\\_Economic\\_Obsolence\\_Meas.pdf](https://citizenscommercial.com/923/BP_Economic_Obsolence_Meas.pdf). *See also* “Guide to Property Tax Valuation,” Robert F. Reilly and Robert P. Schweih (Williamette 2008).

While West Virginia courts have not analyzed the capitalization of income loss method in the context of economic obsolescence, other jurisdictions have approved of its application, including an Arizona court that applied economic obsolescence to pipeline property. *See Transwestern Pipeline Company v. Arizona Department of Revenue*, 2020 WL 4529622 (Court of Appeals of Arizona, Division 1, 2020) (citing *Eurofresh, Inc. v. Graham County*, 218 Ariz. 382, 187 P.3d 530, *supra*). In evaluating the *Eurofresh* “cause of economic obsolescence” prong, the court in *Transwestern Pipeline* held that “economic conditions are a recognized source of economic obsolescence.” *Id.* at 9. In evaluating the *Eurofresh* “quantity prong,” the court approved of the taxpayer’s expert’s quantification of economic obsolescence “using the capitalization of income loss method” which estimates economic obsolescence by “comparing [taxpayer’s] profitability measures (with economic obsolescence) to selected profitability measures (without economic obsolescence).”<sup>39</sup> *Id.* The difference between the two – the income loss – represents economic obsolescence. Finally, in addressing the *Eurofresh* “effect/affect” prong, the Court held that the Tax Court was justified in holding that the taxpayer had demonstrated that the economic obsolescence had an actual effect on its property, and its application of economic obsolescence was affirmed. *Id.* at 10. *See also Guardian Energy, LLC v. County of Waseca*, 868 N.W.2d 253 (Minn. S. Ct. 2015) (holding that “the capitalization of income loss attributable to . . . negative market influences is a generally respected approach to calculationg external obsolesence”).

The obsolescence analysis report performed by Mr. Kistler properly applied the capitalization of income loss method to arrive at a suggested economic obsolescence adjustment

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<sup>39</sup> Richard Reilly, the taxpayer’s expert, quantified economic obsolescence under the capitalization of income loss method via two analyses: 1) he “compare[d] the [taxpayer’s] recent rates of return with historical rates of return” and 2) he compared the taxpayer to “guideline pipeline companies” by comparing the taxpayer’s “rate of return to the return of six pipelines of a similar size and age that operate in the southwestern United States.” He averaged the two to calculate economic obsolescence.

of 35% for the NGL lines.<sup>40</sup> D.R.0409, 0426. The WVOTA's reliance on the capitalization of income loss method to quantify economic obsolescence was supported by substantial evidence and by a rational basis.

The Petitioner's primary argument against use of the capitalization of income loss method is that the 12.20% weighted average cost of capital ("WACC") for the NGL pipelines under Mr. Kistler's capitalization of income loss method was too high. D.R.0449-0451.<sup>41</sup> Petitioner's basic arguments regarding the WACC percentage used by Mr. Kistler are that: 1) the guideline companies used in calculating the WACC are not true peers of MarkWest Liberty NGL and 2) the chosen growth rate of 0% for purposes of the WACC calculation is too low and not an accurate representation of the potential growth of MarkWest Liberty NGL. Pet. Br. pp. 35-36.

Regarding the guideline companies chosen by Mr. Kistler, the WVOTA correctly relied upon Mr. Kistler's testimony that it is important to consider an entire industry when developing a WACC. D.R.0032-33. Specifically, Mr. Kistler testified that the company is "closely tied" to producers in the industry and is in the same geographic area as many of the oil and gas industry companies included amongst the guideline companies. D.R.0348. As such, the WVOTA did not err in determining that Mr. Kistler's testimony regarding the guideline companies was both logical and credible. D.R.0032. Additionally, because the external factor resulting in economic obsolescence in this matter was based on a significant change in the "supply and demand relationship between the property owner and natural gas producers," the WVOTA found it

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<sup>40</sup> Petitioner's brief deems Mr. Kistler's detailed, exhaustively researched capitalization of income loss method a "tortured analysis of cherrypicked data." Pet. Br. p. 3. Judge Pollack of the WVOTA – who presided over this matter, heard multiple days of testimony, and reviewed reams of reports from both Mr. Kistler and the Petitioner's outside consultants – deemed Mr. Kistler's testimony and analysis logical and credible at every turn.

<sup>41</sup> A higher WACC percentage results in a lower valuation of property. D.R.0358.

sensible for Mr. Kistler to include both transporters and producers amongst the guideline companies used in developing the WACC. D.R.0032-33.

In arguing that reliance on the guideline companies resulted in an overinflated WACC, the Petitioner notes that the cost-of-service capital rates reported on MarkWest Liberty NGL's FERC Form 6<sup>42</sup> were 8.48% in 2021 and 8.08% in 2022. Pet. Brief p. 36.

However, Mr. Kistler addressed the issue with using the FERC cost-of-service capital rate, in detail, in his testimony before the WVOTA, explaining that the cost-of-service rates are not market-based weighted average cost of capital rates. D.R.0339, 0345, 0347. For example, investors require a return for inflation, but the cost of service WACC in the strips out inflation. D.R.0359. The generally accepted appraisal practice employed by experts in the valuation and appraisal industry is to develop a market-based WACC, which is precisely what Mr. Kistler did. D.R.0345-46. The WVOTA properly held that "Mr. Kistler's testimony that a market based WACC is necessary and commonly utilized" was "credible." D.R.0033.

Notably, Mr. Wisdom cherry-picked certain data from an Oklahoma Tax Commission's capitalization rate study to calculate his own WACC of 8.72% for the NGL lines under his income capitalization method. The Oklahoma Tax Commission – which published WACC rates for fluid pipelines for 2022 that are almost identical to the WACC rates calculated by Mr. Kistler – goes through the process of developing a market-based WACC rate for fluid pipelines every year. D.R.0326-27.<sup>43</sup> If calculating a WACC rate was as easy as referring to the cost-of-service rate on the FERC forms, there would be no need for Oklahoma or any other state to develop a

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<sup>42</sup> FERC Form 6 includes a cost-of-service analysis that can be viewed by the public. The cost-of-service analysis includes a cost of equity, cost of debt, and a capital structure of the company – often the parent company – and that figure is used to calculate revenue requirements on cost of service.

<sup>43</sup>The 2023 Oklahoma Tax Commission Capitalization Rate Study may be accessed at the following web address: <https://oklahoma.gov/content/dam/ok/en/tax/documents/resources/publications/ad-valorem/2023CapitalizationRateStudy.pdf>



WACC rate for FERC property, a point echoed by the WVOTA: “if the state could just utilize each pipeline company’s FERC report WACC [it would make no sense to develop a fluid pipeline WACC].”<sup>44</sup> D.R.0033, 0360. Oklahoma developed its own WACC rates because they are market-based rates. Mr. Kistler did the same, consistent with generally accepted appraisal practices.

Petitioner also takes the position that MarkWest Liberty NGL’s historical average growths in revenue, net income, earnings, total assets, and total tangible personal property between 2019 and 2021 required that a growth rate higher than 0% be used in perpetuity. Pet. Br. p. 9-10. Mr. Kistler addressed the growth rate included in his obsolescence analysis at length during the WVOTA hearing, explaining the difference between historical growth rates and anticipated growth rates, and explaining why conservative numbers were included in his analysis. D.R.0994-95. The WVOTA addresses the growth rate explanation in its decision, citing Mr. Kistler’s testimony that “from 2019 forward, you have after federal tax income of \$54 million, then \$60 [million], then \$59 million, and then \$58 [million]. So, we haven’t seen just a perpetual income increases that warrants [a growth rate above 0%]. With regards to the NGL would be the fact that those volumes have ramped up and the future is not as rosy as anticipated on the day. So, there’s no growth concluded with that.” D.R.0035. WVOTA held that Mr. Kistler’s use of the 0% growth rate for the NGL lines was “more credible” than the growth rate used by Mr. Wisdom. D.R.0035.

Petitioner notes in his brief that WVOTA stated in its decision that “the record is somewhat confusing” as it relates to growth rates. Pet. Br. p. 37. However, the confusion has

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<sup>44</sup> Mr. Wisdom could provide no reasonable explanation for why the Oklahoma WACC for fluid pipelines was 12.29% for calendar year 2022, a figure that approximates the 12.20% NGL WACC used by Mr. Kistler. D.R.0284-86, 0544.

nothing to do with Mr. Kistler's testimony and report, and everything to do with the testimony and multiple reports provided by Mr. Wisdom. The WVOTA notes that Mr. Wisdom offered "somewhat confusing testimony" regarding the growth rate that he picked for his discounted cash flow analysis, and that Mr. Wisdom had used a 0% growth rate under both a direct capitalization method and income capitalization method. D.R.0014, 0033. As noted *supra*, the WVOTA called into question Mr. Wisdom's credibility on multiple occasions, and averred that the capitalization of income loss method used by Mr. Kistler was sound because "Mr. Wisdom followed the exact same steps in his methodology," including the use of a 0% growth rate. D.R.0037-38.

**G. THE WVOTA'S DECISION TO QUANTIFY THE AMOUNT OF ECONOMIC OBSOLESCENCE BASED SOLELY ON THE CAPITALIZATION OF INCOME LOSS METHOD PERCENTAGE WAS CORRECT**

MarkWest Liberty NGL analyzed economic obsolescence using four generally accepted methodologies<sup>45</sup>: 1) the inutility method, 2) the rate of return on capital method, 3) the capitalization of income loss method, and 4) the blue-chip method. D.R.0401-09, 0953-54, 0956-58. The recommended amount of economic obsolescence was based on a weighted "blend" of the four methods.<sup>46</sup> D.R.0409. While all four methods are widely used in the appraisal industry (and acceptable methods under West Virginia law) the WVOTA opted to employ only the capitalization of income loss method to quantify economic obsolescence, and this decision is supported by substantial evidence and by a rational basis.<sup>47</sup> The WVOTA is granted broad

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<sup>45</sup> See Am. Soc'y of Appraisers, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets* pp. 68-71 (4<sup>th</sup> ed. 2020)

<sup>46</sup> After determining that there were external factors causing economic obsolescence, Mr. Kistler quantified economic obsolescence using the four generally accepted economic obsolescence measurement methods. D.R.0401-09, 0953-54, 0956-58.

<sup>47</sup> MarkWest Liberty NGL detailed all four methods in its initial WVOTA brief. D.R.0157-0160, 0173-0178. Because MarkWest Liberty NGL is not arguing that the WVOTA was *required* to apply all four

authority in determining the outcome of a case, and it may reverse, modify, or vacate and assessment of tax or grant other relief necessary or appropriate to dispose of a matter. W. Va. Code § 11-10A-12.

Notably, the capitalization of income loss method recommended the lowest economic obsolescence percentage adjustment of the four methods. While MarkWest Liberty NGL does not agree with the WVOTA's conclusion that capitalization of income loss method was the only method presented that satisfies West Virginia law (as discussed in MarkWest Liberty NGL's counter assignment of error below), the WVOTA – as a quasi-judicial body under West Virginia law subject to the State Administrative Procedures Act<sup>48</sup> – unequivocally has the authority to evaluate the record of the proceeding before it and to decide upon the method that it deems most appropriate to quantify economic obsolescence, whether that be a single method or a blend of the four methods used by Mr. Kistler. Petitioner fails to cite any authority saying otherwise. *See* Syl. pt. 4, *West Virginia State Police v. Walker*, 246 W. Va. 77, 866 S.E.2d 142 (2021) (“A reviewing court must evaluate the record of an administrative agency's proceeding to determine whether there is evidence on the record as a whole to support the agency's decision. The evaluation is conducted pursuant to the administrative body's findings of fact, regardless of whether the court would have reached a different conclusion on the same set of facts.”).

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methods in reaching its recommendation for an adjustment based on economic obsolescence, it is not rehashing all four methods before the ICA.

<sup>48</sup> W. Va. Code §§ 11-10A-1 and 11-10A-10(b).

**H. THE NET BOOK VALUE OF THE PIPELINES REPORTED ON MARKWEST LIBERTY NGL'S FERC FILINGS IS LOWER THAN THE PETITIONER'S APPRAISED VALUE OF THE LINES; THUS, THE CAPITALIZATION OF INCOME LOSS ECONOMIC OBSOLESCENCE PERCENTAGE OF 35% WAS A CONSERVATIVE NUMBER AND THE WVOTA'S DECISION TO APPLY THIS PERCENTAGE WAS CORRECT**

Petitioner argues that WVOTA erred in applying the 35% capitalization of income loss economic obsolescence percentage to the appraised value calculated by the Petitioner. Specifically, Petitioner notes that Mr. Kistler testified that the economic obsolescence percentage that he calculated under the capitalization of income loss method was applicable to the FERC net book value of the pipeline.

The WVOTA's decision not to address this argument was supported by substantial evidence and by a rational basis. The reason is simple: the "replacement cost new" less physical deterioration calculated by Petitioner using the cost methodology is *higher* than FERC net book value, meaning that the recommended economic obsolescence percentage using the capitalization of income loss method is a *more conservative number* than if it was to be applied against the Petitioner's cost-based methodology appraised figure. D.R.0329-30, 0353

Kistler's report directly addresses the conservative nature of the recommended economic obsolescence adjustment, noting:

these estimated obsolescence figures are a conservative measure for the intended use of this report. West Virginia law prescribes certain guidelines and measures that are used by the assessment community to help determine value. These measures include cost trending and physical depreciation calculations that differ from the FERC regulated rates. Our obsolescence analysis measures the amount of obsolescence as a comparison to the FERC books and financials, in valuation of FERC regulated pipelines, historical costs are not trended to a reproduction cost. This is because FERC does not allow a regulated pipeline the opportunity to earn a return above its investment cost. This is supported by the fact that a willing buyer would not pay more for an asset above its ability to earn a fair return on that investment.

D.R.0410.

**I. THE WVOTA ERRED IN HOLDING THAT ONLY ONE ECONOMIC OBSOLESCENCE METHOD USED BY MARKWEST LIBERTY NGL TO QUANTIFY ECONOMIC OBSOLESCENCE WAS A VALID METHOD UNDER WEST VIRGINIA LAW**

The WVOTA dismisses three of the economic obsolescence methods employed by Mr. Kistler because those methods were not income-based approaches, per W. Va. Code St. R. § 110-1P-2.12. This dismissal does not comport with the language under W. Va. Code St. R. § 110-1P-3.5.2 which establishes that, “[e]conomic obsolescence can *best be measured* by either a market approach method or an income method,” with an income measured being “*normally used*.” (emphasis added). While the WVOTA acknowledged this rule provision in footnote 8 of its decision (inadvertently referring to subsection 2.12), the tribunal nevertheless concluded that “the West Virginia Legislature, in promulgating Series 1P, did not envision the valuation of commercial property (and the attendant economic obsolescence calculations) utilizing methods other than the sales, cost or income methods. Moreover, in this matter we need not go too deep down that road, because both parties agree that Kistler report contains one methodology that meets the definition of an income approach.” D.R.0021.

While both parties agree that only the capitalization of income loss method is an income-based approach, MarkWest Liberty NGL reiterates its argument there is no mandatory directive under the Legislative Rule that economic obsolescence “shall” be measured using either a market approach or an income approach. *See Syl. Pt. 2, American Tower Corp. v. Common Council of City of Beckley*, 210 W. Va. 345, 557 S.E.2d (2001) (“It is well established that the word “shall,” in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation.’ [Citation omitted].” *See also State ex rel. Devono v. Wilmoth*, 248 W. Va. 654, 664, 889 S.E.2d 736, 746 (2023) (“when the word ‘may’ is used [in a statute]” it “generally signifies permission and connotes discretion.”)).

MarkWest Liberty NGL demonstrated that the methods used by Mr. Kistler to analyze economic obsolescence are widely used in the appraisal and property valuation industry, citing to multiple outside authorities and case law in support of their position. D.R.0086-87, 0172.

To be clear, MarkWest Liberty NGL acknowledges that the WVOTA has the authority determine which of the economic obsolescence methods is the best method to determine the calculation of economic obsolescence under West Virginia law and does not object to WVOTA's selection of the capitalization of income loss method (which, as noted above, recommends the lowest adjustment for economic obsolescence among the four methods analyzed by Mr. Kistler). However, MarkWest Liberty NGL believes that all four methodologies employed by Mr. Kistler in analyzing economic obsolescence are valid under West Virginia law and that the WVOTA's determination that three of the methods should be "discarded" was in error.

## **VII. CONCLUSION**

For the foregoing reasons, MarkWest Liberty NGL respectfully requests that the Court affirm the decision of the WVOTA, but render a decision confirming that, as a matter of law, W. Va. Code St. R. § 110-1P-3.5.2 permits consideration the three additional economic obsolescence methodologies presented by MarkWest Liberty NGL.<sup>49</sup>

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<sup>49</sup> To be abundantly clear, MarkWest Liberty NGL does not request a remand on these grounds, but merely wants to see that this issue of law is conclusively corrected by this Court.

**MARKWEST LIBERTY MIDSTREAM &  
RESOURCES, L.L.C., MARKWEST  
LIBERTY ETHANE PIPELINE, L.L.C.,  
MARKWEST LIBERTY NGL PIPELINE,  
L.L.C.  
BY COUNSEL**

*/s/ Craig A. Griffith* \_\_\_\_\_

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

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**SCOTT LEMLEY, in his capacity as  
ASSESSOR OF WETZEL COUNTY, WEST VIRGINIA,**

*Respondent Below, Petitioner,*

**vs.**

**MARKWEST LIBERTY MIDSTREAM & RESOURCES, L.L.C.,  
MARKWEST LIBERTY ETHANE PIPELINE, L.L.C., and  
MARKWEST LIBERTY NGL PIPELINE, L.L.C.,**

*Petitioners Below, Respondents.*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 10th day of February, 2025, I served the foregoing “Brief of the Respondents and Cross Assignment of Error” via File & Serve reflecting service upon all counsel of record.

/s/ Craig A. Griffith  
Craig A. Griffith, Esq. (WVSB No. 8549)