
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,

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 Reply Brief and Response to Cross-Assignment of Error

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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INTRODUCTION

MarkWest Liberty NGL Pipeline, L.L.C. (“MarkWest”) had the burden of proof before the West Virginia Office of Tax Appeals (“WVOTA”). MarkWest was required first to prove that Assessor Lemley failed to consider obsolescence. MarkWest failed to meet this burden. It is undisputed that Assessor Lemley considered economic obsolescence. He did this himself. D.R.0369-0370. He also did it through obtaining expert reports. D.R.0565-0586; D.R.0600-0740. That’s all the law requires. *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) (“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.”) (citations omitted)). WVOTA erred by requiring more of the Assessor than is required by the Supreme Court of Appeals of West Virginia.

MarkWest was also required to demonstrate “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 “loss in value” is a loss in fair market value, which 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). MarkWest never provided a value in terms of money, with or without obsolescence, at any time.

MarkWest’s Response argues that they don’t need to express an actual value of the property to demonstrate a loss in value. That’s nonsensical. One can only prove a loss in value by first

proving a value. MarkWest didn't even attempt to do so, and their failure to value the property in terms of money should be dispositive.

Moreover, MarkWest's interpretation of the definition of economic obsolescence is that it's a cause in search of an effect. MarkWest argues, and WVOTA agreed, that an appraiser can find any alleged change in supply and demand and then work backwards to quantify its effect. This belies the clear language of the definition and the clear language of the legislative rule for measuring economic obsolescence. It requires a loss in value. Without a loss in value, it doesn't matter whether supply and demand relationships change or new legislation is enacted. Without a loss in value, there is no obsolescence.

But WVOTA did not require proof of a loss in value. Instead, WVOTA selected a single methodology from MarkWest's expert's report, despite MarkWest's expert opining that his methodologies should be blended, and then applied a 35% obsolescence percentage to the Assessor's value, despite MarkWest's expert testifying that his obsolescence percentage was applicable to the net book value reported to FERC. The 35% obsolescence percentage is not a representation of a loss in value. It's not a 35% reduction from what the value would have been without the "demand destruction." It's not a 35% reduction from the Assessor's value. It's a meaningless non-monetary percentage of an irrelevant number not contemplated by West Virginia law that was erroneously applied to the Assessor's value. To arrive at this number, MarkWest states that WVOTA relied on "substantial evidence and a rational basis." But MarkWest doesn't bother detailing the "substantial evidence," and a "rational basis" is not the standard. The standard requires proof by a preponderance of the evidence to overcome the presumption that the Assessor's valuation is correct. MarkWest can't overcome that presumption by application of a percentage

representing 30% of its expert's ultimate opinion to a number with no meaning in ad valorem tax law.

MarkWest argues that Assessor Lemley's focus on the testimony of MarkWest's engineer regarding MarkWest's pipeline usage is a "red herring," while simultaneously arguing that the alleged lack of usage is the basis for obsolescence. MarkWest wants the Court to see that it was not fully utilizing its 20" pipeline and accept that as sufficient evidence for a loss in value. But the evidence shows that MarkWest built new pipelines precisely because it had too much volume on its other pipelines. That's evidence of growth. That's evidence of an increase in value. MarkWest does not contend that its revenues have declined, only that its revenues aren't as high as they could possibly be. That's true for every business in West Virginia and for every income-producing asset in West Virginia. McDonald's new grill is not wrought with economic obsolescence because it isn't covered in burgers 100% of the time, 24 hours a day, seven days a week. The same is true for MarkWest. Its new pipeline isn't suffering from economic obsolescence simply because they haven't filled it up. WVOTA's decision should be reversed, or, in the alternative, should be remanded for further proceedings to address the evidentiary gaps identified by WVOTA and in Assessor Lemley's briefing before this Court.

Finally, MarkWest raises a cross-assignment of error, arguing that WVOTA erred in rejecting three of its expert's methodologies because that the legislative rule contains permissive language. MarkWest ignores, however, that the legislative rules only recognize three approaches to value, and MarkWest's expert's methodologies do not meet the criteria for any of those approaches to value. To allow MarkWest to venture outside the three recognized approaches to value would permit unequal and non-uniform taxation in violation of the West Virginia Constitution. MarkWest's cross-assignment of error is meritless and seeks an unconstitutional

outcome. While the WVOTA decision should be reversed, its rejection of the inutility method, rate of return on capital method, and blue-chip method should be affirmed.

ARGUMENT

A. Assessor Lemley considered MarkWest’s claim for economic obsolescence.

In determining the fair market value of property, an assessor is required to consider economic obsolescence, but an assessor is not required to make adjustments. *Berkeley Cnty. Council v. Gov't Props. Income Trust LLC*, 247 W. Va. 395, 407 (2022); *see also Lee Trace, LLC v. Berkeley Cnty. Council*, No. 16-0239, 2017 W. Va. LEXIS 298, 2017 WL 1535075, at *6 (W. Va. Apr. 28, 2017) (memorandum decision) (“Where the cost approach to assessments is concerned, the assessor must ‘consider’ three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.”). An assessor is not required “to make any adjustment to the valuations made regarding property because of physical deterioration, functional obsolescence and economic obsolescence.” *Century Aluminum of W. Virginia, Inc. v. Jackson Cnty. Comm'n*, 229 W. Va. 215, 224, 728 S.E.2d 99, 108 (2012). When applying the cost approach, all that is required of an assessor is to “think about or contemplate [the] three types of depreciation: physical deterioration, functional obsolescence, and economic obsolescence.” *Id.* at 224-25, 728 S.E.2d 108-09. The discretion afforded an assessor is necessarily broad:

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.

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

In this case, the evidence established that economic obsolescence was considered during the valuation process. Specifically, Assessor Lemley responded to MarkWest’s request for

economic obsolescence, stating that he had reviewed the request for adjustments and the report prepared by KE Andrews, but ultimately denied the request. D.R.0369-0370. Assessor Lemley concluded that MarkWest failed to demonstrate that the alleged throughput deficiencies constituted economic obsolescence. D.R.0369-0370. He further 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, both of whom also examined MarkWest’s claim for economic obsolescence. Like Assessor Lemley, they concluded that there was no loss in value due to economic obsolescence and determined that no adjustments were necessary. D.R.0565-0586; D.R.0600-0740.

This approach aligns with decisions from the Supreme Court of Appeals of West Virginia. For example, in *Lee Trace, LLC, supra*, the Court held that an assessor is not required to make adjustments for obsolescence. The Court emphasized that the assessor’s role is to consider these depreciation types, not to automatically adjust valuations based on every form of depreciation. *Id.* at *17-18 (finding no error in the circuit court’s conclusion that the assessor “did consider all three forms of depreciation, and explained why no adjustments were made for economic and functional obsolescence”) (internal quotation marks omitted). MarkWest provides an exhaustive history of the legislative rules regarding consideration of obsolescence, but nothing in that history has changed the requirement that the Assessor must *consider* obsolescence, and that sole requirement has been reiterated as recently as 2022. *See Berkeley Cnty. Council*, 247 W. Va. at 407.

Moreover, an assessor's exercise of discretion in choosing the most appropriate method of property appraisal is protected from judicial interference unless there is a showing of abuse of discretion. *In re Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. at 257. In this case, Assessor Lemley exercised his discretion in determining that economic obsolescence did not exist and therefore there was no need to make an adjustment to the property's value. Assessor Lemley's decision is supported by the available evidence. His consideration of economic obsolescence, as part of his broader cost approach analysis, was not only appropriate but legally sufficient. MarkWest has not shown that the Assessor's consideration was flawed.

In its response to Assessor Lemley's appeal to this Court, MarkWest simply rehashes its own interpretation of economic obsolescence without providing compelling evidence that Assessor Lemley failed to consider obsolescence or that his conclusions were unreasonable or unsupported by law. Under the abuse of discretion standard, a reviewing body such as the WVOTA cannot substitute its judgment for an assessor's judgment. Rather, it can only determine whether an assessor's decision was supported by substantial evidence or was contrary to law. *See State v. Hedrick*, 204 W. Va. 547, 553, 514 S.E.2d 397, 403 (1999). MarkWest fails to demonstrate how Assessor Lemley abused his discretion in determining the fair market value of the property and in considering whether economic obsolescence existed. Assessor Lemley carefully considered economic obsolescence, retained qualified experts, and followed the cost approach to valuation, which is the accepted method under West Virginia law. Furthermore, Assessor Lemley's determination was based on established appraisal principles and was made with due consideration of all relevant factors, including expert opinions.

MarkWest's criticisms of the reports and testimony provided by Assessor Lemley's experts, Ms. Hobart and Mr. Wisdom, further fail to establish that Assessor Lemley abused his discretion.

MarkWest claims that Mr. Wisdom’s methodology, particularly his use of income-based methods like a discounted cash flow analysis, was flawed, yet its only argument against Mr. Wisdom’s approach is that Mr. Wisdom had never calculated economic obsolescence under these methods prior to this case. That’s irrelevant and also inaccurate. Mr. Wisdom testified that he had never performed a direct capitalization or discounted cash flow analysis on a *FERC-regulated pipeline*, not that he had never valued a pipeline using those methods. D.R.0293. Nothing in West Virginia law requires separate treatment for FERC-regulated pipelines. Indeed, MarkWest’s expert recognized that. D.R.0342-0343. And that would violate the Constitution’s mandate of equal and uniform taxation. W. Va. Const. Art. X, § 1. Refusal to treat a property differently than others is not an abuse of discretion; it’s complying with a constitutional mandate.

Similarly, Ms. Hobart’s opinions outline that applying economic obsolescence based on fluctuating prices—typical supply and demand cycles—is inappropriate within the context of property valuation and would create inequities.¹ D.R.0579. She further explained that the methods used by MarkWest’s experts were incompatible with standard property valuation practices. Assessor Lemley appropriately relied on both experts’ testimony and reports to form his conclusion that no economic obsolescence adjustment was warranted, and MarkWest has failed to show why these opinions should have been disregarded by the Assessor or by WVOTA.

Assessor Lemley’s decision to deny MarkWest’s request for an economic obsolescence adjustment was both reasonable and supported by substantial evidence. His cost approach analysis was legally sound. The use of qualified experts, careful analysis of the evidence, and the discretion

¹ The WVOTA dismissed Ms. Hobart’s opinions entirely, focusing on her view that economic obsolescence is permanent when valuing personal property. However, the key aspect of her opinion, which the WVOTA overlooked, is that time constraints are crucial in determining whether economic obsolescence exists: “[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 (emphasis added).

afforded to him under West Virginia law all support his determination. MarkWest has failed to present compelling evidence that the Assessor's decision was an abuse of discretion or contrary to the law. Therefore, the WVOTA's decision to overturn Assessor Lemley's valuation represents a clear legal error, and the Assessor's decision should be reinstated.

B. MarkWest Fails to Address the Necessity of an Actual Appraisal to Determine Fair Market Value

While MarkWest disputes Assessor Lemley's contention that an appraisal was necessary, it fails to sufficiently address the core concern raised, the lack of a fair market value determination. In order to assess the economic obsolescence of the property, MarkWest was required to first establish a true and actual value, as required by West Virginia law. *See* W. Va. Code St. R. § 110-1P-2.7. Without an actual appraisal that reflects the highest price the property would bring in an open market, MarkWest's reliance on a percentage adjustment is inadequate and does not meet the legal standard for property tax assessments. Fair market value must be determined in terms of money, and the process for determining such value is an appraisal.

MarkWest, on the other hand, argues that it is not required to perform an alternate appraisal in order to request an economic obsolescence adjustment. MarkWest is correct that there is no West Virginia law requiring a taxpayer to introduce an appraisal in order to bring a tax appeal. But, in the face of the Assessor's appraisal, and in the face of Mr. Wisdom's appraisal, and in light of the presumption that the Assessor's valuation is correct, Syl. Pt. 7, in part, *In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983), it's hard to imagine how a taxpayer could show, by a greater weight of the evidence, that a lower fair market value should be assigned without ever providing an opinion of value. And the definition of economic obsolescence requires two values. Because it is defined as a "loss in value," a taxpayer is required to prove the fair market value in the absence of any external factors and to prove the fair market value reduced

by an external factor. W. Va. Code St. R. § 110-1P-2.5. MarkWest did neither. It didn't present an appraisal. D.R.0999. It never even presented an opinion of fair market value in terms of money. A taxpayer can't overcome the presumption afforded to assessors without offering an opinion of value. The lack of an appraisal is dispositive for that reason.

Moreover, MarkWest's use of a percentage reduction to account for economic obsolescence is insufficient because it does not translate into an actual monetary amount that represents the fair market value of the property. Under the law, fair market value must be expressed in monetary terms, reflecting what a willing buyer would pay in an open and competitive market. By relying on an economic obsolescence adjustment as a percentage rather than a calculated value using the three accepted approaches to value, MarkWest does not provide the necessary fair market value expressed in monetary terms.

MarkWest's argument that an alternate appraisal is unnecessary to request economic obsolescence adjustments does not adequately address WVOTA's core error in this case, that a fair market value was never established before deciding there was a loss in value. Without a fair market value, MarkWest cannot substantiate its economic obsolescence claim or provide a legally sound basis for adjusting the tax assessment. To prevail, MarkWest should have been required to present and defend a fair market value. MarkWest's failure to do so is dispositive, and WVOTA's failure to require an appraisal, or at least an opinion of value, was clearly wrong.

C. The WVOTA erred by taking judicial notice of the COVID pandemic's impact without evidence of its effect on MarkWest's income or the NGL market.

MarkWest mischaracterizes the basis of the WVOTA's decision when it claims the tribunal examined "the specific impact that the pandemic had on the production of natural gas, and on MarkWest Liberty NGL and its customers." Resp. Br., p. 22. In reality, the WVOTA took judicial notice of the effect the COVID pandemic had on the U.S. economy," D.R.0038, rather than

analyzing any specific impact on MarkWest. Instead of making a generalized statement about COVID-19's impact on the economy, the WVOTA should have conducted a more focused analysis of the pandemic's specific effects on MarkWest and the NGL pipeline market. This analysis should have included reviewing industry-specific data on NGL production, examining MarkWest's financial and operational records during the pandemic, and assessing the impact on MarkWest's revenue. These are all steps the WVOTA failed to take, despite MarkWest's assertions in its response to Assessor Lemley's appeal.

MarkWest's mischaracterization aside, judicial notice, under standard evidentiary rules, is allowed for facts that are either "generally known" within the court's jurisdiction or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." W. Va. R. Evid. 201(b). Here, the WVOTA's decision to take judicial notice of the pandemic's effects on the U.S. economy is flawed because it is a broad assertion, not a specific, readily determinable fact related to MarkWest's operations or claim of economic obsolescence. And the Assessor presented evidence regarding the U.S. Energy Information Administration's energy outlook as of July 2022, showing the highest ethane prices and exports in a decade, 9% growth in the year prior to the lien date, and anticipated increased demand for NGLs. D.R.0751-0762. WVOTA completely ignored this data in favor of its generalized judicial notice. That's arbitrary and capricious.

Judicial notice applies to adjudicative facts that are specific to the case and help establish what happened, who was involved, and the circumstances surrounding an event. The general economic downturn caused by the COVID-19 pandemic is not specific to MarkWest's case and does not meet the criteria for judicial notice. WVOTA accepted this broad claim without establishing how the pandemic specifically impacted MarkWest's pipelines' value. And judicial

notice can only be taken for facts that are not subject to reasonable dispute. The economic impact of the pandemic varied across industries, and there is no uniform agreement about how the pandemic affected individual businesses, including MarkWest and its pipeline assets. For example, some sectors, like technology, saw growth, while others, like travel, were severely affected. Given these disparities, it is unreasonable to claim that the pandemic had a singular effect on the economy, including MarkWest's assets, without clear, case-specific evidence.

Furthermore, MarkWest failed to provide sufficient evidence of the specific economic forces that contributed to the alleged loss in value of its NGL pipelines. It relied on hearsay and speculative statements from its expert, Mr. Kistler, who did not present concrete data linking the COVID-19 pandemic to MarkWest's claimed loss in value. The claim that throughput "deficiency" was directly caused by the pandemic is unsupported by facts specific to MarkWest's operations. For instance, according to MarkWest's own witnesses, throughput volumes for the period from July 1, 2021, to June 30, 2022, were "not materially different" from prior years, with no decrease in throughput volumes. D.R. 0909-0910. Additionally, MarkWest Liberty NGL's FERC-6 filings show a consistent increase in revenues from 2019 through 2022: \$97,443,723 in 2019, \$111,194,645 in 2020, \$116,386,720 in 2021, and \$118,682,971 in 2022. D.R.0778. Finally, MarkWest's representative testified that the twenty-inch pipeline was built to accommodate throughput volumes that could no longer be handled by the twelve-inch lines. D.R.0918. This was corroborated by MarkWest's engineer, who explained that the twelve-inch line was constructed when the eight-inch/ten-inch line could no longer support the volumes. D.R.0942. Essentially, as MarkWest's business and throughput volumes grew, so did its need for larger capacity to move natural gas liquids. That they haven't yet filled their "significant[ly]" larger pipeline is not evidence of a loss in value. D.R.0939

MarkWest's claim that the COVID-19 pandemic caused economic obsolescence relies on speculative assertions and fails to meet the evidentiary burden required to establish such obsolescence. The WVOTA's decision to take judicial notice of the broad economic effects of COVID-19, without properly considering the specific impact on MarkWest's operations or requiring sufficient proof from MarkWest, and in order to satisfy an essential element of economic obsolescence, was arbitrary and capricious. Therefore, the decision should be reversed.

D. The WVOTA Relied on Throughput Deficiencies in Determining Economic Obsolescence.

MarkWest argues that the WVOTA did not rely on throughput deficiencies to determine the existence of economic obsolescence because WVOTA rejected Kistler's inutility analysis. Resp. Br., 25. However, this misconstrues qualification and quantification. WVOTA explicitly stated that "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 (emphasis added). The WVOTA also concluded "that the pipelines in question *were underutilized* as of the assessment date of July 1, 2022." D.R.0011 (emphasis added). Thus, by the plain language in the WVOTA's order on appeal, it is clear that it relied on throughput deficiencies to determine economic obsolescence existed. That's the qualification of economic obsolescence through inutility. Inutility itself is not a loss in value from external forces, and inutility is not external to the property; it's literally internal to the pipeline assets.

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

MarkWest defends Mr. Kistler's decision to include both pipeline companies and non-pipeline companies, including producers and exploration firms, within the peer group for the

weighted average cost of capital (“WACC”) calculation.² MarkWest itself is a regulated pipeline operator with specific market and regulatory conditions. By including companies that operate in fundamentally different segments such as exploration and production, MarkWest’s WACC calculation is significantly skewed. The risk profiles of these non-pipeline companies are fundamentally different from MarkWest’s, and this results in an inflated WACC. Pipeline companies, such as MarkWest, are generally subject to stable, regulated returns that are not as volatile as those of exploration and production firms. D.R.0987-0988.

MarkWest’s insistence on using a WACC derived from companies outside its specific industry rather than the one in which MarkWest operates is misguided. MarkWest itself reports a WACC to FERC that accurately reflects the cost of capital allowed for regulated pipelines. It is inappropriate to apply a rate that disregards the specific regulatory and financial circumstances of MarkWest’s operations. MarkWest adopts Mr. Kistler’s rationale for not using MarkWest’s reported WACCs, arguing that Mr. Kistler’s analysis accounts for investors’ return on inflation. Resp. Br., 29. However, this justification overlooks the fact that MarkWest is a regulated entity with a predictable rate of return. The WACC reported to FERC by MarkWest directly reflects the financial realities and regulatory framework in which MarkWest operates.³ Even if there were merit to MarkWest’s argument, it still does not explain how, even accounting for inflation, Mr. Kistler’s WACC is approximately 50% higher than MarkWest’s FERC reported rates.

² Mr. Kistler develops a WACC based on the financial performance of 24 guideline companies. D.R.0404-0405. Many of these “guideline” companies are not similar to MarkWest. Although Mr. Kistler acknowledged that producers are generally more volatile than FERC-regulated pipeline companies, D.R.0987-0988, he included producers in his guideline companies. He also included exploration companies as part of his guideline companies. Mr. Kistler provides no explanation as to how or why these guideline companies were selected.

³ MarkWest’s own WACC of 8.48% in 2021 and 8.08% in 2022 provides a clear reflection of the cost of capital MarkWest is allowed to earn on its regulated assets. Mr. Kistler’s WACC of 12.59%, which is 50% higher than MarkWest’s reported WACC, is an inflated figure that distorts the analysis of economic obsolescence.

MarkWest also defends the 0% growth rate applied by Mr. Kistler, arguing that it was a conservative approach given anticipated market conditions. However, this position fails to account for the positive growth trends demonstrated in MarkWest's historical performance data, as outlined in the KE Andrews Report itself. MarkWest's revenue, net income, and earnings have all shown consistent growth, with the company reporting a positive average growth rate for operating metrics between 2019 and 2021. This data directly contradicts Mr. Kistler's assumption of a 0% growth rate for the NGL lines. MarkWest's defense of a 0% growth rate is based on the argument that anticipated volumes are not as strong as originally expected, but these numbers are not in the record. MarkWest's representative testified that throughput projections were provided to Kistler, but not to the Assessor. D.R.0908-0909. And Kistler didn't disclose the figures he purportedly relied upon. While market conditions can change, the 0% growth rate fails to recognize the actual positive trends in MarkWest's financials. By selecting a 0% growth rate, Mr. Kistler undermines the accuracy of his obsolescence calculation and skews the final results.

MarkWest argues that the 0% growth rate is appropriate based on the testimony of Mr. Kistler that, "from 2019 forward, you have after federal income tax of \$54 million, then \$60 [million], and then \$58 [million]. So, we haven't seen just a perpetual income increases that warrants a change [above 0%]." D.R.0035. In addition to cherry-picking when to use "market-based" metrics and "asset-based" metrics, Kistler's numbers aren't even accurate. MarkWest didn't pay federal income taxes. For 2022, MarkWest reported operating revenues of \$118,682,971 and net income of \$78,092,388. D.R.0853. Adding in some miscellaneous income, MarkWest reported "ordinary income before federal income taxes" of \$79,742,026. D.R.0853. The very next line on the report is "(Less) Income Taxes on Income from Continuing Operations." D.R.0853. It's blank. D.R.0853. Kistler assumed a level of federal income taxes without relying on actual numbers and

without presenting evidence of actual numbers. These numbers are, therefore, incorrect and unreliable, and the reliance upon them by OTA is arbitrary and capricious and clearly wrong.

While MarkWest asserts that Mr. Kistler's use of an alleged market-based WACC and the application of an alleged asset-based 0% growth rate are in line with generally accepted appraisal practices, these assumptions are not justified in the context of MarkWest's specific operations. The use of a mixed peer group, an inflated WACC, and an arbitrary growth rate leads to a flawed conclusion regarding economic obsolescence. Mr. Wisdom provided a more accurate and reliable methodology by focusing on pipeline companies similar to MarkWest, using MarkWest's reported WACC, and considering a more reasonable growth rate based on MarkWest's historical and anticipated performance and data from the U.S. EIA. These factors lead to a more accurate determination of the value for MarkWest's NGL lines. Accordingly, remand is necessary for the WVOTA to reconsider its reliance on Mr. Kistler's capitalization of income loss method, which was based on flawed assumptions and misapplied methodology.

F. The WVOTA Erred in Relying on a Flawed Methodology and Arbitrary Obsolescence Percentage

MarkWest's argument fails to adequately address Assessor Lemley's key point regarding the validity of the methodology used to determine economic obsolescence. Instead of directly confronting the flaws in the blending of methods as the Assessor pointed out, MarkWest primarily defends the WVOTA's decision to rely on the capitalization of income loss method. MarkWest overlooks the central issue raised by the Assessor: WVOTA selected a percentage that MarkWest's expert said is, at best, 30% valid.

The blended methodology employed by Mr. Kistler arrives at an ultimate opinion that is different than the ultimate conclusion reached by the WVOTA. Mr. Kistler's report used a blended methodology, which included a significant portion of invalid methods—specifically, the inutility

method, the rate of return on capital method, and the blue-chip method.⁴ Seventy percent of Mr. Kistler's final obsolescence opinion relied on these invalid methodologies, none of which comply with West Virginia law. MarkWest does not address this critical concern, which is that WVOTA's final decision relied entirely on a methodology that Mr. Kistler said is only 30% of the total obsolescence percentage he believes should apply to arrive at a true and actual value. That simply does not meet the required standard of proof under the law. Thirty percent validity is not enough to overcome the presumption of correctness afforded to Assessor Lemley's valuation. A decision based on such a partial opinion cannot meet the threshold of the preponderance of the evidence or be considered the greater weight of the evidence.

Moreover, MarkWest's defense that the WVOTA acted within its discretion by selecting only the capitalization of income loss method disregards the fact that the capitalization of income loss method was not the only one presented to the WVOTA. The method recommended by Mr. Kistler was, as discussed, a blended percentage drawn from multiple methods, not a singular figure derived from a valid approach alone. The 35% obsolescence percentage applied by the WVOTA, taken directly from Mr. Kistler's report, was not supported by any expert's opinion—neither Assessor Lemley nor MarkWest's expert's conclusion. Instead, this percentage was arbitrarily chosen and inappropriately applied, a decision that is arbitrary and capricious.

The WVOTA erred by relying on a blended, legally flawed methodology and by arbitrarily selecting an unsubstantiated obsolescence percentage. The Assessor's objection is not just a technicality—it goes to the heart of the reliability of the final valuation and the correctness of the decision. Therefore, the WVOTA's decision should be reversed.

⁴ As set forth in the West Virginia Code of State Rules, economic obsolescence should be measured using either a market approach or an income approach, with the income approach being preferred in cases where market data is insufficient. W. Va. Code St. R. § 110-1P-3.5.2.

G. The WVOTA Erred in Accepting MarkWest's Misapplied Obsolescence Percentage.

MarkWest's response fails to address the application of a 35% obsolescence percentage based on the FERC net book value to the Assessor's fair market value, only stating that the FERC net book value was higher than the Assessor's fair market value. That's not in the record. MarkWest's argument rests on the assertion that applying the obsolescence percentage to the FERC net book value is more conservative than applying it to a cost-based valuation mandated by legislative rule. Resp. Br., 33. However, this overlooks the fundamental point that the FERC net book value is not the same as the fair market value required under West Virginia law. MarkWest has not explained why it is appropriate to apply the obsolescence percentage to the Assessor's fair market value, which is derived through a method mandated by the state. Another key issue raised by Assessor Lemley is that MarkWest did not compare its obsolescence analysis with the Assessor's valuation. MarkWest cannot prove that its supposed income-based obsolescence approach leads to a lower fair market value than the Assessor's valuation because MarkWest failed to perform this comparison. Without such a comparison, there is no basis for concluding that the Assessor's value is flawed or too high. MarkWest's response completely ignores this essential argument. Simply stated, MarkWest's evidence does not establish that the Assessor's valuation is incorrect or that it should be reduced by the 35% obsolescence figure.

While MarkWest emphasizes the "conservative" nature of using the FERC net book value, it completely ignores the Assessor's argument that these two values are inherently different. The FERC net book value is based on accounting standards and does not reflect a fair market value as required by West Virginia law.⁵ This is a crucial distinction. Thus, the 35% obsolescence percentage, calculated for the FERC net book value, is irrelevant when applied to the Assessor's

⁵ MarkWest's expert conceded that FERC net book value is not a fair market value. D.R.0970.

fair market value. Moreover, using a non-comparable value (the FERC net book value) in a formula meant for fair market value creates a mathematical error. The WVOTA's failure to reconcile these two different values (and its insistence on applying the obsolescence percentage directly) undermines the integrity of the valuation. The WVOTA erred by not addressing this critical flaw and by accepting the application of the 35% reduction without proper context.

The issue here is not simply whether a percentage can be applied to a valuation, but rather whether the right valuation is being used. West Virginia law requires that tax assessments be based on fair market value. Applying an obsolescence percentage to an incorrect figure such as the FERC net book value instead of the Assessor's fair market value undermines the validity of the entire analysis. By failing to follow the required methodology for determining fair market value, MarkWest effectively sidesteps the proper legal process. The WVOTA's decision to accept this misapplication was in error and should be reversed.

H. The WVOTA Correctly Rejected Non-Income-Based Methods for Measuring Economic Obsolescence.

MarkWest's argument that the WVOTA erred in rejecting three of Mr. Kistler's methodologies for analyzing economic obsolescence because they were not income-based methods disregards the West Virginia Code of State Rules and the clear text of the West Virginia Constitution. Although MarkWest cites the general language in W. Va. Code St. R. § 110-1P-3.5.2 allowing economic obsolescence to be measured by either a market or income approach, this language does not support the argument that methods outside these recognized approaches are valid under the state's regulatory framework for property tax assessments. Indeed, West Virginia law only recognizes three approaches to value, the cost approach, the income approach, and the market approach. W. Va. Code St. R. § 110-1P-3.4.3.1. Kistler's inutility method, the rate of return

on capital method, and the blue-chip method do not satisfy the definitions of any of these approaches. W. Va. Code St. R. §§ 110-1P-2.4, 2.12, and 2.17.

As set forth in the West Virginia Code of State Rules, economic obsolescence should be determined using a market approach or an income approach, with the latter being the preferred method when market data is insufficient. W. Va. Code St. R. § 110-1P-3.5.2. Mr. Kistler's reliance on the inutility method, rate of return on capital method, and blue-chip method represents a departure from the regulatory guidelines, as these methods are not recognized as valid approaches under the West Virginia regulatory framework for assessing fair market value or economic obsolescence.

The inutility method, which focuses on the lack of use of property, does not measure economic obsolescence in the way that is outlined by the Legislative Rules. Similarly, the rate of return on capital method compares a company's rate of return to that of other companies but does not assess whether a loss in value has actually occurred. Mr. Kistler himself admitted that this method does not meet the definition of an income-based approach, as it does not discount future income into present value. The blue-chip method is also problematic. While it compares profitability metrics between the subject company and other companies, it does not measure actual loss of value. Instead, it assumes that sub-par performance is a result of economic obsolescence, without considering other factors that may affect performance. This method, too, fails to meet the criteria of an income approach as defined under West Virginia law.

MarkWest's argument that the statutory language of W. Va. Code St. R. § 110-1P-3.5.2 does not mandate the exclusive use of market or income approaches is unconvincing. While the term "may" does suggest discretion, this discretion is limited by the fact that only certain methods, including the income approach, are recognized under the Legislative Rules. The Legislature did

not intend for methods like the inutility, rate of return on capital, or blue-chip methods to be used in property tax assessments, because these methodologies do not meet the definition of any recognized approach to value.

Moreover, MarkWest's position poses a significant threat to the uniformity of property taxation in West Virginia. The West Virginia Constitution clearly mandates that taxation must be equal and uniform throughout the state. W. Va. Const. Art. X, § 1. The purpose of this uniformity is to ensure that all taxpayers are treated equally and that no individual or entity bears a disproportionate tax burden. If this Court were to adopt MarkWest's position, it would result in inconsistent and unequal tax assessments, violating this fundamental constitutional principle. By advocating for the inclusion of methodologies outside the accepted approaches, MarkWest is proposing a system of assessment that could lead to differing standards of valuation across the state. These non-standard methods have not been recognized by the West Virginia regulatory framework as valid approaches to measure value or economic obsolescence for property tax purposes. If these methods were accepted, they could result in assessments that are inconsistent and unfairly skewed, as each assessor or party could use their own preferred methodologies, rather than applying the uniform, standardized methods prescribed by law. This could allow for different tax assessments for properties that are otherwise similar. This inconsistency would create an environment where two properties with similar characteristics could be taxed at different values based on the methodology employed, resulting in inequitable taxation. This could further erode taxpayer confidence in the fairness and integrity of the assessment process, and most importantly, would violate the constitutional requirement for uniform taxation.⁶

⁶ For example, if one property is valued using an unrecognized approach like the inutility method or rate of return on capital method, while another is assessed using the statutory and well-established cost, income, or market approaches, the tax burden on these properties would not be uniform or equally distributed, leading to potential taxpayer inequity and constitutional violations.

It is the responsibility of the Assessor to ensure that property assessments comply with the uniformity requirement of the West Virginia Constitution. This means that all properties should be assessed using the same recognized standards, based on cost, market, or income approaches, which are specifically designed to ensure equal treatment and uniform valuation. Accepting MarkWest's argument and allowing the use of non-standard methodologies would open the door to subjective, inconsistent assessments that would undermine the uniformity that is constitutionally mandated.

The WVOTA's decision to reject the inutility, rate of return on capital, and blue-chip methods was not in error. These methods fall outside the scope of the recognized approaches outlined in the West Virginia Code of State Rules. MarkWest's argument that these three methods should have been accepted is inconsistent with the statutory guidelines and constitutional mandate and should be rejected.

CONCLUSION

Petitioner Scott Lemley respectfully requests that this Court reverse the decision of the West Virginia Office of Tax Appeals and remand this matter with instructions that WVOTA 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 Reply Brief and Response to Cross-Assignment of Error* has been served upon the parties and counsel of record via File & ServeXpress, this 25th day of February 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)