SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
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MIRANT NEW YORK, INC. and MIRANT LOVETT, LLC,

Petitioners,

-Against-

TOWN OF STONY POINT ASSESSOR, TOWN OF STONY PONT BOARD OF ASSESSMENT REVIEW and the TOWN OF STONY POINT, ROCKLAND COUNTY, NEW YORK,

Respondents,

NORTH ROCKLAND CENTRAL SCHOOL DISTRICT, COUNTY OF ROCKLAND,

Intervenors-Respondents.

For a Review of Tax Assessments Under Article 7 of the Real Property Tax Law.

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FILED AND ENTERED ON DATE

ROCKLAND COUNTY CLERK

DECISION & ORDER

Index Nos: 4357/00
4696/01
5122/02
5279/03

DICKERSON, J.

POST TRIAL DECISION: THE LOVETT GENERATION STATION

The trial of this Real Property Tax Law [" RPTL "] Article 7 proceeding challenging the Petitioners' real property tax assessments for the years 2000-2003 imposed upon the Lovett Generation Station [" Lovett "] in the Town of Stony Point, New York [and its companion tax certiorari proceeding, Orange & Rockland Utilities, Inc. v. Town of Haverstraw Assessor[1], challenging the real property tax assessments for the years 1995-2003 imposed upon the Petitioners' Bowline Point Generation Station [" Bowline "] in the Town of Haverstraw, New York] lasted a total of fifty-nine (59) days during which numerous experts[2] and other witnesses[3] testified. After a careful review the trial record and exhibits and the excellent post trial memoranda of law[4] including findings of fact and conclusions of law submitted by the parties, this Court, in cooperation with Judge D. Michael Lynn of the United States Bankruptcy Court of the Northern District of Texas in the matter of In Re: Mirant Corporation[5], now renders its decision regarding the full market value of Lovett.

Nature Of The Property

Lovett is situated on nineteen (19) parcels located on, approximately, 60 acres within the Town of Stony Point, New York [" the Town "]. Lovett consists of five generating units identified as Units 1 through 5. Units 1 and 2, rated at 20 MW each, were designed to burn coal and went on-line in 1949 and 1951, respectively. These units were

retired in place in 1995. Unit 3, rated at 68 MW, is capable of burning oil or natural gas and began operation in 1995. Units 4 and 5, rated at 185 MW and 200 MW, respectively, are capable of burning coal, oil or natural gas and went on-line in 1966 and 1969, respectively. The site has deepwater, rail and trucking access. The units are connected to the nearby 345 KV electricity transmission grid by connections at 69 KV and 138 KV[6].

Environmental Constraints

Lovett is located in a " severe non-attainment " area for air pollution control purposes of the United States Environmental Protection Agency [" E.P.A "][7]. As such it has significant restrictions on air emissions and its use of residual oil [Unit 3][must be .37% sulfur or less] and coal [Units 4 and 5][must be low sulfur].

The Consent Decree

In addition, Lovett is the subject of a Consent Decree [" Consent Decree "] entered into with the New York State Department of Conservation [" DEC "] and the New York State Attorney General's Office. The Consent Decree provides that by April 30, 2007 Lovett has to complete the conversion of Unit 5 to a natural gas fired boiler and permanently cease the firing of coal or complete the installation of

back end controls on Unit 5 or permanently discontinue operation of Unit 5[8]. In addition, Lovett must, by April 30, 2008, install back-end controls in Unit 4 or shut it down[9].

Common Facilities

The common facilities at Lovett include a concrete stack for Units 4 and 5 (with individual steel flues); cooling water intake structures for each unit; sub-surface and surface cooling water discharges to the Hudson River for each unit; two fresh water storage tanks and a fire protection pump house; coal pile; coal handling facilities; coal handling equipment; maintenance facility; railroad unloading facility; railroad siding; natural gas metering station; three fuel oil storage tanks; dock and oil unloading facilities; electronic precipitator on Units 4 and 5; fly ash handling systems; two fly ash storage silos; fly ash unloading facilities; bottom ash handling facility; two wastewater storage tanks; process wastewater treatment facility; sanitary waste treatment facility; service building; air compressor building; fly ash equipment maintenance building; coal ash management facility; leachate and runoff pump station and treatment pond; and a warehouse[10].

The Tax Parcels

By stipulation and order of this Court, the Bowline parcels are identified by tax I.D. number on the assessment rolls of the Town as follows[11]:

10.02-3-17 MH	10.04-2-19 OB
10.04-2-10 HM	10.04-2-2 IG
10.04-2-11 1F	10.04-2-3 IZ
10-04-2-12 IV	10.04-2-4 JS
10.04-2-13 JR	10.04-2-5 KL
10.04-2-14 KK	10.04-2-6 LE
10.04-2-15 LD	10.04-2-8 MQ
10.4-2-16 LW	10.04-2-9 NJ
10.04-2-17 MP	10.04-2-7 LX
10.04-2-18 NI	

The Equalization Rates

The parties have stipulated that the equalization rate for the Town of Stony Point for each year in question is as follows[12]:

2000	**22.43%**
2001	**20.93%**

2002	**19.36%**
2003	**16.76%**

The Land Value And Equalized Full Values

The parties have further stipulated to a land value $4,570,000[13] for all years in question and equalized full values[14] of the Lovett parcels as follows :

2000	**$359,942,867**
2001	**$385,739,059**
2000	**$417,020,584**
2003	**$481,713,514**

History Of Proceedings

The subject Petitions challenge the tax assessments imposed by the Town on Lovett for the tax years 2000-2003. The 2000 petition was brought by Southern Energy Lovett LLC [" SEL "]. The 2001 through 2003 Petitions were brought by Mirant New York, Inc. During the course of the trial this Court granted Petitioners' motion deeming Mirant New York, Inc. an aggrieved party, granting Mirant Lovett LLC permission to intervene and allowing the substitution of Mirant Lovett LLC in each of the proceedings commenced by SEL [See Orange and Rockland Utilities,

Inc. v. Town of Stony Point Assessor, 7 Misc. 3d 1024, 801 N.Y.S. 2d 238 (Rockland Sup. 2005)].

Constructing A Valuation Floor And Ceiling

We found it useful in determining the true value of Bowline[15] to begin our analysis by constructing a valuation floor and ceiling based upon several well accepted principals. First, the Petitioners and Respondents are bound by their admissions of reconciled values in their respective appraisals for each year under review[16]. Second, the Petitioners are bound by their full value figures set forth in their Petitions but only to the extent [as in Bowline but not herein] that they are greater than the admissions of value which appear in their appraisal[17]. Third, the Petitioners' purchase in July of 1999 of Bowline[18] [$193,800,000] and Lovett [$213,580,000] occurred within the context of arm's length transactions and is the best evidence of value for tax year 2000. This last principal had no impact in Bowline since Petitioners were bound by the full market value [$771,026,464] in their 2000 Petition reduced by Respondents' admission of 2000 reconciled value of $341,000,000[19]. However, this principal does make a difference herein and as such Lovett's 1999 purchase price of $213,580,000 serves as both the floor and ceiling for tax year 2000 since this figure is above both Petitioner's full value figure in its 2000 Petition [$111,755,956] and the 2000 fair market value in its appraisal

[$125,000,000].

The Valuation Floor

The Petitions set forth the following full value figures[20];

2000 Full Value of **$111,755,956**

2001 Full Value of **$115,962,733**

2002 Full Value of **$117,204,545**

2003 Full Value of **$115,762,700[21]**

At trial, Petitioners' appraiser, Mr. Remsha, after reconciling the cost[22] [reproduction cost new less depreciation [" RCNLD "][2000-2003]], income[23] [discounted cash flow [" DCF "]] [2000-2003] and sales comparison[24] [2000-2003] approaches[25], concluded that the fair market value of Lovett was as follows;

2000 Fair Market Value of **$125,000,000**

2001 Fair Market Value of **$150,000,000**

2002 Fair Market Value of **$200,000,000**

2003 Fair Market Value of **$125,000,000**

Based on the foregoing the floor of full values, below which this Court may not go, are as follows:

2000 Full Value of **$125,000,000**

2001 Full Value of **$150,000,000**

2002 Full Value of **$200,000,000**

2003 Full Value of **$125,000,000**[26]

The Valuation Ceiling

Having established a valuation floor, what is the valuation ceiling, above which this Court may not go? The Town's equalized full value figures[27] are as follows;

2000 Equalized Full Value of **$359,942,867**

2001 Equalized Full Value of **$385,739,059**

2002 Equalized Full Value of **$417,020,584**

2003 Equalized Full Value of **$481,713,514**

However, the Respondents' appraiser, after reconciling the cost

[RCNLD][2000-2003] and income [DCF][2000-2003] approaches[28] concluded that the fair market value of Bowline was as follows;

2000 Fair Market Value of **$240,000,000**

2001 Fair Market Value of **$355,000,000**

2002 Fair Market Value of **$320,000,000**

2003 Fair Market Value of **$380,000,000**

Purchase Price As The Best Evidence Of 2000 Full Market Value

In July 1999 [after the 1999 taxable status date of January 1, 1999] SEL purchased Lovett from O&R and Con Edison for $213,580,000 [value of real property assets] within the context of a two phase auction process. To what extent is a purchase price " of recent vintage " the best evidence of the true value of Lovett, at least, for tax year 2000?

The Sale Of Lovett Was An Arm's Length Transaction

After a careful review of the circumstances of that transaction *as encouraged* by the New York State Public Service Commission [" P.S.C. "] in Opinion No. 92-12, pp. 65-66[29] (" We strongly encourage divestiture, particularly of generation assets, but do not require it immediately...While divestiture of energy service company

operations is encouraged, for now we will allow utilities to continue to provide energy services to their customers either directly or through an affiliate "), *as monitored* by the P.S.C. in Order Authorizing The Process For Auctioning Of Generation Plant dated April 16, 1998[30]
(" O&R's Divestiture Plan provides for the auctioning of all of its generation assets, a portfolio that totals slightly less than 1000 MW of capacity with a book value of about $280 million. O&R owns the fossil-fueled Lovett Station, sized at 416 MW and a one-third interest in the Bowline Station or 400 MW out of a total of 1200 MW...the utility proposed essentially a two-phase auction process ") and *as approved* by the P.S.C. in Order Approving Transfer Of Generating Facilities And Making Other Findings dated June 24, 1999[31] (" The Auction Plan Order approved (O&R's) proposal to conduct a two-phase auction...Donaldson, Lufkin and Jenrette Securities Corporation (DLJ) served as (O&R's) financial advisor as well as the auction administrator...DLJ began the auction process in early June 1998 by soliciting expressions of interest in the auction from approximately 175 interested entities...DLJ invited qualified bidders to participate in Phase I and submit non-binding initial bids...Upon D.J.'s...recommendation, (O&R) invited a select group of bidders to participate in Phase II...(O&R) asserts that the identity of Phase II bidders was kept confidential...DLJ received Phase II bids on October 23, 1998. Subsequently, after a period of negotiations, (O&R), Con Edison and the (SEI) Affiliates executed final contracts for Southern's purchase of all of the generating

assets...on November, 24, 1998...Transition Power Contracts...While the capacity price appears somewhat high...it is offset by the energy price...the benefit provided by the energy price appears to justify the capacity payment...Load Pocket Agreements...The payment that (O&R) will make to (SEI) for energy required during load pocket hours is a function of historical generation characteristics, fuel price indices and market revenues. The penalties and legal provisions...which are meant to ensure that reliability will be safeguarded are reasonable...Energy Sales Agreements. The energy price derivations contained in the Incremental Energy Sales Agreement(s)...are reasonable...the energy prices contained in these agreements are reasonable as compared to the market price of electric futures...Comparison to Other Auctions. A large number of generation auctions have been completed to date...Overall, generation auctions for all types of assets have seen prices averaging $319 per KW. This auction resulted in an average price of $268 per KW, which is acceptable given the operating characteristics of the Purchased Assets...with the adjustments discussed above, the utilities' ratepayers have received fair and reasonable value for the Purchased Assets...the proposed transfer is approved as in the public interest "), and as discussed in the Record[32] and in Petitioners' and Respondents' Memoranda of Law[33], this Court finds that the transaction was arm's length and the sale price of $213,580,000 [value of real property assets] is the best evidence of value of Lovett for the tax year 2000, the sale occurring before the

January 1, 2000 taxable status date [See e.g., Plaza Hotel Associates v. Wellington Assocs., 37 N.Y. 2d 273, 372 N.Y.S. 2d 35 (1975)(" the purchase price set in the course of an arms's length transaction of recent vintage, if not explained away as abnormal in any fashion, is evidence of the ' highest rank ' to determine the true value of the property at that time ") quoting, Matter of Woolworth Co. v. Tax Comm., 20 N.Y. 2d 561, 285 N.Y.S. 2d 604 (1967); Matter of Reckson Operating Partnership, LP v. Assessor of the Town of Greenburgh, 289 A.D. 2d 248, 734 N.Y.S. 2d 478 (2nd Dept. 2001); Matter of Robert Lovett v. Assessor of the Town of Islip, 298 A.D. 2d 521, 748 N.Y.S. 2d 517 (2nd Dept. 2002); Matter of Application of 325 Highland, LLC v. City of Mount Vernon, 5 Misc. 3d 1018 (West. Sup. 2004)] notwithstanding that the transaction took place within the context of an auction [See e.g., Matter of City of New York(Grimm), 98 A.D. 2d 166, 471 N.Y.S. 2d 105 (2d Dept. 1983)(" Under all of these circumstances, we conclude that the auction sales were not of a ' panic ' or ' distress ' sale nature and that, on the facts at bar, they were not so abnormal in nature as to preclude their use or to minimize their weight ")].

The Floor & Ceiling For Each Year At Issue

2000	Valuation Ceiling	**$213,580,000**
	Valuation Floor	**$213,580,000**
2001	Valuation Ceiling	**$355,000,000**
	Valuation Floor	**$150,000,000**
2002	Valuation Ceiling	**$320,000,000**
	Valuation Floor	**$200,000,000**
2003	Valuation Ceiling	**$380,000,000**
	Valuation Floor	**$125,000,000**

Overcoming The Presumption Of Validity

Notwithstanding the Petitioners' accurate observation that " based on Respondents' own admission, as contained in their appraisal report, for each year in question Respondents grossly, over-assessed " Lovett[34] [See e.g., Matter of Arsenal Housing Associates v. City Assessor of City of Watertown, 298 A.D. 2d 830, 747 N.Y.S. 2d 814 (4th Dept. 2002); Matter of South Slope Holding Corp. v. Comstock, 280 A.D. 2d 883, 721 N.Y.S. 2d 171 (4th Dept. 2001)(" We conclude that the court was required to consider the

entire record and that respondents' appraisals, received in evidence, constituted admissions against interest by respondents that the assessments were excessive to the extent that they exceeded those appraisals ")], the Petitioners must, through the submission of substantial evidence, overcome the presumptive validity of the disputed assessments [See e.g., Matter of FMC Corp. [Peroxygen Chems. Div.] v. Unmack, 92 N.Y. 2d 179, 677 N.Y.S. 2d 269 (1998)(" ' In the context of tax assessment cases, the substantial evidence standard merely requires that petitioner demonstrate the existence of a valid and credible dispute regarding valuation. The ultimate strength, credibility and persuasiveness are not germane during this threshold inquiry...a court should simply determine whether the documentary evidence and testimonial evidence proffered by petitioner is based on ' sound theory and objective data ' "); Matter of Niagara Mohawk Power Corp. v Assessor of the Town of Geddes, 92 N.Y. 2d 192, 677, N.Y.S. 2d 275 (" In the context of a proceeding to challenge a tax assessment, substantial evidence proof requires a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser "); Matter of Reckson Operating Partnership v. Assessor of the Town of Greenburgh, 2 Misc. 3d 1005 (West. Sup. 2004)(" This Court finds that the Petitioner has submitted substantial evidence based upon ' sound theory and objective data ' consisting of an Appraisal and the testimony of (its appraiser

), and as such has demonstrated the existence of a valid dispute concerning the propriety of the assessments. Having met its initial burden, the Petitioner must prove, through a preponderance of evidence, that the assessments are excessive. The Court has considered and evaluated the weight and credibility of the evidence submitted to determine whether the Petitioner has proven that the assessments are excessive ")].

The Petitioners through the testimony and evidentiary submissions of Dr. Lawrence Makovich[35], a Ph.D. economist and senior director at Cambridge Energy Research Associates [" CERA "], who provided forecasts of pricing for electricity, natural gas, oil and coal as of January 1, 2000, 2001, 2002 and 2003; William Crean[36], a licensed professional engineer and cost estimator of electric generating plants and employed by Black & Veatch, who provided calculations of the reproduction and replacement costs and depreciation of Lovett as of each of the valuation dates; Michael Remsha[37] of American Appraisal Associates, an appraiser and licensed professional engineer in the State of Wisconsin, who provided an appraisal of Lovett using three valuation methods, i.e., cost [RCNLD] [2000-2003], income [DCF] [2000-2003] and sales comparisons [2000-2003]; Victoria Lynch[38], an employee of Mirant Corporation and former employee of O&R who testified regarding O&R's trading arm that was formed in 1997 to trade in various

wholesale markets including the New York Power Pool; Eddie Dorsett[39], a former employee of Southern Energy International [" SEI "] and Mirant Corporation, who testified about the sale of Lovett to SEL and about the trading activities of SEI in the electricity wholesale market; and Elliott Neri[40], employed by Mirant Corporation as the manager of its New York assets including Lovett, who testified about the operations of Lovett and its historical capacity factors, the Petitioners have met their threshold burden of presenting substantial credible evidence, including an appraisal based on " standard accepted appraisal techniques and prepared by a qualified appraiser ", to overcome the presumption of validity of the assessments imposed by Respondents upon Lovett for each of the tax years in dispute.

Petitioners' And Respondents' Valuation Methodologies

What is the true value of Lovett? It is clear that for the tax years in dispute [2000-2003] Lovett's true value must be between its valuation floor and ceiling. The Petitioners' appraiser used all three methods of valuation for each of the disputed years 2000-2003, i.e., the cost [RCNLD], income [DCF] and sales comparison methodologies. The Petitioners's appraiser reconciled the results from all three approaches in concluding Lovett's true value for each year in dispute[41]. The Respondents' appraiser used the cost

[RCNLD], income [DCF] and sales comparison methodologies to valuation but only reconciled the results of the cost [RCNLD] and income [DCF] approaches in concluding Lovett's true value for each year in dispute[42].

Selecting A Reasonable Valuation Methodology

Stated, simply, the Court rejects the Respondents' income [DCF][2000-2003] and cost [RCNLD][2000-2003] methodologies, rejects Petitioners' income [DCF][2000-2003] and sales comparison [2000-2003] methodologies but accepts Petitioners' cost [RCNLD][2000-2003] methodology [with modifications] as the only reasonable method of establishing the true value of Lovett, particularly, given the inconsistency and anecdotal[43] nature of market data pre-NYISO and the unreliability and volatility of market data post-NYISO, all of which developed during a tumultuous

and disheartening[1], period of deregulation leading up to and after the benchmark date of December 1, 1999 when the New York Independent System Operator [" NYISO "] opened its doors for business [See e.g., Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 2003 WL 211726636 (N.Y. Sup. 2003)(valuation of hydroelectric facility for tax years 2000 and 2001), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004)(" At trial, petitioner presented extensive appraisal evidence employing the comparable sales, DCF and RCNLD methods of valuation. Supreme Court accepted Petitioner's argument that, following deregulation of the industry, a market had developed for power facilities and, thus, they should no longer be considered specialty properties to be valued using only the RCNLD method...Inasmuch as

[1] It's Beyond Mirant-Editorial, Journal News (June 16, 2006)(" ...Deregulation, promised in the 1980s by presidents and Congress as salvation for an energy-hungry nation, has not given consumers new sources of supply nor lowered their rates. Instead, it has put energy at risk, removed long-serving utility expertise from the market, encouraged bottom-line only profit seeking and mismanagement by such companies as Enron and confused consumers who were long used to the protection given by state regulators...The system wasn't broken, and deregulation seriously wounded it. The future ahead is in ever-escalating costs, a burden for local taxpayers and consumers and inadequate supply..."); See also: Conspiracy of Fools, Kurt Eichenwald, Broadway Books (2005)(" The implications of the Enron debacle were so vast that even years in hindsight, they are still coming into view. It set off what became a cascading collapse in public confidence...trillions of dollars in stock values vanished translating into untold numbers of second jobs, postponed retirements, lost homes, suspended educations and shattered dreams "); McLean & Elkind, The Smartest Guys In The Room: Scandalous Fall of Enron, Portfolio Trade (2004).

the record supports Supreme Court's finding that petitioners' DCF analysis was based on unreliable price forecasts and overstated operating expenses, it was appropriate for the court to reject it and elect to use the RCNLD method. While this approach must be used with caution, since it may overvalue property if insufficient obsolescence is applied...Supreme Court met this concern by adopting petitioner's own figures. Contrary to petitioner's contention, there is nothing inherently inappropriate about this approach, as we regularly upheld it for the valuation of hydroelectric facilities before deregulation (see Matter of Niagara Mohawk Power Corp. v. City of Cohoes Bd. of Assessors, 280 AD 2d 724 (3d Dept. 2001) "); Matter of Consolidated Edison Company of New York v. City of New York, Index No. 8564/98 (Kings Sup. 2004)(Slip. Op. pp. 5-6)(Hon. Michael L. Peace)
(" Historically, electric generating facilities (prior to deregulation) have been held to fall into a narrow category of ' specialty property ' which was required to be assessed using the RCNLD method of valuation...During the tax years under review [1994-1998] both appraisers found that the subject property was speciality property and stipulated at trial that the RCNLD method is the appropriate method of valuation in these proceedings ")]. Matter of TBG Cogen Partners v. The Assessor of the County of Nassau, New York Law Journal, August 15, 2001, p. 21, col. 3 (Nassau Sup. 2001)(J. Winslow)(" The property owners...contend that the property was over-assessed for the tax years 1994 through

2000. The property...is improved with a co-generation plant that was constructed in 1998 to produce steam and electricity from natural gas-powered turbines. Grumman/Northrup-Grumman has been the Plant's sole purchaser of steam for the Plant's entire working life to date...the parties agree that this is a ' specialty property ' and that...(RCNLD) is the proper method of valuation for determining true market value...")].

The Impact Of Deregulation On Valuation Methodologies

Before computing the true value of Lovett using the cost [RCNLD] method it is necessary to discuss the deregulation of the markets in New York State for wholesale electricity and the sale of generating facilities[44], the creation and operation of the NYISO and the need, for tax certiorari purposes, to use reliable and actual data in valuing electricity generating facilities.

The Market For Electricity

The electricity industry is comprised of four functions: generation, transmission, distribution, and customer service[45]. Traditionally, these functions were integrated and provided by publicly owned electric utilities [" PUCs "][46] or investor owned utilities [" IOUs "][47]. Starting in the late 1970s, general

public concern about high-energy costs and the need for conservation caused federal and state governments to consider alternative solutions[48].

Rate Based Regulation

Historically, PUCs/IOUs were vertically integrated monopolies[49]. A state's public service or utility commission [e.g., New York State Public Service Commission [" P.S.C. "]] regulated the PUC's/IOU's rate of return on investments and compensable operating expenses[50]. That is, the PUC/IOU provided service to the public at a determined " reasonable rate " on its investments in physical assets and operating expenses[51]. This is known as rate-based regulation[52].

The Northeast Blackout

In 1965, the Northeast blackout occurred[53]. As a result, the North American Electrical Reliability Council [" NERC "] was formed to improve the United States' interconnection and communication between electric power pools or regions[54]. This Council increased the number of transactions between PUCs/IOUs to lower electricity production costs and increase reliability in the electric grid[55].

Regulating Interstate Energy Transmissions

Following the increase in oil prices during the early 1970's, the Federal Energy Regulatory Commission [" FERC "] was established in 1977[56]. FERC was created to regulate interstate electric and gas transmissions.

Opening The Market To Non-Utility Generators

To promote increased reliance on market forces, Congress passed the Public Utility Regulatory Policy Act [" PURPA "] of 1978[57]. PURPA permitted non-utility generators [" NUGs "] and independent power producers [" IPPs "] to enter the wholesale or bulk power market, by encouraging them to either buy or construct generating facilities, and to operate them independently of PUCs/IOUs[58]. As a result, NUGs sold power to PUCs/IOUs[59]. PURPA opened the market for small generators [e.g., eighty (80) megawatts [" MW "] or smaller], that were, primarily, hydroelectric, wood-burning, and co-generation stations[60]. In 1981, the P.S.C. enacted the " 6-cents law "[61].

A Wholesale Market For Electricity Evolves

Although not its original intent, PURPA resulted in increased competition in the wholesale market[62]. NUGs needed to find buyers for their excess capacity[63] [i.e., excess of the capacity they sold to PUCs/IOUs]. Many of these transactions were telephonic and/or bilateral contracts[64] that, generally, had to be filed with FERC.

Traders & Brokers

By the 1990s traders and brokers had entered the market and transacted sales of electricity even though they did not own any generation or transmission assets[65]. The entrance of these traders and brokers further increased the competitive forces driving the wholesale electricity market[66]. Ultimately, to compete with traders and brokers, PUCs/IOUs set up their own trading rooms for wholesale transactions[67].

Merchants Of Electricity

In 1992, Congress passed the National Energy Policy Act [" NEPA "][68]. This legislation allowed merchants IPPs to sell their generated electricity to PUCs/IOUs[69].

Open Access To Transmission Lines

In recognition of the increasing marketplace for electricity, in 1996 FERC issued Order 888[70] which required open access to PUCs' transmission facilities for all generators and lead to the proliferation of Purchase Power Agreements[71].

OASIS

FERC also issued Order 889 which required transparency in transmission line cost and access information, by making such information electronically available [known as the Open Access Sametime Information System [" OASIS "]][72].

Separating Transmission & Sales Employees

FERC Order 889 also required transmission providers to functionally separate their transmission employees from wholesale energy sales and purchase employees. These pieces of legislation and administrative orders encouraged the continued development of a competitive wholesale electricity market.

Publication Of Wholesale Pricing Information

In 1994 DRI/McGraw Hill [" McGraw Hill "] began publishing wholesale electricity prices in the DRI Electricity Review[73]. By 1995, McGraw Hill also published reports of New York wholesale electricity prices. In 1997, McGraw Hill daily reported electricity prices for both western [Zone G] and eastern [Zone A] New York. McGraw Hill sold its publication of eastern and western New York electricity prices to persons and entities that were trying to ascertain market trends, including traders and brokers, municipal utilities, trading rooms of PUCs/IOUs and IPPs. In addition to McGraw Hill's publication, competitive wholesale transactions were reported by PUCs to FERC on FERC Form 1.

The Need For Cheaper Energy Sources

Wholesale electricity transactions in the 1990s may have resulted, in part, from production cost differentials between the various generators and their owner's desire to reduce costs by purchasing electricity from the lowest cost producers. For example, O&R routinely sought cheaper energy sources [e.g., in the PJM and NEPOOL markets] to avoid having to run Bowline due to its high operation costs. During this period some states determined that electricity prices were too high and began considering ways in which to encourage competition in an effort to reduce electricity prices.

The Market For Generating Plants In New York

On May 20, 1996 the P.S.C. issued Opinion No. 96-12[74] which encouraged PUCs/IOUs to prepare proposed plans to restructure the generation portion of their companies, a process known as unbundling [" The provision of electric service in a time of increasing competitive options facing consumers raises numerous complex issues. This proceeding was established to seek ways the industry could be restructured in light of these options, taking account of the need to lower rates for all customers in order to spur economic development in the State and to avoid jeopardizing safe and reliable electric service[75]...The recommended decision also suggested that all investor-owned utilities [" IOUs "] be directed to file, within six months...comprehensive long-term...(3) proposals for separating generation from transmission and distribution[76]...Critical to a movement toward a restructured industry is the need to avoid undue concentration of market power and particularly the use of monopoly power on the distribution side to unduly restrict choice on the generation side. Divestiture of generation and energy services is a clear way to allay concerns about vertical market power...Divestiture may create a number of competing generating companies...an advantage of divesting generation is that a clear market value for generating assets is established[77] "].

Unbundling Generation Assets

As part of their strategic planning to unbundle generation assets, most New York PUCs/IOUs determined that their core businesses did not include operating generating assets in a deregulated environment. New York's PUCs/IOUs had the choice[78] to either retain their generation assets in a subsidiary non-regulated company [IPP] or to divest themselves of those assets.

Sales Of New York Generation Assets: 1999-2001

Following these policy developments, sales of electric generating stations began to occur. In New York during the period 1999-2001, purchasers entered the market and bought existing generating facilities[79], including the purchase of Lovett and Bowline in 1999[80]. There were no sales of generating stations in New York State in 1997 or 1998[81].

The Creation Of NYISO

On December 1, 1999, the New York Independent System Operator

[" NYISO "] opened its markets and took over operation of the State's bulk electric transmission system[82] from the New York Power Pool [" NYPP "][83].

NYISO Markets

The NYISO established several types of energy markets[84], many of which did not previously exist and all of which were essential for the operation of a deregulated yet reliable market for wholesale electricity.

The NYISO Market Data Exchange

In addition to numerous services the NYISO provides an extraordinary amount of information online in its Market Data Exchange[85].

How NYISO Works To Meet Demand For Electricity On A Daily Basis

In Bowline, supra, this Court discussed how the NYISO works to meet the demand for electricity [" Dr. Makovich, in response to a question posed by the Court regarding the bidding process for wholesale electricity, described how NYISO works. " With the (NYISO) in place there is actually a routine function right now

where all the suppliers (of electricity) put in their bids, what price you are willing to supply power and one of the jobs in (NYISO) is to collect them all, figure out who they want to be running at any point in time and they typically do this a day ahead. So they ask for all the bids for the next day and they estimate what they think demand is going to be the next day. They come up with this plan of who is going to run and who is not and what the market clearing price is likely to be. Then as the day happens it may be that anticipated supply and demand is a little bit different from what they planned the previous day. They have to now look for who (has) got that marginal cost, who would be the most economic one to go for based upon the bid they put in. That kind of a frequent rebidding is what goes on in the market place " The Court: Is that done every day for the entire state? The Witness: Yes. The Court" Where is the physical location of this...stock market, if you will, of electricity? The Witness: That all comes together in a center in Albany, I believe. Q. Did New York Power Pool serve the same function before NYISO? A. The New York Power Pool did something different in that people would provide their marginal cost information and they would then create a plan of dispatch based upon those marginal costs. It's a similar thing but not exactly the same "[86] "].

When Did Deregulation Officially Start In New York State?

When was the market for wholesale electricity and generating facilities in New York State sufficiently developed and of such a character that observations of that market could reasonably and reliably predict the future market for such commodities? At what point in time did it become appropriate to use an income and sales comparison approach [in addition to cost [RCNLD]] in valuing electricity generating facilities such as Lovett? [See e.g., Matter of Niagara Mohawk Power Corp. v. Town of Moreau Assessor, 307 A.D. 2d 669, 762 N.Y.S. 2d 847 (3d Dept. 2003)(" In the mid-to-late 1990s, however, the industry underwent deregulation and, according to evidence presented in the record by petitioners, a market began to emerge for the purchase and sale of electric generating facilities. Petitioners argue that the emergence of such a market provides a framework for a shift in the paradigm for valuing utility properties such as those implicated in these petitions. Given the procedural posture in which the issue has reached us, we need not engage in a protracted discussion of the ultimate merits of the purported arguments regarding valuation of electric generating facilities in the age of deregulation...*They should thus be afforded an opportunity to attempt to convince the trier of fact of the existence of a such a market. If successful...they can further attempt to persuade Supreme Court that...the income method best reflects actual value* [emphasis added] ")].

The Market Started On December 1, 1999

The Court finds, based upon the credible evidence[87] herein and its earlier analysis and determination in Bowline[88], supra, that the beginning of deregulation of the market in New York State for wholesale electricity and the sale of generating facilities, for tax certiorari purposes [i.e., when was it appropriate to use all three valuation methodologies [See e.g., Saratoga Racetrack, Inc. v. Williams, 91 N.Y. 2d 639, 697 N.E. 2d 164, 674 N.Y.S. 2d 263 (1998)(" there must be no market for the type of property and no sales of property for such use ")] coincided with the opening of the NYISO on December 1, 1999. In essence, for tax certiorari purposes, there was no meaningful market for wholesale electricity and the sale of electricity generating facilities [the first such sale took place in March of 1999 with additional sales in 2000 and 2001[89]] in New York State before December 1, 1999.

Early NYISO Data Unreliable And Volatile

However, although the creation of the NYISO justified the use of the income and sales comparison [in addition to cost [RCNLD]] approaches in valuing generating facilities in New York State, NYISO data generated during its early years has been found to be

unreliable and volatile [See e.g., Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 2003 WL 211726636 (N.Y. Sup. 2003)(valuation of hydroelectric facility for tax years 2000 and 2001; " The accuracy of these opinions of value is dependent upon the data from which they were derived. It is on this point that petitioner's appraisal falters. As pointed out, the revenue forecast is mostly predicated upon data derived from the first 14 months of an emerging market [NYISO] for a commodity subject to price volatility due to the vagaries of supply and demand as well as market manipulations...There is nothing in the record that addresses the Court's concern that this relatively small sample provided an accurate precursor of the price of electricity in five or ten years. Interestingly, in the California cases [See e.g., Watson Cogeneration Co. v. County of Los Angeles, 98 Cal. App. 4th 1066, 120 Cal. Rptr. 2d 42134 (3d Dept. 2004) (" selling its power...pursuant to the power purchase agreement...Where as here, the income flow can be expected to remain stable, based on controlled pricing and assured usage, the value of the property ' can best be estimated in terms of actual income rather than imputed income "); Freeport-McMoran Resource Partners v. County of Lake, 12 Cal. App. 4th 634, 16 Cal. Rptr. 2d 428 (1993)] the income projections were predicated upon power purchase agreements rather than assumptions of revenue...Therefore, in light of this analysis the Court rejects petitioner's appraisal based on the DCF methodology since it does not appear that the

ingredients of the appraisal were sufficiently in place to arrive as an accurate valuation "), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004) (" Inasmuch as the record supports Supreme Court's finding that petitioners' DCF analysis was based on unreliable price forecasts and overstated operating expenses, it was appropriate for the court to reject it and elect to use the RCNLD method ")].

What Is The Income [DCF] Method?

The Appraisal of Real Estate[90] defines discounted cash flow [DCF] methodology as " being appropriate for any pattern of regular or irregular income. In many markets DCF analysis is the technique investors prefer...*Investors do make forecasts and rely on DCF analysis, particularly in regard to investment grade, multi-tenant properties such as shopping centers and office buildings* [emphasis added]. In keeping with the principal of anticipation, market-supported forecasting is the essence of valuation... *(DCF) analysis can only provide accurate results if the forecasts developed are based on accurate, reliable information..*[emphasis added]." (DCF) analysis a " procedure in which a yield rate is applied to a set of projected income streams and a reversion to determine whether the investment property will produce a required yield given a known acquisition price. If the rate of return is

known, DCF analysis can be used to solve for present value of the property ".

Valuing Machinery and Equipment[91] defines DCF as a method " most frequently developed on a debt-free, net cash flow basis...This technique measures the direct economic benefits derived from ownership, in the form of future cash inflows and outflows attributed to the property, stated at their present value. Cash inflows are derived from income plus noncash expenses (depreciation expense). Cash outflows arise from future operating and general/administration expenses, future capital expenditures and any required influxes of working capital necessary to support growth and sales revenue ".

Acceptance Of DCF Methodology

Although some New York State courts have accepted the DCF valuation methodology in cases involving public utility rate increases[92], valuing stock in closely held corporations[93] and valuing real property taken in condemnation proceedings[94], DCF methodology has yet to be accepted in valuing electricity generating facilities in New York State [See e.g., Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 2003 WL 211726636 (N.Y. Sup. 2003)(valuation of hydroelectric facility for tax years 2000 and 2001), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004)(" At trial, petitioner presented extensive appraisal

evidence employing the comparable sales, DCF and RCNLD methods of valuation. Supreme Court accepted Petitioner's argument that, following deregulation of the industry, a market had developed for power facilities and, thus, they should no longer be considered specialty properties to be valued using only the RCNLD method...The first defect in petitioner's DCF approach is the failure...to use actual income based on two power purchase agreements...(Appraiser) used market rate information accumulated from November 1999 through December 2000, which Supreme Court found to be an unreasonably narrow time frame for purposes of collecting a sample in an indisputably volatile market...To the extent that petitioner urges that its DCF method must be adopted because purchasers regularly utilize it to determine the value of power plants, we need only note that such sales are of ongoing businesses where numerous factors beyond the value of the real property and generating equipment are involved...Inasmuch as the record supports Supreme Court's finding that petitioners' DCF analysis was based on unreliable price forecasts and overstated operating expenses, it was appropriate for the court to reject it and elect to use the RCNLD method ")].

Respondents' DCF Methodology Is Rejected

The recognized unreliability and volatility of NYISO data during its early years of operation is sufficient grounds for

rejecting Respondents' income [DCF] approach for tax years 2000-2003 since in preparing his price duration curve [PDC] Mr. Walker relied upon NYISO data[95] previously rejected by the Court in Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 2003 WL 211726636 (N.Y. Sup. 2003), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004).

The Holding Period Of 31 Years Is Too Long

In addition, Mr. Walker's income [DCF] approach must be rejected because his holding period is too long. Mr. Walker developed a DCF model that encompassed thirty-one (31) years of forecasting revenues and expenses. Such a " holding period " is too long, increases the risks and uncertainties of developing reasonable and realistic cash flow projections and is well beyond the holding period recommended in The Appraisal of Real Estate[96] (" The procedural steps typically include forecasting income, vacancy, operating and capital expenses...over ownership periods of 5 to 15 years. In some markets, 10 years is cited as an average or standard study period ") and Valuing Machinery and Equipment[97] (" The above schedule represents the basic model that is used to restate the facility's actual historical operating statements and to forecast the future in a DCF analysis. The number of years included in what is called the ' specific forecast ' period is based on several factors, such as the economics of the subject

industry and the economics and the physical attributes of the subject property. If the subject assets are physically very old and obsolete, the remaining life of the property may be very short...Hence, the forecast period in such a case could be very short...Generally, after the changes in net cash flow begin to stabilize (for example, after 5, 10 or 15 years)...").

A Holding Period Of 20 Years Is Still Too Long

In Bass v. The Tax Commission of the City of New York, 1991 N.Y. Misc. LEXIS 89 (N.Y. Sup. 1991) the Court rejected a twenty-year (20) holding period (" Petitioner's appraiser found it necessary to go out 20 years to 2003 to stabilize cash flow...the court finds that the DCF method as employed by petitioner's appraiser is not particularly suited for valuation of this property [office building] for tax purposes. DCF must be applied with caution particularly when the analysis involves cash flow projections over a long period of time. The degree of uncertainty in long term analysis of variable cash flows limits the reliability of DCF for appraisal purposes....buyers and sellers would be wise to look upon long term projections with caution. DCF analysis is much more convincing when used to estimate stabilized incomes within shorter time frames ")].

Petitioners' DCF Methodology

Since Lovett [Post-NYISO] is an income stream it is appropriate to use the " capitalization of income method for determining the value of income-producing property " but " it is a ' method [that] can be effective only with thorough data, including accurate actual income and operating expenses of the subject properties " [Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004)].

Respondents' And Petitioners' PDCs Are Based On Unreliable Data

The Petitioners seek to avoid rejection of their DCF analysis by asserting that, unlike Mr. Walker's DCF analysis, it is not infected with the unreliability and volatility of early NYISO market data. Petitioners claim that " neither Dr. Makovich nor Mr. Remsha used NYISO or pre-NYISO transactions to project electricity prices. Unlike Mr. Walker, Dr. Makovich did not apply historical electricity prices as the foundation for his price forecasts. Dr. Makovich modeled a competitive market by his application of

economic fundamentals to project fuel costs, and thereby electricity prices "[98]. Nonetheless, Petitioner's DCF analysis is equally unreliable because it is based, in part, upon the illusory belief that " A liquid wholesale electricity market existed in 1997, 1998 and 1999 ", a concept which this Court has rejected. The Petitioner's PDC is as infected with unreliable data as is Respondents' PDC [" Dr. Makovich used electricity price data in 1997 that was from a competitive wholesale market for electricity, for the sole purpose of computing a price dispersion curve. The PDC compared actual hourly electricity prices to the overall actual average electricity price, based on the existent competitive market paradigm "[99]].

Petitioners' DCF Economic Fundamentals

The Petitioners' income methodology for valuing Lovett used the DCF methodology to look at " the potential revenue streams based on historical supply and demand, as statistically reviewed (regression analysis) and projected, by...Dr. Makovich who also forecast future revenues by forecasting electricity prices and capacity payments "[100]. Generation revenues arise from the production and sale of electricity into the marketplace[101] while capacity revenues are payments to Bowline for its generating capability apart from its actual production[102]. Capacity payments

are intended to ensure sufficient reserve capacity in the electric grid.

The Holding Period

To apply the DCF Mr. Remsha determined a holding period (i.e., the length of time over which the future cash flow was projected under the DCF)[103] of seven years[104]. Mr. Remsha observed that by the seventh year the cash flow had sufficiently stabilized to permit an assumed long-term growth on a normalized cash flow (i.e., the seventh year was used to compute the terminal value)[105].

Short Run Marginal Costs

Dr. Makovich generated supply and demand curves, the intersection of which is the price of electricity and " occurs at a suppliers' short-run marginal cost (' SRMC ') "[106]. For electric generation purposes the SRMC is the fuel cost plus variable costs associated solely with actual generation[107]. The supply curve, then, is a compilation of the SRMC of all suppliers-ordered from lowest SRMC to the highest SRMC[108].

The Demand Curve

In developing a demand curve, Dr. Makovich constructed a statistical model, based on data from the Edison Electric Institute [" EEI "] for the Mid-Atlantic region, to compute the expected demand rate for the years in question[109]. To compute the demand growth rate, he performed a regression analysis on the EEI data and found an annual growth rate of two (2%) percent for electricity[110]. Dr. Makovich's regression analysis considered several variables including population growth, price of electricity, weather conditions and economic growth[111]. To project electricity prices, Dr. Makovich applied a two percent growth (compounded) to the 1995 average demand and computed an average demand for both 1997 and 2012 (the book end years of his DCF analysis) for his projections of electricity prices for 2000 through 2003[112].

The Supply Curve

To determine the supply curve for his electricity price projections Dr. Makovich began with 1997 as a base year ranking each generating unit in New York by its SRMC computed by multiplying each unit's heat rate by its fuel and avoidable costs[113]. Dr. Makovich performed a similar analysis for 2012 by determining the total supply needs in 2012 (by projecting the peak demand for 2012 and then adding the NYISO required reserve margin

of eighteen (18%) percent). Dr. Makovich computed the 2012 supply needs by applying a two (2%) percent growth rate per year with a resulting supply projection that approximately five thousand megawatts of new capacity was required to be added by 2012[114]. For the new capacity, D. Makovich determined that the technology of choice would be either CCGT or simply cycle plants[115]. Having determined the supply needs for his book-end years of 1997 and 2012, Dr. Makovich next determined the marginal fuel shares which he used to compute the average electricity price for each year[116].

The Price Duration Curves

Dr. Makovich developed price duration curves [" PDC "] as of each valuation date to determine the volatility and dispersion for each hour across the year (all 8760 hours) of electricity prices[117]. Dr. Makovich computed the actual electricity price for 1997 using actual 1997 electricity price data[118] and concluded that the volatility and dispersion experienced in 1997 should be the same for 1998 through 2012, the book end years[119].

Using Lovett as an example of how the PDC worked, Dr. Makovich testified that Lovett was estimated to run 54-57% of the time[120]. After calculating an integrated price duration curve[121], Dr.

Makovich projected hourly electricity prices as of each valuation date in question[122] and increased those price projections by 6.5% that reflected the higher prices in Zone G where Lovett was located[123].

Projected Capacity Payments

Dr. Makovich projected capacity payments for each valuation date, the premise being that a developer would not provide new generating resources unless the expected total price (energy plus capacity) covered all costs, including a competitive profit[124]. For each year in dispute Dr. Makovich evaluated market conditions to determine whether the market would have surplus capacity in any particular year, be balanced or experience a shortage of capacity in the market. For his evaluation, Dr. Makovich included the required eighteen percent (18%) reserve[125].

Projecting Revenue Streams, Expenses & Capital Expenditures

Petitioners' appraiser, Mr. Remsha, applied Dr. Makovich's estimated price and capacity payment forecasts for Lovett for each year comprising the holding period[126]. To develop Lovett's energy production revenue stream, Mr. Remsha developed an opinion of Lovett's annual generation of electricity for each year of the

holding period[127]. Mr. Remsha recognized that coal plants were intended to be operated as base load plants[128]. Mr. Remsha concluded that Lovett's capacity factor for Units 4 and 5 would be sixty-seven (67%) percent and for Unit 3 fifteen percent (15%), for a composite capacity factor of 59.2% for all seven years of his holding period[129]. Recognizing that Lovett as a coal plant had to run often to be profitable[130], Mr. Remsha projected generation revenue of $92 million (78%) and projected capacity payments of $25.9 million (22%)[131]. Mr. Remsha also applied Dr. Makovich's costs for natural gas, fuel oil and coal, all of which Lovett utilized, and computed total fuel cost for his DCF model for Unit 3 using the lesser projected cost of natural gas or fuel oil for each year and for Units 4 and 5 using Dr. Makovich's coal price forecast[132]. Having computed the fuel cost, Mr. Remsha calculated Lovett's operating expenses starting with actual expense data for the years 2000-2002[133]. Mr. Remsha accounted for capital expenditures that could reasonably be expected to occur during the holding period[134] which included the actual environmental controls required by the DEC Consent Decree[135] such as back-end controls to restrict NOX and SO2 emissions and the bag house for Unit 5. Mr. Remsha also included the construction of the fish larvae entrainment or the gunderboom[136] to prevent fish larvae and small animals from being drawn into the plant.

Discounting The Cash Flow

Having determined the annual income, expenses and capital expenditures for each year of the holding period, Mr. Remsha computed the annual net cash flow for each year and its present value[137] and totaled those cash flows[138]. For the seventh year of the holding period Mr. Remsha projected the long-term growth and, then, capitalized the cash flow into the future to derive a value as of the beginning of the seventh year. The seventh year's terminal value was added to the summed six years of cash flow, which resulted in the business enterprise value which included intangible and tangible assets, as well as working capital[139]. Intangible assets and working capital were quantified and deducted to arrive at the value attributable to the real property[140].

Petitioners' Income [DCF] Methodology Is Rejected

In creating his DCF model Mr. Remsha's used 1995 as an average year for purposes of evaluating hourly demand dispersion suggesting that in his opinion it was more representative year than 1996 or 1999. Dr. Makovich decided to use the years 1997 and 2012 as the bookend years of electricity price forecasts for the years 2000 through 2003. In so doing Dr. Makovich not only evaluated 1997 demand data but formulated assumptions about the supply side based on 1997 data as well. Dr. Makovich determined the SRMC of New York State generation units based on such data[141] which estimates were

then used to determine marginal fuel shares for the first of his bookend years[142].

Mr. Remsha's income [DCF] approach [2000-2003] was premised on the assumption that a wholesale market [sufficiently developed and of such a character that observations of that market could reasonably and reliably inform predictions about the future market for electricity commodities] existed in New York State several years prior to the relevant valuation dates for the 2000-2003 tax years in dispute, an assumption which this Court has rejected. Mr. Remsha's reliance upon data from 1995 and 1997 [and earlier] reflecting an economic environment dominated by regulated utilities [wherein " power marketers had (only) carved out a niche[143] "] while not considering data available as of the relevant valuation dates for the 2000-2003 years in dispute undercuts the credibility of his DCF analysis. The Petitioner's income [DCF] methodology is based upon unreliable data generated in a market very different, indeed, from the market in which Lovett operated during the tax years in dispute and is , therefore, rejected.

A Proper Income Approach Should Rely Upon Actual Market Data

The Petitioners' rejection of " NYISO or pre-NYISO transactions to project electricity prices " by applying only

" economic fundamentals to project fuel costs, and thereby electricity prices "[144] [premised upon a pre-1999 wholesale market for electricity which did not exist] in preparing their income [DCF] analysis is not a useful alternative when faced with unreliable and volatile NYISO market data which the Respondents chose to rely upon. It may be, that for tax certiorari purposes [e.g., taxing authorities, taxpayers and the courts need well defined and comprehensible assessment methodologies], it is reasonable to continue using the cost [RCNLD] methodology [with appropriate modifications] until such time as NYISO market data is deemed sufficiently reliable and stable to support an income approach [whether it be direct capitalization or DCF methodologies] to value electricity generating facilities [See e.g., Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 2003 WL 211726636 (N.Y. Sup. 2003)(valuation of hydroelectric facility for tax years 2000 and 2001; DCF methodology rejected because NYISO market data unreliable and volatile; " While the direct capitalization method is useful when a property is operating on a stabilized basis, where, as here, income changes in an irregular pattern, it is less useful (citing The Appraisal of Real Estate at p. 529) "), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004)(" Inasmuch as the record supports Supreme Court's finding that petitioners' DCF analysis was based on unreliable price forecasts and overstated operating expenses, it was appropriate for the court to reject it and elect to use the

RCNLD method. While this approach must be used with caution, since it may overvalue property if insufficient obsolescence is applied...Supreme Court met this concern by adopting petitioner's own figures. Contrary to petitioner's contention, *there is nothing inherently inappropriate about this approach, as we regularly upheld it for the valuation of hydroelectric facilities before deregulation* [emphasis added] "); Orange & Rockland Utilities, Inc. v. Town of Haverstraw Assessor, 12 Misc. 3d 1194 (Rockland Sup. 2006)(valuation of oil and gas fired electricity generating facility for tax years 1995, 1997-2003; petitioner's income [DCF] and sales comparison methodologies rejected; respondents' income [DCF] and cost [RNCLD] methodologies rejected; petitioners' cost [RNCLD] methodology accepted with modifications)].

What Is The Sales Comparison Methodology?

The Appraisal of Real Estate[145] defines the sales comparison approach as " A set of procedures in which a value indication is derived by comparing the property being appraised to similar properties that have been sold recently, applying appropriate units of comparison, and making adjustments to the sales prices of the comparables based on the elements of comparison. The sales comparison approach may be used to value improved properties...".

Valuing Machinery and Equipment[146] defines the sales comparison approach as an indication of value " by analyzing recent sales (or offering prices) of properties that are similar (i.e., comparable) to the subject property. If the comparables are not exactly like the properties being appraised, the selling prices of the comparables are adjusted to equate them to the characteristics of the properties being appraised...Like the cost and income approaches, the sales comparison assumes that the informed purchaser would pay no more for a property than the cost of acquiring a comparable property with the same utility ".

Acceptance Of The Sales Comparison Methodology

The sales comparison approach has been well accepted by New York State courts [See e.g., 860 Fifth Ave, Corp. v. Tax Commission, 8 N.Y. 2d 29, 167 N.E. 2d 455, 200 N.Y.S. 2d 817 (1960)(" it came to be realized that they furnish valuable evidence of market value if consummated between willing buyers and sellers under ordinary market conditions "); Matter of Merrick Holding Corp. v. Board of Assessors, 45 N.Y. 2d 538, 382 N.E. 2d 1341, 410 N.Y.S. 2d 564 (1978)(" Thus, though commonly the most accurate standard is provided by the sales prices of comparable properties located within the same or similar competitive area in which a parcel being assessed is located, in the absence of sufficiently

reliable market data, alternative methods such as income capitalization or, when necessary, reproduction cost, may be employed...as to income producing property, income capitalization has been the preferred mode "); General Motors Corp. v. Assessor of Massena, 146 A.D. 2d 851, 536 N.Y.S. 2d 256 (3d Dept. 1989), appeal denied, 74 N.Y. 2d 604, 543 N.Y.S. 2d 397, 541 N.E. 2d 426 (1989)(failure to select appropriate comparables leads to dismissal of petition).

In the case of income producing properties [" income streams "] such as Lovett [post-NYISO] the comparable sales and income methods merge [See e.g., Matter of The New Country Club of Garden City v. Board of Assessors, 1991 N.Y. Misc. LEXIS 606 (Nassau Sup. 1991)(" In his income approach, petitioner's golf appraiser relied on comparable leases [with] generally fixed rental income on the basis of different percentages of the gross receipts from various revenue sources typically found in golf courses. Not all the leases used identical classifications of revenue, but they supported this appraiser's dichotomy of subject's gross receipts into golf revenue (i.e., golf, tennis and social fees and dues and cart and locker rentals) and departmental sales (i.e., food, beverage and golf shop sales. While most leases had minimum rent requirements...such were exceeded in almost all cases and, more importantly, the overriding percentages were the figures relied on by investors in valuing golf course properties... ")].

Income Streams: The Need For Actual Income And Expense Data

An electricity generating facility [post-NYISO] is an income stream and must be valued using actual income and expense data. For example, Petitioners' appraiser, Michael Remsha, used a sales comparison approach for the tax years 2000-2003 but failed to properly treat Lovett as an " income stream " by obtaining and using actual income and expense data for each comparable sale[147] [See e.g., Reckson Operating Partnership, L.P. v. Assessor of the Town of Greenburgh, 2 Misc. 3d 1005 (West. Sup. 2004)(" The Court rejects the sales-comparison approach...without a detailed understanding of the income and expenses of the proposed comparable sales, there is no factual basis for concluding that such sales are in fact comparable to 555 White Plains Road. Both (appraisers) agreed that a buyer of income producing property purchases an income stream. As stated in The Appraisal of Real Estate (12th ed.), Appraisal Institute, Chicago, Ill., 2001, at 419-420, " The sales comparison approach usually provides the primary indication of market value in appraisals of properties that are not usually purchased for their income producing characteristics. These types of properties are amenable to sales comparison because similar properties are commonly bought and sold in the same market. Typically, the sales comparison approach provides the best indication of value for owner-occupied commercial and industrial

properties. Buyers of income-producing properties usually concentrate on a property's economic characteristics. Thoroughly analyzing comparable sales of large, complex, income-producing properties is difficult because information on the economic factors influencing the decisions of buyers is not readily available from public records or interviews with buyers and sellers. For example, an appraiser may not have sufficient knowledge of the existing leases applicable to a neighborhood shopping center that is potentially comparable to the subject. Property encumbered by a lease is a sale of rights other than fee simple rights and requires knowledge of the terms of all leases and an understanding of the tenant(s) occupying the premises. Some transactions include sales of other physical assets or business interests. In each instance, if the sale is to be useful for comparison purposes, it must be dissected into its various components. Even when the components of value can be allocated, it must be understood that because of the complexity of the mix of factors involved, the sale may be less reliable as an indicator of the subject's real property value " (The Respondent's appraiser) acknowledged that (his appraisal) contained no financial or other economic data for any of his comparable sales. Without information on the most crucial aspect of comparability, the income stream, his sales comparison approach will be given no weight [See e.g., Matter of Blue Hill Plaza Associates v. Assessor of Town of Orangetown , Sup. Ct. Rockland Co., Index Nos. 5093/90 et al., Slip Op. dated December 23, 1994

(n.o.r.), *mod*. 230 AD2d 846, 646 N.Y.S. 2d 836 (2d Dept.1996), *lv. den*. 89 NY2d 804 (1996); Taxter Park Associates v. Assessor of Town of Greenburgh , Sup. Ct. West. Co., Index Nos. 16189/96 et al., Slip Op. dated October 8, 1996 (n.o.r.)]"].

Petitioners' Comparable Sales Methodology Is Rejected

Although Petitioners' assert that Mr. Remsha's sales comparison analysis of nine sales contained " adjustments encompass(ing) income information for each sale "[148], no such information was obtained by Petitioners or provided herein.

" Average Data " Not Specific Enough

While Mr. Remsha attempted to measure profitability for each comparable sale in his " Market Conditions " adjustment[149] by using an electricity price/fuel price ratio, such a ratio[150] was based upon generalized data including, *inter alia*, an average NYISO daily price, none of which were specific to each comparable sale.

" Average Data " Is Inaccurate And Lacks Foundation

Furthermore, the " average NYISO daily price " data developed by Mr. Remsha lacks a proper foundation, does not accurately reflect all " on peak " and " off peak " prices during 1999-2003 and is based upon an extrapolation of " off peak " pricing for the entire period 2000-2003 using only one day in the year 2000[151]. As a consequence, Mr. Remsha failed to obtain and compare the actual income stream of each comparable sale with that of Lovett.

No Credible Evidence Of Arm's Length Transactions

Mr. Remsha used sales[152] from Illinois, Indiana (same facility sold twice), Western New York and Pennsylvania without properly taking into account different economic conditions in those markets as compared to the market in which Lovett operates. In addition, Mr. Remsha's assertion in describing his " Conditions of Sale " adjustment that " it was concluded that all of the sales reflect arm's-length transactions "[153] is unsupported by credible evidence with the exception of the sale of Lovett to SEL which this Court has found to be an arm's length transaction based upon credible evidence.

For all of these reasons the Petitioners' sales comparison approach for tax years 2000-2003 is rejected.

What Is The Cost [RCNLD] Approach?

The Appraisal of Real Estate[154] states that " In the cost approach the appraiser compares the cost to develop a new property or a substitute property with the same utility as the subject property. The estimate of development cost is adjusted for differences in the age, condition and utility of the subject property to generate a value indication by the cost approach...In applying the cost approach, an appraiser estimates the market's perception of the difference between the property improvements being appraised and a newly constructed building with optimal utility. Generally, the cost approach supports two methods for estimating cost [i.e., reproduction cost or replacement cost using one of three methods, comparative-unit method, unit-in-place method, quantity survey method (sticks & bricks)] and three methods of estimating depreciation (physical, functional and external) ".

Valuing Machinery and Equipment[155] states " Using the cost approach, the appraiser starts with the current replacement cost of the property being appraised and then deducts for the loss in value caused by physical deterioration, functional obsolescence and economic obsolescence. The logic behind the cost approach is the principal of substitution: a prudent buyer will not pay more for a property than the cost of acquiring a substitute property of equivalent utility ".

Acceptance Of The Cost [RCNLD] Methodology

The cost [RCNLD] method has been well accepted by New York State Courts [Piazza v. Town Assessor, 16 A.D. 2d 863, 228 N.Y.S. 2d 397 (4th Dept. 1962)(distinction between functional and economic obsolescence); Guilderland Center Nursing Home v. Town of Guilderland Board of Assessment Review, 195 A.D. 2d 902, 600 N.Y.S. 834 (3d Dept. 1993)(an expert familiar with construction costs is needed on the issue of reproduction or replacement costs; " Key to calculating value using reproduction cost method is a working knowledge of current construction costs and methods and the ability to perform a detailed analysis of the structure being appraised ")], particularly, in valuing electricity generating facilities [see e.g., Matter of Erie Boulevard Hydropower L.P. v. Town of Ephratah Board of Assessors, 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004)(" At trial, petitioner presented extensive appraisal evidence employing the comparable sales, DCF and RCNLD methods of valuation. Supreme Court accepted Petitioner's argument that, following deregulation of the industry, a market had developed for power facilities and, thus, they should no longer be considered specialty properties to be valued using only the RCNLD method...Inasmuch as the record supports Supreme Court's finding that petitioners' DCF analysis was based on unreliable price forecasts and overstated operating expenses, it was appropriate for the court to reject it and elect to use the RCNLD method. While this approach must be used with caution, since it may overvalue property if insufficient obsolescence is applied...Supreme Court

met this concern by adopting petitioner's own figures. Contrary to petitioner's contention, *there is nothing inherently inappropriate about this approach, as we regularly upheld it for the valuation of hydroelectric facilities before deregulation* [emphasis added](see Matter of Niagara Mohawk Power Corp. v. City of Cohoes Bd. of Assessors, 280 AD 2d 724 (3d Dept. 2001) "); Matter of Consolidated Edison Company of New York v. City of New York, Index No. 8564/98 (Kings Sup. 2004)(Slip. Op. pp. 5-6)(Hon. Michael L. Peace)(" Historically, electric generating facilities (prior to deregulation) have been held to fall into a narrow category of ' specialty property ' which was required to be assessed using the RCNLD method of valuation...During the tax years under review [1994-1998] both appraisers found that the subject property was speciality property and stipulated at trial that the RCNLD method is the appropriate method of valuation in these proceedings "); Matter of TBG Cogen Partners v. The Assessor of the County of Nassau, New York Law Journal, August 15, 2001, p. 21, col. 3 (Nassau Sup. 2001)(J. Winslow)(" The property owners...contend that the property was over-assessed for the tax years 1994 through 2000. The property...is improved with a co-generation plant that was constructed in 1998 to produce steam and electricity from natural gas-powered turbines. Grumman/Northrup-Grumman has been the Plant's sole purchaser of steam for the Plant's entire working life to date...the parties agree that this is a ' specialty property ' and that...(RCNLD) is the proper method of valuation for

determining true market value...The Court is being asked to consider the nature, applicability and extent of depreciation for functional and economic obsolescence on the value of specialty property "); Orange & Rockland Utilities, Inc. v. Town of Haverstraw Assessor, 12 Misc. 3d 1194 (Rockland Sup. 2006)(valuation of oil and gas fired electricity generating facility for tax years 1995, 1997-2003; petitioners' income [DCF] and sales comparison methodologies rejected; respondents' income [DCF] and cost [RNCLD] methodologies rejected; petitioners' cost [RCNLD] methodology accepted with modifications)].

Determining The RCN: Trending And Sticks & Bricks

In applying the RCNLD methodology, the appraiser first calculates reproduction cost new ("RCN") which " is the estimated cost to construct, as of the effective appraisal date, an exact duplicate or replica of the building with the same materials, construction standards, layout and quality of workmanship and embodying all the deficiencies superadequacies and obsolescence of the subject building "[156]. Both Respondents' engineer, Mr. Sansoucy, and Petitioner's engineer, Mr. Crean, used the trended original cost method [" TOC "] of determining RCN. TOC trends up the original costs for each surviving capital expenditure by applying a cost translator from the Handy Whitman Public Utility

Construction Index (North Atlantic Region) [" Handy Whitman Index "][157]. While both engineers used the TOC to compute Bowline's RCN, Mr. Crean also used the quantity survey method [" sticks & bricks "][158].

Petitioners' Cost [RCNLD] Methodology

Calibrating The Handy Whitman Index To Rockland County

To determine if the Handy Whitman Index was appropriate for local use, Mr. Crean investigated the rate of change in labor and material costs that were incurred in Rockland County over time. He then compared the rate of change in these costs, as measured by the Handy Whitman Index, to the rate of change of similar construction costs for Rockland County. He accomplished this by relying on a study by the United Engineers and Constructors along with the Energy Economic Data Base of the Department of Energy[159]. He broke down the reported costs for labor, boilers, fans, turbines and condensers by FERC accounts to set up a comparable cost inflation model. The labor rates were figures that Mr. Crean obtained from labor unions in Rockland County[160]

For the non-labor components, Mr. Crean indexed actual costs from 2000 to 2003. He measured the trends for each category, and then computed a weighted average trend for all categories. The

annual increase for all categories taken together for 2000 to 2003 was calculated to be 2.23% per year[161]. By the Handy Whitman Index for the North Atlantic region, that annual rate of change was 2.84%. Mr. Crean reported his results to Mr. Remsha who determined that although there was a slight difference between the two figures, it was reasonable to use the Handy Whitman Index for his TOC analysis[162].

Sticks & Bricks Methodology

In addition to using the TOC method Mr. Crean determined the RCN using the sticks & bricks methodology[163]. Mr. Crean estimated the construction costs of generating stations over a period in excess of twenty years[164]. He computed the exact quantities, costs of material, labor costs, equipment costs, overhead, and applicable indirect costs as of each year in question[165].

Components Of Cost Model

The purpose of Mr. Crean's cost model was to determine the material costs for the components, the man hours to construct or erect the components, apply the determined crew rate, compute the labor cost, and add the material costs and the labor costs together to determine the total direct construction costs[166]

Coal-Fired Boiler

Mr. Crean next estimated the man hours necessary to erect a coal-fired boiler of the same size as Lovett, which he determined to be 270,000 man hours[167]. He multiplied the crew rates by the man hours to compute the total direct labor costs[168]. The material costs were then added to the direct labor costs to reach a total project cost. The constructed boiler met the characteristics of the boiler in place[169]. Mr. Crean applied the same or similar approach for each year in question[170].

Steam Turbine Generator Package

Mr. Crean also testified concerning the costing out of the steam turbine generator package, precipitator and ash handling system, using the same general methodology and then totaling up all of his costs[171].

Indirect Costs

Having determined the labor and material costs, and the resulting total project direct costs, Mr. Crean computed the applicable indirect costs. He determined that there were two forms

of indirect costs, i.e., construction and project costs[172]. Mr. Crean totaled both the direct and indirect costs for all the property to compute the total project costs and he performed this set of computations for each of the years 2000 through 2003. As Mr. Crean's computed RCN was more detailed and exceeded the RCN computed by trended original cost, Mr. Remsha concluded that Mr. Crean's computed sticks & bricks RCN figure was a more conservative and exact measure of the RCN[173].

Additional Indirect Costs

Mr. Remsha also determined that additional indirect costs [not included in Mr. Crean's indirect costs] were required, which included the costs incurred during construction, i.e., interest [" IDC "], insurance and property taxes.

Interest During Construction

Mr. Crean provided Mr. Remsha with a cash flow schedule of IDC payments for each of the, approximately, fifty-four months comprising the construction schedule[174]. Mr. Remsha allocated Mr. Crean's determined RCN over the cash flow schedule by applying Mr. Crean's monthly percentages. Mr. Remsha adjusted the RCN dollars allocated for each month of the schedule to account for the effect

of inflation. For the interest applied during the loan periods, Mr. Remsha determined that a three-year treasury bill rate best reflected corporate interest during construction. He weighted each year's interest rate by the percent of investment made that year[175].

Insurance Costs

The computation of the cost of insurance was based on the magnitude of capital assets needed to be insured for each year of the construction project. Mr. Remsha adjusted his insurance costs for time over the construction period by applying the Handy Whitman Index[176]. He then trended up those figures to the valuation date.

Property Taxes

Property taxes were added to the construction costs for a given year based on the actual effective property tax rate for each valuation date of four [4%] percent[177]

Total Reproduction Costs

The total reproduction cost for each year was based upon the following formula: RCN + insurance + IDC + property taxes. The total reproduction costs were determined to be:

Year	RCN
2000	**$790,125,000.**
2001	**794,217,000.**
2002	**816,001,000.**
2003	**836,820,000.**

Respondents' Cost [RCNLD] Methodology

Mr. Sansoucy determined the RCN for Lovett by using TOC[178]. He testified that TOC was appropriate for the Lovett plant because there were no recently built coal plants in the same size class as Lovett[179]. Mr. Sansoucy's RCN calculations accounted for both the " hard costs", such as costs of equipment and labor, and " soft costs ", such as IDC, referred to, according to Mr. Sansoucy, as an Allowance for Funding During Construction
[" AFUDC "][180].

Original Hard Costs

Mr. Sansoucy first identified the original " hard " costs, by year of installation, for each type of property at the plant, such as structures, turbines, boilers and other improvements, using FERC's Uniform System of Accounts[181].

Trended Reproduction Costs

Mr. Sansoucy then applied the trending factors in the Handy Whitman Index to those costs to calculate the trended reproduction costs for the various components in the plant[182]. After those hard costs were trended, Mr. Sansoucy added the IDC to determine the RCN.

WACC

He did so by identifying the time for construction, the cash flow needed, and the weighted average cost of capital ["WACC"] to fund that cash flow[183].

Calculating RCN

Mr. Sansoucy then added the IDC to the trended costs to determine the total RCN for Lovett[184].

Respondents' RCN Rejected As Unreliable

Although Mr. Sansoucy previously opined that various deficiencies precluded the sole use of TOC[185], he did not address any of his prior concerns in his current Lovett RCN methodology.

For example, in Niagara Mohawk Power Corporation v. Town of Bethlehem, 225 A.D.2d 841, 639 N.Y.S.2d 492 (3d Dept. 1996), Mr. Sansoucy expressed his concern that unidentified intangible business assets in the original cost records can be trended forward thereby providing an erroneous number[186].

However, although Mr. Sansoucy stated that Mr. Walker verified the trended original costs with a replacement cost[187], there was no segregation by Mr. Walker of tangible versus non-tangible business assets. With respect to the actual original costs that Mr. Sansoucy trended, other than referring to a FERC uniform system of account number in which the investment had been recorded, Mr. Sansoucy and Mr. Walker lacked any knowledge as to what equipment or component any of the original costs actually represented, and neither had any knowledge of whether O&R actually recorded its costs[188].

Disallowed Capital Costs

Mr. Sansoucy also expressed his concern in Bethlehem, supra, that the original cost records being trended may not contain all the costs such as capital costs disallowed by the regulatory agencies or by an agreement in rate cases. Hence, he opined that the unreliability of the index itself becomes compounded by the convoluted nature of the original cost records. Yet, Mr. Sansoucy

did not determine whether the original costs contained disallowed capital costs or were impacted by an " agreement in rate cases."[189]

Failure To Investigate

Clearly, Mr. Sansoucy did not investigate O&R's original cost data. Neither he nor Mr. Walker appeared to know what was actually represented by any particular original cost other than by referring to the FERC uniform system of account number in which the investment had been recorded. Mr. Sansoucy and Mr. Walker lacked any knowledge as to what equipment or component any of the original costs actually represented, and neither had any knowledge of whether O&R accurately recorded its costs[190]. Mr. Sansoucy testified that he could not identify the individual components or conduct a sticks & bricks RCN[191]. Mr. Sansoucy stated in his report that " The quantity survey, comparative-unit and unit-in-place methods of estimating reproduction costs were considered and rejected due to lack of unit cost information for site-specific and unique components similar to those that comprise the station."[192]

Failure To Include Relevant Drawings And Prints

Although Mr. Sansoucy admitted to having received and reviewed certain civil, architectural, mechanical and electrical drawings

and prints of Lovett, he failed to include those drawings in his report[193]. This Court questions why Mr. Sansoucy, as a professional engineer, could not discern and cost out individual components of the Lovett Station from the drawings or prints provided to him, particularly since, based on his review of those drawings, Mr. Sansoucy was able to opine that Lovett would never be reproduced.[194]

Failure To Verify

In applying the TOC methodology, neither Mr. Sansoucy nor Mr. Walker verified that the trended original costs reflected actual construction costs as of each of Lovett's valuation dates of January 1, 2000, 2001, 2002 or 2003[195].

What Is A Generic Coal Plant?

The only verification was Mr. Walker's reduction of Mr. Sansoucy's RCN to a dollar per megawatt figure that he compared to a United States Department of Energy's Energy Information Administration's [" EIA "] estimate to construct a " generic coal plant ".[196] Mr. Walker did not determine exactly what comprised the EIA's " generic coal plant ", how the cost was derived by the EIA, what recent construction expenditures for a coal-fired plant it relied upon, and whether the EIA estimate reflected the actual

construction costs of a coal-fired generation station in New York as of each valuation date.

Failure To Review Data Base

Unlike Mr. Crean, neither Mr. Walker nor Mr. Sansoucy reviewed a database of actual constructed generation facilities to verify that the trending of O&R's original costs, by the Handy Whitman Index, was appropriate.[197]

No Construction Experience

It is important to note that neither Mr. Walker nor Mr. Sansoucy have ever built or participated in the construction of a coal-fired generation station [See e.g., Tennessee Gas Pipeline Company v. Town of Sharon, 298 A.D.2d 758, 749 N.Y.S.2d 106 (3d Dept.)(" Typically, then, an appraisal of a specialty property will be conducted by an architect, engineer, builder or other professional with expertise in the relevant construction methods and costs...Petitioner's appraiser...is registered as an engineer in three states, although he acknowledged that he has never practiced as a professional engineer...[h]e readily admitted that he is unfamiliar with local building costs and could not independently verify the construction costs used in his own

appraisal. Given these limitations, we cannot say that Supreme Court erred in concluding that petitioner's appraiser did not possess sufficient knowledge of current construction costs to determine the value of petitioner's pipelines.")]. While Respondents' engineer may have constructed sewer lines and re-built low head and small hydroelectric stations[198] or appraised other fossil fuel generation properties, neither Mr. Walker nor Mr. Sansoucy have ever been engaged to design, cost out or construct a coal-fired generation station[199].

Failure To Verify Original Costs

Mr. Walker, assisted by Mr. Sansoucy, relied solely upon the TOC method to determine RCN value, even though Mr. Sansoucy was unaware of what the original costs represented, and he failed to verify those original costs to ensure that the TOC method was an accurate measure of current construction costs.

For all of these reasons, this Court rejects the Respondents' RCN methodology and accepts Mr. Crean's RCN methodology.

Depreciation

Once the RCN has been established, a deduction must be made for all three forms of depreciation, i.e., functional obsolescence, economic obsolescence, and physical depreciation [See e.g., Allied Corp. v. Town of Camillus, 80 N.Y.2d 351, 590 N.Y.S.2d 417 (1992); Niagara Mohawk Power Corp. v. Town of Geddes, 239 A.D.2d 911, 659 N.Y.S.2d 632 (4th Dept. 1997)]. In applying the cost approach, it was incumbent on both appraisers, Mr. Remsha and Mr. Walker, to carefully consider all forms of depreciation [physical, functional and economic][See e.g., Consolidated Edison Company of New York, Inc. v. City of New York, Index No. 8564/98 (Kings Sup. Oct. 5, 2004) (Hon. Michael L. Pesce)(" The appraiser then calculates the elements of depreciation, which include amounts attributable to functional depreciation and physical depreciation, and deducts these elements from reproduction cost new to arrive at a net value for the improvement (Matter of City of New York [Salvation Army], 43 N.Y.2d at 516; Matter of Onondaga County Water District v. Board of Assessors of Town of Minetto, 39 N.Y.2d 601 (1976)...")].

Functional Obsolescence

" Functional obsolescence is defined as the loss in value or usefulness of a property caused by inefficiencies or inadequacies of the property itself, when compared to a more efficient or less costly replacement property that new technology has developed. Symptoms suggesting the presence of functional obsolescence are excess operating (i.e. manufacturing) cost, excess construction (excess capital cost), over-capacity, inadequacy, lack of utility, or similar conditions."[200]

Petitioner's Analysis: Functional Obsolescence For Excess Construction Costs

The first deduction made by Mr. Remsha was for functional obsolescence due to excess construction costs which is defined as " Functional obsolescence due to excess capital costs results from improvements and changes in design, materials, layout, product flow, construction methods, and equipment size and mix. Essentially, these are the improvements that make the new technology more desirable."[201]

Principal Of Substitution

Basic to the cost approach is the principle of substitution which " affirms that a prudent buyer would pay no more for a property than the cost to acquire a similar site and construct improvements of equivalent desirability and utility without undue delay "[202] [See e.g., Consolidated Edison Company of New York, Inc. v. City of New York, Index No. 8564/98 (Kings Sup. Oct. 5, 2004) (Hon. Michael L. Pesce)(" the principle of substitution, to wit, that the cost of producing electricity at the subject facility was greater than the cost of producing electricity at a substitute combined-cycle, gas turbine [CCGT] facility of similar capacity ")].

Lovett's Functional Obsolescence

Since the cost approach is based on the concept of substitution, it was Mr. Remsha's view that no one would pay to reconstruct the present aged generating station if they could build an equivalent and more efficient modern facility for a lower capital cost. Hence, Mr. Crean conducted a replacement study based on his actual experience of constructing modern generation facilities. From that study, Mr. Remsha determined that Lovett was functionally obsolete[203].

Quantifying Excess Construction Costs

To quantify the excess construction costs, Mr. Remsha computed the difference between the replacement cost of a state of the art generating facility [" CCGT "] and the reproduction cost of Lovett[204].

State Of The Art CCGT

Mr Crean performed a cost study to construct a modern replacement power plant for Lovett[205]. Between 2000 and 2003, the combined cycle gas turbine [" CCGT "] and simple cycle peakers were the main project built by regulated utilities and merchant generators[206]. It was Mr. Crean's view that the technology and plant of choice to be used as a modern replacement facility in his replacement study was the CCGT[207].

Engineering Procurement Contract

To construct a modern CCGT facility, Mr. Crean used the modern contracting method of Engineering Procurement Contract [" EPC "][208] By this method the owner furnishes the contractor with a request for a power plant of a defined output. The contractor

performs all engineering, design, component procurement and construction. At the end of this process the contractor turns over a fully operational facility to the owner[209]

Costs Of A Replacement CCGT

Mr. Crean developed a capital cost for each year in question, a cash flow schedule and performance attributes for the CCGT[210]. He developed the non-fuel and maintenance costs for the CCGT[211], and used Rockland County labor rates for his labor cost component[212]. For material costs, Mr. Crean obtained actual price quotes[213].

Using The Costs Of A Known Facility

For the replacement study, Mr. Crean used a design of " two blocks on one," meaning that each block had two gas turbines, two Heat Recovery Steam Generators [" HRSG's "] and one steam turbine[214]. The total time to construct and test both units for 454 megawatts of power was twenty-four (24) months, as opposed to the fifty-four (54) months to reproduce Lovett[215].

Similar to his reproduction cost new model, Mr. Crean obtained material prices, estimated man-hours, and applied a labor crew rate to determine labor costs[216]. The material and labor costs were summed to compute the total project costs[217]. Mr. Crean also

determined that 27,000 man hours would be needed to install a Combustion Turbine [" CT "]. He multiplied that number by the applicable crew rate, added his total labor and material costs, and computed the total direct project costs[218].

Indirect Costs

Mr. Crean then used the same methodology, wage rates and percentages to compute the indirect costs for the replacement plant (meaning the construction and project costs) as he had done for the reproduction costs[219]. He then provided the replacement study to Mr. Remsha.

Total Replacement Cost

Applying the same approach used in determining RCN, Mr. Remsha added insurance, interest during construction [" IDC "] and property taxes to the replacement cost determined by Mr. Crean, for each year of construction, resulting in the total replacement cost[220]. The total functional obsolescence for excess construction costs was determined by Mr. Remsha for each year to be the difference between the RCN and the Total Replacement Cost[221]

Respondents' Analysis: Functional Obsolescence For Excess Construction Costs

Respondents' Appraiser, Mr. Walker, considered whether there was incurable functional obsolescence associated with the facility that should be deducted from the RCN[222]. In his analysis, Mr. Walker measured this obsolescence by determining whether the RCN estimate exceeded the cost of replacing it with a modern coal plant[223].

Comparing Lovett - Dollars Per Kilowatt

To determine the cost of the modern replacement, Mr. Walker took the RCN value developed by Mr. Sansoucy and determined the dollar per kilowatt [" $/KW "] cost for the reproduction of Lovett on each valuation date. Mr. Walker then used the comparative unit method to develop the construction costs of a modern, generic coal plant, using unit cost measures in $/KW published by the Energy Information Administration [The EIA is a statistical agent for the U.S. Department of Energy that provides independent data forecasting and analysis] [" EIA "] for a plant of " equivalent desirability and utility "[224]. In assessing functional obsolescence, Mr. Walker identified unit cost measures published by the EIA to construct a generic coal plant similar to

the Lovett facility. He compared the $/KW construction cost of the reproduction of Lovett with the $/KW cost of construction of a replacement coal plant. That comparison showed that there is no excess construction cost associated with reproduction of the Lovett facility when it is compared to the cost of an equivalent replacement and therefore no functional obsolescence from excess construction costs[225].

Failure To Verify EIA Construction Costs

Mr. Walker copied EIA's construction costs of a theoretical coal plant, without analyzing whether the EIA determined construction costs reflected actual recent plant construction as of each valuation date[226]. Although he opined that the EIA costs were reasonable, he conceded that he did not conduct a study in his report to reach that conclusion.

Functional Obsolescence "Too Insignificant"

Unlike in Bowline, supra, where he did not apply the regional multiplier for New York, he did so here, with the same scaling factor that he used for Bowline[227]. Even with this different approach in Lovett, Mr. Walker failed to eradicate functional obsolescence due to excess construction.[228] Instead he seemed to

ignore it by concluding that $54.8 million of functional obsolescence was " too insignificant " to consider[229].

Failure To Use A Modern Facility As A Basis For Comparison

The 2001 and 2003 EIA AEO Outlooks demonstrated that the vast majority of new plant construction was CCGT, not coal or oil/gas steam turbines[230]. In fact, contrary to Mr. Walker's recognition that only CCGTs were the standard technology being built[231], Mr. Walker did not conduct a proper analysis. To compute functional obsolescence, the Respondents, simply, objected to the Petitioner's analysis of modern technology and modern generating facilities. Instead, Mr. Walker used old generating plants as a comparison base to compute functional obsolescence.

Respondents' Analysis Of Functional Obsolescence Rejected

This Court rejects Respondents' comparison of the RCN of Lovett to the construction cost for a generic coal plant. The Respondents' analysis of functional obsolescence due to excess construction costs is erroneous. This Court accepts the Petitioners' comparison of Lovett with a modern CCGT facility as well as their analysis of functional obsolescence due to excess construction costs to the extent modified below.

Petitioners' Analysis Of Functional Obsolescence Accepted But Modified

Mr. Crean developed the cost for the construction of the replacement gas plant, exclusive of IDC. To determine the full construction cost of the gas-fired replacement, Mr. Remsha needed to add the IDC. He opined that the applicable rate for interest during construction would be " reflective of about a three-year treasury bill rate."[232]. The actual IDC rate that Mr. Remsha applied to the construction cost of the CCGT was approximately 3.7%[233].

IDC Unrealistic

By using such a low IDC Mr. Remsha clearly reduced the construction costs of the CCGT. It is undisputed that during 2000-2003, the early years of deregulation, the generating station market was a high risk market. In his discussion of the income approach, Mr. Remsha stated that, " The industry as of this point in time is in somewhat of a turmoil where all of these companies are having financial difficulties. There's been changes in the industry. There's been changes in the economics of the industry and these companies are somewhat struggling. Hence, their equity values are low. Their Betas, which are an indication of inherent

risk in their stock ownership are high. And their debt rate as shown on page 14-14 tend to be high...any investor who will be looking at an investment in this industry or in a plant will be looking at a higher cost of debt."[234]

Failure To Properly Account For Investment Risk

However, when Mr. Remsha calculated the IDC for his cost approach, he seemed to ignore this very high risk market and chose a risk-free three-year Treasury bill rate. Mr. Remsha testified at trial that his choice of that rate was based solely on unspecified, informal conversations he had with unspecified
" Companies " about their financing rates for unspecified
" projects " many years earlier, when the market was regulated and far less risky[235]. Mr. Remsha's report is even less helpful as it states that he used "the nominal prevailing interest rates during the period of construction"[236] Mr. Remsha appears to have had no credible basis for his use of the risk-free three-year Treasury bill rate.

Respondents' AFUDC Rate Based On WACC Equally Inappropriate

In computing the AFUDC rate [which Mr. Sansoucy stated was the equivalent of IDC used by non-public utilities] he used a

weighted average cost of capital [" WACC "] rather than using an interest rate. Other than his " vast experience " in the construction of generation stations, Mr. Sansoucy was unable to identify any basis for using a WACC.[237] Although he testified that IDC and AFUDC were synonymous, he stated that AFUDC and WACC were not [Rec., p. 2009], appearing to arbitrarily use a WACC instead of an interest rate.[238] The Respondents' AFUDC based on the WACC resulted in Mr. Sansoucy's AFUDC rates as follows: 25.08% for 1/1/2000; 24.10% for 1/1/2001; 24.88% for 1/1/2002; and 24.10% for 1/1/2003[239].

Petitioners' AFUDC Rate More Realistic

It appears that Mr. Sansoucy's AFUDC rates were overstated by using the WACC, certainly resulting in over-valuations. Petitioner compared the impact of Mr. Sansoucy's WACC rate against the use of long-term debt rates[240]. Petitioner's recalculation of the AFUDC using a long-term debt rate taken from the Respondents' appraisal report[241] resulted in an ADUFC rate that is more reasonable and conservative than either the IDC rate used by Mr. Remsha or the AFUDC rate used by Mr. Sansoucy, and are rates that the Court will adopt. They are as follows:

Valuation Date	AFUDC Rate
1/1/2000	**14.53%**
1/1/2001	**15.48%**
1/1/2002	**14.67%**
1/1/2003	**14.38%**

Functional Obsolescence For Excess Construction Costs

When these AFUDC rates are added to the construction costs for each tax year at issue, and then subtracted from the RCN, the functional obsolescence for excess construction costs for each year is as follows:

Valuation Date	Funct. Obsolesc. For Excess Construction Costs
1/1/2000	**$452,599,000.**
1/1/2001	**451,969,000.**
1/1/2002	**499,773,000.**
1/1/2003	**533,472,000.**

Physical Deterioration [Depreciation]

Physical deterioration is " the loss in value or usefulness of a property due to the using up or expiration of its useful life caused by wear and tear, deterioration, exposure to various elements, physical stresses, and similar factors...Deterioration or depreciation is curable when it is economically feasible to remedy

it, because the resulting increase in utility and value is greater than the cost to cure. Deterioration or depreciation is incurable when it is not economically feasible to remedy it."[242]

Respondents' Analysis: Physical Depreciation

Incurable Physical Depreciation

Mr. Sansoucy identified and quantified the incurable physical depreciation for each of the valuation years. He estimated incurable physical depreciation for Lovett by using the age-life method which calculates a ratio of incurable physical depreciation by comparing the effective age to the total physical life[243] To use the age-life method the effective age must be determined. Mr. Sansoucy determined that the effective age of the property at issue was equivalent to its chronological age[244]. He then estimated average total physical lives for each of the FERC account classes of property[245].

Curable Physical Depreciation

Mr. Walker reviewed the determinations of incurable physical depreciation made by Mr. Sansoucy, adopted them in his cost approach[246] determined curable depreciation[247]. He made his

deduction for curable physical depreciation based on actual historical experience at Lovett in that Mr. Sansoucy had examined the plant, its drawings and other records, and determined that no significant changes or additions to Lovett had been made since its original construction[248]. Mr. Walker then subtracted Mr. Sansoucy's incurable physical depreciation figures from the RCN for each year, along with the amounts for curable physical depreciation.

Respondents' Analysis Of Physical Depreciation Rejected

Class Lives

For the physical life factor of his age/life computation, Mr. Sansoucy[249] determined that for all property whose original costs were recorded in FERC Account 311 [structures and improvements], they had a " class life " of ninety years[250]. All other FERC accounts that comprised Lovett's real property had a " class life " of sixty years[251]. Mr. Sansoucy's basis for using two categories of class lives was his " experience ", observation and " fact in industry ", without more[252]. Mr. Sansoucy did not conduct a review of national, regional, or New York State databases reporting FERC account average service lives[253]. His own physical life sheet provided for component physical lives that were shorter than his determined class life[254].

Retirements And Estimated Physical Lives

Mr. Sansoucy did report retirements and estimated physical lives with respect to Mirant's investments in the subject property for the years 2000, 2001 and 2002[255]. For each of those years, Mr. Sansoucy testified that what he trended for purposes of developing the RCN was net of retirements. Therefore, Mr. Sansoucy estimated the amount and age of retirements, by FERC account, that resulted from Mirant's investments in capital expenditures between 2000 and 2003[256].

Physical Lives Unexplained

Mr. Sansoucy's physical life conclusions were not supported by empirical data[257]. The basis for his " experience " to determine physical lives of components comprising a coal-fired generation station was never explained.

Failure To Identify The Economically Curable

Although Mr. Sansoucy was the only engineer hired by Respondents, he did not identify any components at Lovett that were economically curable. He instead left that responsibility to Mr.

Walker, who was not an engineer[258]. Unlike Mr. Crean, whose experience with constructing generation stations enabled him to identify and quantify curable physical depreciation[259] neither Mr. Walker nor Mr. Sansoucy had any personal experience with constructing, operating or maintaining a coal-fired generation station. Therefore, neither were able to identify components that suffered curable physical depreciation[260]. Respondents' report was totally devoid of any list or specifically identified component, piece of equipment or machinery that was in need of repair, even though Mr. Walker testified that curable physical depreciation " is meant to represent those things that are in need of repair at or around the valuation date."[261]

What Items Needed Repair?

To compute curable physical depreciation Mr. Walker summed three prior years of capital expenditures and denominated that to be curable physical depreciation[262]. Mr. Walker admitted that this summed amount was not for repairs that were needed, but that it merely represented monies that had been spent prior to the taxable status date[263] He could not specify what precisely those dollars of investment represented. Mr. Walker did not know whether the expenditures were for "curable physical depreciation."[264], entirely new items or replacements.

Hence, for all of the aforementioned reasons, this Court finds that Mr. Walker's methodology is not credible and rejects the Respondents' analysis for both curable and incurable physical depreciation.

Petitioners' Analysis Of Physical Depreciation Accepted

Average Service Lives

In determining physical depreciation, Mr. Remsha applied straight-line depreciation[265]. He computed incurable physical depreciation for each property account by both vintage year of installation and the effective age of the FERC account[266]. To do so Mr. Remsha applied average service lives [" ASL "] for each FERC property account. To determine the ASL Mr. Remsha determined the component's physical useful life by account[267].

To determine the appropriate ASL for each FERC account, Mr. Remsha investigated published information, reviewed Mr. Crean's physical assessments, discussed Lovett's operations and components with its manager and engineers and applied his experience[268]. Mr. Remsha reviewed the American Gas Association and Edison Electric Institute [" AGA "][269] which provided national, regional and New York average service lives. In addition, Mr. Remsha reviewed the FERC Form 1 filings by O&R, Central Hudson Gas & Electric, Inc. and

Consolidated Edison Company of New York, Inc.[270]. Mr. Remsha's team from AAA[271] spent several days inspecting Lovett and conducting interviews.

Mr. Remsha also reviewed Mr. Crean's report, which set forth the physical condition of major components and their estimated remaining lives[272] This assessment was based on Mr. Crean's team's many years of engineering expertise, knowledge of generating equipment, and its inspection and discussions with Mirant personnel[273].

Computation of Age-Life Ratio

Mr. Remsha developed a set of ASL's for physical deterioration[274] Having determined the applicable ASL's, Mr. Remsha next computed an age-life ratio for each FERC account[275]. Here, he divided the effective age by the ASL to compute an indication of physical deterioration of Lovett.

Depreciation Should Not Exceed 50%

Mr. Remsha determined that depreciation should not exceed approximately 50% based on the premise that for a plant to operate in a safe and reliable manner it had to do so at a certain level of physical condition[276].

This Court finds Mr. Remsha's analysis for physical depreciation to be fully credible and accepts it in its entirety.

Economic Obsolescence

" Economic obsolescence [also known as 'external obsolescence'] is the loss in value or usefulness of a property caused by factors external to the asset. These factors include increased cost of raw materials, labor and utilities [without an offsetting increase in product price]; reduced demand for the product; increased competition; environmental or other regulations; or similar factors."[277]

Respondents' Analysis : Economic Obsolescence

For his cost approach in connection with the 2000, 2001, 2002 and 2003 valuation dates, Mr. Walker measured obsolescence using the income capitalization approach, by capitalizing the potential lost income caused by imbalances between supply and demand or technological advances that result in Lovett being less efficient than other units. According to Mr. Walker's testimony, that approach demonstrated that Lovett exhibited external obsolescence in 2000, 2001, and 2002[278]. However, Mr. Walker stated that he took no external obsolescence deduction for 2003, reasoning that Lovett

had lower fuel costs than other alternatives in the market in 2003.[279]

Failure To Deduct For Economic Obsolescence

However, an examination of Mr. Walker's appraisal report demonstrates that for the years 2000 to 2003, Mr. Walker did not deduct for economic obsolescence in his report or errata. He stated in his report, without explanation, that the economic obsolescence was addressed in the reconciliation of values[280]. Mr. Walker stated in his appraisal that " [t]he difference between the reproduction cost new less physical depreciation and functional obsolescence, and the value estimated using the income capitalization approach is considered external obsolescence."[281] During cross-examination, Mr Walker stated that his economic obsolescence was the difference between the income value conclusion and the RCNLD for physical depreciation only[282]. Hence, based on Mr. Walker's cross-examination testimony there clearly existed economic [external] obsolescence for the years 2000 to 2003.

Respondents' Economic Obsolescence Analysis Rejected

Hence, for the aforesaid reasons, this Court rejects Mr. Walker's economic obsolescence analysis.

Petitioners' Analysis: Economic Obsolescence

Measuring Economic Obsolescence

Mr. Remsha applied two methods of measuring economic obsolescence: spark spread and inutility analysis[283]

The Spark Spread

The spark spread is the difference between the electricity price and the applicable fuel price, which is also known as the gross margin[284]. Mr. Remsha's comparison was based on actual historical prices[285]. The electricity price was the average annual round the clock price reported by Platts Megawatt Daily, and the coal prices were reported by the EIA for New York PUCs[286]. Electricity prices were reported in $/KW and coal prices were reported as $/MMBtu and were converted to $/KW[287]. The computed spark spread applying natural gas prices resulted in a graphed relationship that over time showed electric generation plant profitability based on the gross margin measure[288].

Measuring Economic Obsolescence By Spark Spread

To measure economic obsolescence by the spark spread analysis, Mr. Remsha developed a two-year mean spark spread to buffer extremes[289]. He then compared each year's actual spark spread to the two-year average, by subtracting the actual spark spread for the year in question from the two-year mean. He then divided that difference by the two-year average. By this analysis, Mr. Remsha determined that, for the 2002 tax year, the range of economic obsolescence was twenty-eight percent. Mr. Remsha used the same analysis for all the years at issue[290]

Inutility Analysis

To measure economic obsolescence for inutility, Mr. Remsha compared the utilization of Lovett to competing plants in the same area[291]. He based his analysis on FERC Form 1 data that was reported for the comparable competing plants.[292] Mr. Remsha analyzed coal plants similar to Lovett, studying their utilization by reviewing their capacity factors.

The Best Of The Best

Mr. Remsha studied ten plants owned by utilities [four for 1998] including Lovett[293]. He first averaged the utilization of all ten plants studied, determining that the capacity factors ranged from 55.3% to 60.2%. He then removed under performers to determine the " best plants ". This resulted in four to six plants whose capacity factors ranged from 59.6% to 69.4%[294]. Mr. Remsha also determined the " best of the best ", resulting in a single plant for each year. The range of capacity for the best of the best was 66.3% to 79.7%[295].

Inutility Penalty Range

Applying the capacity factor ranges for the " best of the best " plants to Lovett, Mr. Remsha computed the potential net generation of Lovett[296]. He then compared that potential net generation with Lovett's actual production to derive an inutility penalty range of 20.75% to 29.03%. Mr. Remsha concluded that 25% was the inutility penalty for the " best of the best ". He did the same computation and derivation for the best plants and concluded that 19% was the inutility penalty. Finally, he compared Lovett to all plants and concluded that 14% was the inutility penalty.

Considering all three inutility penalties, he concluded an economic obsolescence factor due to inutility to be 25%[297]

Total Economic Obsolescence Calculated

Mr. Remsha then compared both economic obsolescence methodologies, spark spread and inutility, and determined the total economic obsolescence for each year under review.[298]

Lovett Should Be Compared Only To " All Plants "

Following the analysis in Bowline, supra [" However, rather than comparing Bowline to each of the oil/gas generating facilities in Bowline's region, Mr. Remsha compared a year of Bowline's run time to a 5 year average of only the " best " plants there, and then to only the " best of the best ". It is Mr. Walker's position that this comparison by Mr. Remsha is designed to disadvantage Bowline thereby artificially increasing any lost value."], this Court is of the opinion that Lovett should only have been compared with " all plants ".

Hence, the only inutility penalty that will be considered is the penalty that results when Lovett is compared to " all plants," which for the years at issue are as follows:

Year	Inutility Penalty for "All Plants"
2000	**8%**
2001	**8%**
2002	**20%**
2003	**14%**

The Economic Obsolescence Penalty To Be Applied

When comparing Mr. Remsha's economic obsolescence methodologies [spark spread and the inutility penalty for " all plants "], this Court concludes that the economic obsolescence for the tax years at issue to be:

Year	Economic Obsolescence
2000	**4%**
2001	**4%**
2002	**10%**
2003	**18%**

Respondents' Analysis: Functional Obsolescence For Excess Operating Costs

Mr. Walker considered functional obsolescence related to excess operating costs by comparing Lovett's operating costs to those of other plants in the subject's market. To do so, Mr. Walker identified eight other coal plants in the New York region of comparable size, and compared their heat rate and fixed and

variable operating and maintenance expenses to those of Lovett's[299]. Mr. Walker found that although Lovett plant's heat rate and operating expenses were lower than some of the comparison plants, Lovett was at the high end of the ranges presented by those plants[300]. Therefore, Mr. Walker determined that a deduction should be taken for functional obsolescence for excess operating costs. He determined that the appropriate way to measure that deduction was through the income capitalization approach.

Respondents' Analysis Of Functional Obsolescence For Excess Operating Costs Rejected

To determine functional obsolescence for excess operating costs, Mr. Walker, instead of using EIA data for a modern coal facility, compared Lovett to equally aged and similarly obsolete generating stations[301]. Mr. Walker testified that not one of these plants, except possibly Kintigh, would be reproduced[302]. Hence, to the extent the plants were comparable, they were comparably obsolete[303].

As a result of not using a modern facility, Mr. Walker failed to account for differences in operating costs between a modern facility and Lovett which included the number of people needed to operate the respective facilities, the maintenance requirements for each station, and the difference in fuel costs resulting from the

disparate heat rates, i.e. the measure of efficiency difference in producing electricity, between a modern plant and Lovett.

In fact, Respondents' own experts admitted that the market was not building coal plants in New York as of the valuation dates[304]. Mr. Walker stated that he knew that the plant of choice being built was the CCGT[305].

Clearly, Mr. Walker should have compared Lovett to a modern CCGT, [See e.g., Matter of Consolidated Edison Company of New York v. City of New York, Index No. 8564/98 (Kings Sup. 2004)(Hon. Michael L. Peace)(" The evidence establishes that the current technology of choice is the combined-cycle, gas turbine system, which has supplanted the older single-cycle steam system because it is much cheaper to build and operate and is much more efficient")].

Therefore, for the aforesaid reasons, this Court rejects Mr. Walker's analysis of functional obsolescence for excess operating costs.

Petitioner's Analysis: Functional Obsolescence For Excess Operating Costs

It was Mr. Remsha's view that older plants such as Lovett are more expensive to operate than a functionally equivalent generating station using current technology. For operating cost

functional obsolescence, Mr. Remsha based the difference in operating costs of a CCGT and Lovett on the number of people needed to operate the facility, the maintenance required due to design changes, and the difference in fuel costs resulting from the disparate heat rates.

Measuring Obsolescence Due To Operating Costs

To measure the obsolescence due to operating costs, Mr. Remsha used Mirant's prior year actual financial statements[306]. He reviewed the prior year's capacity factor and used it to compute the generation magnitude of Lovett[307]. He then applied the financial data to compute a three-year average operating expense based on Lovett's actual experience[308].

Fuel Operating Costs

To compute the fuel operating cost, Mr. Remsha used the monthly historical heat rates[309]. He then computed an annual average heat rate for both Lovett and the CCGT and multiplied that by the net generation to achieve a total energy consumption in millions of btus per year[310]. Mr. Remsha multiplied the energy consumed by the fuel cost, using the same fuel cost for both Lovett and the CCGT[311].

Non-Fuel Operating Costs

When computing the non-fuel operating costs, Mr. Remsha used Mr. Crean's estimated operating costs and adjusted those costs for the net generation based on the capacity factor applicable for the year being valued[312].

Operating Expenses

In determining operating expenses, Mr. Remsha added together the fuel, fixed and operating costs for both Lovett and the CCGT[313]. After computing total operating expenses, Mr. Remsha subtracted the CCGT's operating costs from Lovett's.

Discount Rate

Mr. Remsha next computed a discount rate of 7.4%, capitalized the difference in operating costs by the discount rate, and obtained the total functional obsolescence due to operating costs[314].

Petitioners' Analysis Of Functional Obsolescence For Excess Operating Costs Rejected

Artificially Low Capacity Factor

By burning coal, Lovett had a fuel cost advantage over Petitioner's replacement CCGT, which burned gas, a more expensive fuel. The more that Lovett ran each year, and therefore, the higher its capacity factor, the greater its fuel advantage over the CCGT. It appears that in order to avoid that advantage and inflate their deduction for functional obsolescence for excess operating costs, Petitioners used an artificially low capacity factor in their calculations.

Depressed Fuel Advantage

Although Mr. Remsha opined in his income approach that the plant could be expected to run at a stable rate of 59.2%[315], he used far lower capacity rates to calculate functional obsolescence for excess operating costs. Mr. Remsha calculated Lovett's operating costs by using capacity factors ranging from 31% to 52%[316] Using

the lower rates depressed Lovett's fuel advantage and resulted in inflated deductions for functional obsolescence.

Mr. Remsha stated that using the 59.2% capacity factor would not be appropriate because the cost approach should be based solely on historical data. However, an investor would value the plant based on how it will compete with other plants on the valuation date, January 1, as well as for the rest of the year. What is relevant to the investor is how the plant will compete for the valuation year in question. Hence, it would have been more appropriate for Mr. Remsha to have used the 59.2% rate.

Incongruities

The incongruity of using a past capacity factor is also illustrated in the portion of Mr. Remsha's calculation for functional obsolescence that brings the penalty to present value. His present value calculation uses a period of 22 years to determine the functional obsolescence at the station[317]. That has the effect of taking the full value, now, of a going-forward penalty without taking any of the going-forward benefits which would include the higher capacity rate and the widening difference in price between coal and natural gas.

Therefore, for the aforesaid reasons, this Court rejects Mr. Remsha's assessment of functional obsolescence for excess operating costs.

Functional/Economic Obsolescence Due To Necessary Capital Expenditures

Implementing The Consent Decree

Mr. Remsha's final deduction for functional obsolescence was a combined deduction for " Functional/Economic Obsolescence Due to Necessary Capital Expenditures." These deductions for the costs of implementing the Consent Decree totaled $86,880,000 in 2002 and $88,970,000 in 2003[318]. The deductions are allegedly for expenses that Petitioners would have to pay in 2002 and 2003 to resolve air pollution violations prosecuted by the government.

Costs Unknown

Mr. Remsha testified that he did not consider the environmental deductions in his sales comparison approach because the sales took place in a "time frame when a lot of these environmental deductions weren't really known to any great extent yet."[319]. Mr. Remsha also testified that, for the valuation years

at issue, " I don't have any quantifiable data that tells me how much " the increased operating costs from the environmental controls will be[320]. Mr. Remsha stated that Petitioners' uncertainty as to the cost of settling with the government continued until the signing of the consent decree which occurred six months after the valuation date. In fact, as of January 1 of each of the tax years at issue, Petitioners were still negotiating with the government, and the Consent Decree was not signed until June 2003.

To Spend Or Not To Spend?

Mr. Remsha testified that Petitioners " didn't have any budget of substance again until 2003, after the Consent Decree was pretty well solidified and they knew what they had to do."[321] Moreover, Mr. Remsha stated that, after all of the valuation dates had passed, the consent decree was finally signed, and Petitioners " had budgeted for it " and Petitioners " still have to make a decision whether they are going to spend it or not "[322].

Show Me The Money

As of January 1, 2003, Petitioners had not spent any money on the installation of environmental equipment at Lovett to implement

the consent decree. By the time of the trial in this matter, the deadlines in the consent decree had passed and still no money had been spent on the environmental installations that Mr. Remsha used to take the dramatic deductions in his cost approach.

Therefore, this Court rejects Mr. Remsha’s deductions for implementing the Consent Decree which he described as Functional/Economic Obsolescence Due To Necessary Capital Expenditures.

Fair Market Values of Lovett Using Cost [RCNLD] Approach

This Court determines that the range of testimony and evidence supports the following full market values based upon the cost [RCNLD] approach of the subject property for the tax years at issue:

	2000	2001
Reproduction Cost New	$790,125,000.	$794,217,000.
Less		
Funct. Obsol. (Cons. Co.)	337,526,000.	342,248,000.
Phys. Deprec.	(49%)221,773,510.	(49%)221,464,810.
Econ. Obsol.	(4%) 9,233,010.	(4%) 9,220,168.
Funct. Obsol. (Oper. Co.)	0	0
Funct./Econ. Obsol. due to Necess. Cap. Expend.	0	0
Plus Land	4,570,000.	4,570,000.
RCNLD Value of Property	**$226,162,480.**	**$225,854,022.**
Valuation Ceiling	**$213,580,000.**	**$355,000,000.**
Valuation Floor	**$213,580,000.**	**$150,000,000.**

	2002	2003
Reproduction Cost New	$816,001,000.	$836,820,000.
Less		
Funct. Obsol. (Cons. Co.)	316,228,000.	303,348,000.
Phys. Deprec.	(49%)244,888,770.	(49%) 261,401,280.
Econ. Obsol.	(10%) 25,488,423.	(18%) 48,972,730.
Funct. Obsol. (Oper. Co.)	0	0
Funct./Econ. Obsol. due to Necess. Cap. Expend.	0	0
Plus Land	4,570,000.	4,570,000.
RCNLD Value of Property	**$233,965,807.**	**$227,667,990.**
Valuation Ceiling	**$320,000,000.**	**$380,000,000.**
Valuation Floor	**$200,000,000.**	**$125,000,000.**

Moveable Machinery And Equipment

Lastly, the Petitioners seek to reduce still further the true value of Lovett for tax years 2000-2003 by subtracting the depreciated value of certain categories of equipment which they claim are " moveable machinery and equipment " as defined in Real Property Tax Law [" RPTL "] § 102(12)(f)[323], i.e., " electrical equipment (including the main generator step up transformer)

(not used for purposes of electricity in the plant to operate the machinery and equipment, but rather, for transmission to grid), substation equipment (again, not used for purposes of electricity in the plant to operate the machinery and equipment, but rather, for transmission to grid), pumps, ventilation equipment, valves and instrumentation "[324], a request opposed by the Respondents[325].

Specifically, the Petitioners urge this Court to further reduce the true value of Lovett in 2000 by an additional $29,241,730, in 2001 by an additional $29,583,750, in 2002 by an additional $29,928,710 and in 2003 by an additional $30,288,370[326].

Totally Lacking In Merit

Stated, simply, the Petitioners' position is totally lacking in merit and their request for still further reductions of Lovett's full market value for the tax years 2000-2003 is denied.

RPTL § 102(12)(f)

RPTL § 102(12)(f) states that real property shall include " power generating apparatus " and " equipment for the distribution of...power " but shall not include " moveable machinery or equipment consisting of structures or erections to the operation of

which machinery is essential, owned by a corporation taxable under article nine-a of the tax law, used for trade or manufacture and not essential for the support of the building, structure...and removable without material injury thereto “.

The Courts that have considered the issue raised by Petitioners have held that pursuant to RPTL § 102(12)(f) electric power generation and distribution machinery are taxable regardless of whether such equipment is moveable, used in manufacture or owned by an entity conducting business under Article 9-A of the Tax Law [See e.g., City of Lackawana v. State Board of Equalization and Assessment, 16 N.Y. 2d 222, 264 N.Y.S. 2d 528 (1965)(first and second clauses in RPTL § 102(12)(f) operate independently and govern separate property; power generating apparatus and equipment for the distribution of heat, power, gases and liquids is taxable); Consolidated Edison v. City of New York, 80 Misc. 2d 1065, 365 N.Y.S. 2d 377 (1975), aff’d 57 A.D. 2d 826, 395 N.Y.S. 2d 42 (2d Dept. 1977), aff’d 44 N.Y. 2d 536, 406 N.Y.S. 2d 727 (1978); Fourth Branch Associates v. Town of Waterford, 147 Misc. 2d 646, 558 N.Y.S. 2d 453 (1990)(“ It has been clear...that power-generating equipment in a facility designed exclusively to produce same for commercial sale and transmission is assessable as real property...Respondents are awarded partial summary judgment to the extent all the contested equipment and machinery [computer consoles, relay cabinets, turbines] is includable in the assessed

value "); Matter of KIAC Partners v. Cerullo, 260 A.D. 2d 381, 687 N.Y.S. 2d 692 (2d Dept. 1999)(" At issue on this appeal is whether the entire plant including two electric generators is entitled to a real property tax exemption...It is well settled that electric generators...are considered to be real property as that term is defined in (RPTL 102(12)(f)...We... conclude that the generators at issue are both ' structures affixed to the land ' (RPTL 102(12)(b) and ' power generating apparatus ' (RPTL 102(12)(f))")].

RPTL § 102(12)(b),(e)

In addition to finding that power generation and distribution equipment is taxable under the first clause of RPTL § 102(12)(f), over the past 100 years New York Courts have consistently found that power generation equipment used in the commercial production of electricity [and equipment used in its distribution] is taxable under RPTL § 102(12)(b) or (e) (or their predecessor statutes)[See e.g., Herkimer County Light & Power Co. v. Johnson, 37 A.D. 257, 55 N.Y.S. 924 (4th Dept. 1899)(the provision treating as real property " all mains, pipes and tanks laid or placed in, upon, above or under public or private street or place for conducting...electricity or any property, substance or product capable of transmission or conveyance therein or that is protected

thereby " applied to purifiers, scrubbers, condensers, engines and other " machinery used in connection with the mains or wires for generating and sending forth electricity on the lines or gas through the mains "); Consolidated Edison v. City of New York, 80 Misc. 2d 1065, 365 N.Y.S. 2d 377 (1975)(" From the legislative history of the statutes and the decided cases it is clear to this court that it and always has been the policy of this State and the intention of the Legislature that power-generating apparatus and machinery and equipment, whether moveable or permanently affixed to realty, used in connection with the generation and distribution of power and an integral component part of a unified system–are taxable as real property per se under subdivision 12 of section 102 of the (RPTL) because they generate and distribute power "), aff'd 57 A.D. 2d 826, 395 N.Y.S. 2d 42 (2d Dept. 1977), aff'd 44 N.Y. 2d 536, 406 N.Y.S. 2d 727 (1978)(" Concluding that the barge-mounted power plants are real property within the meaning of (RPTL § 102(12)(b)) we find no sufficient reason to reach a contrary result with respect to the auxiliary apparatus and equipment and the four fuel oil barges which, in the manner of operation here employed, were used in connection with the power plants "); Fourth Branch Associates v. Town of Waterford, 147 Misc. 2d 646, 558 N.Y.S. 2d 453 (1990)].

Procedurally In Error

The Petitioner's presentation of this issue is procedurally in error since Petitioners' appraiser, Mr. Remsha, did not quantify what the deductions for moveable machinery and equipment should be or, more importantly, how any such deduction would affect his reconciled opinions of value for each year. The deductions based on property found by Petitioners' engineer, Mr. Crean, not to be taxable real property were never evaluated or endorsed by Mr. Remsha and thus does not form a permissible adjustment to his cost [RCNLD] approach.

Conclusion

The Court determines that the full market value [underlined figures] of Lovett for each of the tax years in dispute [comparing the results of the RCNLD analysis with Lovett's valuation ceiling and floor] to be as follows:

	2000	2001
Valuation Ceiling	**$213,580,000.**	**$355,000,000.**
RCNLD Value of Property	**$226,162,480.**	**$225,854,022.**
Valuation Floor	**$213,580,000.**	**$150,000,000.**

	2002	2003
Valuation Ceiling	**$320,000,000.**	**$380,000,000.**
RCNLD Value of Property	**$233,965,807.**	**$227,667,990.**
Valuation Floor	**$200,000,000.**	**$125,000,000.**

Indicated Assessed Values

Applying the stipulated equalization rates for each year 2000 (22.43%), 2001 (20.93%), 2002 (19.36%) and 2003 (16.76%) the indicated assessed values are as follows:

Year	FMV	Eq. Rate	Indicated Assessed Value
2000	213,580,000.	22.43%	**47,905,994.**
2001	225,854,022.	20.93%	**47,271,247.**
2002	233,965,807.	19.36%	**45,295,780.**
2003	227,667,990.	16.76%	**38,157,155.**

Year	Town's Assessed Value	Differ. in Assessed Value
2000	80,735,185.	**32,829,191.**
2001	80,735,185.	**33,463,938.**
2002	80,735,185.	**35,439,405.**
2003	80,735,185.	**42,578,030.**

Accordingly, the Petition is granted to the extent indicated above. With respect to the issue of allocation of the differences in assessed values among the various parcels (tax ID numbers), the parties are to submit an Order within seven (7) days addressing that issue.

Following such allocation, the assessment rolls are to be corrected, and the overpayments of taxes are to be refunded to the Petitioner with interest [See RPTL 726(1)(2)].

This constitutes the Decision, Order and Judgment of this Court.

Dated: August 28, 2006
White Plains, N.Y. 10601

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HON. THOMAS A. DICKERSON
SUPREME COURT JUSTICE

TO: Judge D. Michael Lynn
United States Bankruptcy Court
Northern District of Texas
Eldon B. Mahon Federal Courthouse
501 W. 10th Street
Forth Worth, Texas 76112

Lawrence A. Zimmerman, Esq.
Mark D. Lansing, Esq.
Hiscock & Barclay, LLP
Attorneys for Petitioners
50 Beaver Street
Albany, N.Y. 12207

Melvin H. Osterman, Jr., Esq.
Margaret J. Gillis, Esq.
Jonathan P. Nye, Esq.
Whiteman Osterman & Hanna, LLP
Attorneys For Respondents
One Commerce Plaza
Albany, N.Y. 12260

Patricia Zugibe, Esq.
Rockland County Attorney
Fina Del Principio, Esq.
Principal Assistant County Attorney
Rockland County
Allison-Parris County Office Building
11 New Hempstead Road
New City, NY 10956

ENDNOTES

1. Orange & Rockland Utilities, Inc. v. Town of Haverstraw Assessor, Index No: 4133/95, 346/96, 4424/97, 4639/98, 4238/99, 4239/99, 4538/00, 4694/01, 5120/02, 5278/03, Rockland Supreme Court. See Post Trial Decision dated August 11, 2006 at 12 Misc. 3d 1194 (Rockland Sup. 2006).

2. Petitioners' experts included Dr. Lawrence Makovich, a Ph.D. economist and senior director at Cambridge Energy Research Associates [" CERA "], who provided forecasts of pricing for electricity, natural gas, oil and coal as of January 1, 2000, 2001, 2002 and 2003 [Record at pp. Record at pp. 8-751, 1028-1080], William Crean, a licensed professional engineer and cost estimator of electric generating plants and employed by Black & Veatch, who provided calculations of the reproduction and replacement costs and depreciation of Lovett as of each of the valuation dates [Record at pp. 770-1016] and Michael Remsha of American Appraisal Associates, an appraiser and licensed professional engineer in the State of Wisconsin, who provided an appraisal of Lovett using three valuation methods, i.e., cost [RCNLD][2000-2003], income [DCF] [2000-2003] and sales comparisons [2000-2003][Record at pp. 1088-1857].

Respondents' experts included George E. Sansoucy of George E. Sansoucy, P.E., LLC, a licensed professional engineer in the State of New Hampshire, who provided an engineering analysis for the reproduction cost new and incurable depreciation calculations in Respondents' cost approach to the value of Lovett [Record at pp. 1860-2080] and Glenn Walker, an employee of George E. Sansoucy, P.E., LLC responsible for the development of appraisals dealing with electric generating facilities and public utility property, is a licensed certified general appraiser in the State of New York as well as Maine, New Hampshire, Michigan and Ohio, who provided an appraisal of Lovett using three valuation methods, i.e., cost [RCNLD][2000-2003], income [DCF][2000-2003] and sales comparisons [2000-2003][Record at pp. 2093-2577, 2595-2616].

3. Petitioners' other witnesses included Victoria Lynch, an employee of Mirant Corporation and former employee of O&R who testified regarding O&R's trading arm that was formed in 1997 to trade in the New York Power Pool [" NYPP "]...New England Power Pool [" NEPOOL "]...and Pennsylvania-New Jersey-Maryland [" PJM "]... energy wholesale markets [P. Ex. 44]; Eddie Dorsett, a former employee of Southern Energy International [" SEI "] and Mirant Corporation, who testified about the sale of Lovett to SEI and about the trading activities of SEI in the electricity wholesale market [P. Ex. 43] and Elliott Neri, an

employee of Mirant Corporation as the manager of its New York assets including Lovett. Prior to that position Mr. Neri was Plant Manager of Bowline. Mr. Neri testified about the operations of Lovett including capacity factors [Record at pp. 2618-2646].

4. Petitioners' Post-Trial Memorandum of Law on Petitioners' Proof dated April 17, 2006 [" P. Memo. I "], Petitioners' Post-Trial Memorandum of Law on Respondents' Proof dated April 17, 2006 [" P. Memo. II "], Respondents' Post-Trial Memorandum dated April 17, 2006 [" R. Memo. "], Petitioners' Mirant New York, Inc. v. Mirant Lovett, LLC Post-Trial Reply Memorandum of Law dated July 21, 2006 [" P. Reply Memo. "], Respondents' Post-Trial Reply Memorandum dated July 21, 2006 [" R. Reply Memo. "], Petitioners' Post-Trial Memorandum of Law on Moveable Machinery and Equipment dated April 12, 2006 [" P. M&E Memo. "], Respondents' Post-Trial Memorandum of Law on Moveable Machinery and Equipment dated July 21, 2006 [" R. M&E Memo. "].

5. In Re: Mirant Corporation, Debtors, United States Bankruptcy Court for the Northern District of Texas, Fort Worth Division, Case No. 03-46590-DML-11, Memorandum Order dated June 23, 2006, Judge Lynn (" By order entered January 9, 2004 this court deferred proceedings on the 505 Motion to allow the parties an opportunity to resolve the N.Y. Debtors' liabilities to the Taxing Authorities in the State Court Proceedings. In accordance with this court's requirements, trial of the State Court Proceedings was commenced by mid-2004. After months of evidentiary hearings, trial was completed but for filing of post-trial briefs. Before submission of all post-trial briefs, the parties asked Justice Dickerson to suspend the State Court Proceedings in order to permit settlement discussions...[settlement discussions were later terminated]...These chapter 11 cases have now been pending for almost three years...In order for the N.Y. Debtors to emerge from bankruptcy, these issues must be decided, as settlement of them appears politically impossible...For these reasons, the court orders and directs as follows: 1. Subject to the further provisions of this memorandum order the 505 Motion will be heard by this court on August 21 and 22, 2006...5. The 505 Motion will not be heard to the extent that: a. Justice Dickerson renders a decision in the State Court Proceedings with respect to the Lovett Case or the Bowline case or both...In the event Justice Dickerson prior to August 7, 2006 informs this court that he expects to issue a decision disposing of the Lovett Case or the Bowline Case or both prior to October 21, 2006, hearing of the 505 Motion will be continued...to a date after October 21, 2006...").

6. R. Ex. H-1 at p. 5.

7. Record at pp. 5, 337-40, 358, 359, 827, 923-25, 1137; P. Ex. 3A, App. E-2-4; P. Ex. 11A at p. 1-9, P. Ex. 27A at p. 4, 5, 3-1, 3-2, 8-7, R. Ex. H1 at pp. 1,3,21-24.

8. P. Memo. I at p. 17-18.

9. P. Exs. 11A at pp. 1-9-1-20; 27A at pp. 4-4-4-13; P. Memo. I at pp. 18-19 (" In addition, Lovett had to install a gunderboom to filter out fish larva and other small animals from entering the Station through the water intake [P. Ex. 27A at p. 4-20]. The Consent Decree did not address other additional constraints on Lovett, such as mercury emission restrictions [P. Exs. 11A at pp. 1-14-1-20, 27A at pp. 4-9-4-13, 27B, App. F at p. 3] ").

10. R. Ex. H-1 at p. 5.

11. P. Ex. 1 at p. 2.

12. P. Ex. 1 at p. 3.

13. P. Ex. 1 at p. 3.

14. Lansing Ltr. at p. 1

15. Orange & Rockland Utilities, Inc. v. Town of Havertsraw Assessor, 12 Misc., 3d 1194 (Rockland Sup. 2006).

16. Orange & Rockland Utilities, Inc. v. Town of Havertsraw Assessor, 12 Misc., 3d 1194 (Rockland Sup. 2006)(" In establishing Bowline's full market value this Court must be guided by its earlier decision [Orange and Rockland Utilities, Inc. v. Assessor of the Town of Haverstraw, 7 Misc. 3d 1017, 801 N.Y.S. 2d 238 (2005)] wherein the Petitioners sought " ' to amend its petitions [for the years 1995 through 2003] to conform them to the proof of the fair market value opined by (Mirant's) appraiser at trial ' ".

The Petitions set forth the following full value figures;

1995 Full Value of **$409,115,435**
1996 Full Value of **$420,116,095**
1997 Full Value of **$321,733,445**
1998 Full Value of **$224,471,245**
1999 Full Value of **$156,995,675**
2000 Full Value of **$771,026,464**
2001 Full Value of **$191,723,256**
2002 Full Value of **$205,333,333**
2003 Full Value of **$180,340,000**

At trial, Petitioners' appraiser, after reconciling the cost [reproduction cost new less depreciation [" RCNLD "][1995-2003]], income [discounted cash flow [" DCF "]] [1998-2003] and sales comparison [2000-2003] approaches, concluded that the fair market value of Bowline was as follows;

1995 Fair Market Value of **$211,000,000**
1996 Fair Market Value of **$187,000,000**
1997 Fair Market Value of **$146,000,000**
1998 Fair Market Value of **$150,000,000**
1999 Fair Market Value of **$125,000,000**
2000 Fair Market Value of **$175,000,000**
2001 Fair Market Value of **$150,000,000**
2002 Fair Market Value of **$200,000,000**
2003 Fair Market Value of **$200,000,000**

This Court denied the Petitioners' request but did reduce the 2000 Petition full value figure from $771,026,464 to $341,000,000 because " [t]he Respondents' appraiser concluded a fair market value for the Bowline Station for the year 2000 of $341,000,000. The Respondents are bound by their admission against interest ". Based on the same principal this Court hereby substitutes Petitioner's 2003 fair market value of $200,000,000 for the $180,340,000 full market figure set forth in the 2003 Petition ").

17. Id.

18. Orange & Rockland Utilities, Inc. v. Town of Havertsraw Assessor, 12 Misc., 3d 1194 (Rockland Sup. 2006)(" In July 1999 [after the 1999 taxable status date of January 1, 1999] SEB purchased Bowline from O&R and Con Edison for $193,800,000 [value of real property assets] within the context of a two phase auction process. An interesting but moot issue [since Petitioner is bound by the $341,000,000 floor for tax year 2000 in any event] is the extent to which a purchase price " of recent vintage " is the best evidence of the true value of Bowline, at least, for tax year 2000. After a careful review of the circumstances of that transaction...this Court finds that the transaction was arm's length and the sale price of $193,800,000 [value of real property assets] is the best evidence of value of Bowline for the tax year 2000, the sale occurring before the January 1, 2000 taxable status date ")].

19. See N. 16, supra.

20. See letter from Mark D. Lansing dated August 24, 2006 [" Lansing Ltr. "] at p. 1. See also Southern Energy Lovett LLC v. Assessor of the Town of Stony Point, Notice of Application for Review of Tax Assessments, Index No: 4357/00, Year 2000 dated July 20, 2000; Mirant New York, Inc. v. Assessor of the Town of Stony Point, Notice of Application for Review of Tax Assessment, Index No: 4696/01, Year 2001 dated July 25, 2001; Mirant New York, Inc. v. Assessor of the Town of Stony Point, Notice of Application for Review of Tax Assessments, Index No: 5122/02, Year 2002 dated July 23, 2002; Mirant New York, Inc. v. Town of Stony Point Assessor, Notice of Petition, Index No: 5279/03 dated July 28, 2003.

21. Belatedly, the parties have raised an issue as to what the " full market value " figure should be in the Petitioners' 2003 Petition. The Petitioners' 2003 Petition dated July 28, 2003 asserts that the " full market value of [Lovett] is $115,762,700 ". Petitioners' attorney Mark D. Lansing in his letter dated August 24, 2006 [" Lansing Ltr "] states that " the claimed full value per Petitioner's 2003 Petition was $115,726,700 ". Respondents' attorney Jonathan P. Nye in his letter dated August 25, 2006 [" Nye Ltr. "] states " In the aggregate, the claimed assessments for the 2003 petition are in the amount of $22,411,658. As Petitioners has stipulated to an equalization rate of 16.76% in this matter...the equalized fair market value of the property as a whole, for purposes of Mr. Lansing's chart and for comparison to the fair market value ultimately found by the Court, would be $133,721,110.00. That figure may be useful for characterizing the petition ' floor ' in relation to a finding of value by the Court, but the actual assessments claimed are specified in each of the relevant petitions, and pursuant to section 720 are controlling ").

22. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001), pp. 349-414; Valuing Machinery and Equipment: The Fundamental of Appraising Machinery and Technical Assets, American Society of Appraisers (2000), pp. 45-113; Lee & LeForestier, Review and Reduction of Real Property Assessments in New York, N.Y.S.B.A. (1988), (2000 Supp), § 1.07.

23. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001), pp. 570-593; Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000), pp. 179-182; Lee & LeForestier, Review and Reduction of Real Property Assessments in New York, N.Y.S.B.A. (1988), (2000 Supp), § 1.08.

24. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001), pp. 417-467; Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000), pp. 115-156; Lee & LeForestier, Review and Reduction of Real Property Assessments in New York, N.Y.S.B.A. (1988), (2000 Supp), § 1.04.

25. See P. Ex. 28 at p. 6 and Lansing Ltr. at p. 1.

Year	Cost	Income	Sales	Reconciled
2000	80,416,000	74,000,000	225,000,000	125,000,000
2001	205,326,000	130,000,000	300,000,000	150,000,000
2002	70,118,000	60,000,000	300,000,000	200,000,000
2003	35,903,000	95,000,000	225,000,000	125,000,000

26. See N. 21, supra. Evidently, it is Respondents' position that the 2003 floor should be $133,721,110.00, a position with which the Petitioners' disagree [email from Mark Lansing dated August 25, 2006 (" we disagree with Respondents' contentions ")]. As shall be made clear in our analysis and determination of the full market value of Lovett for tax year 2003 it makes no difference whether the 2003 floor is $115,762,700 or $125,000,000 or $133,721,110.

27. Lansing Ltr. at p. 1.

28. R. Ex. H-1 at tabs V, VI and VII.

Year	Cost	Income	Sales	Reconciled
2000	342,399,000	240,000,000	n/a	240,000,000
2001	357,148,000	355,000,000	n/a	355,000,000
2002	362,619,000	320,000,000	n/a	320,000,000
2003	368,305,000	380,000,000	n/a	380,000,000

29. P. Ex. 25L, App. II.

30. P. Ex. 51, pp. 2-4.

31. P. Ex. 30 at pp. 2-33.

32. P. Ex. 43.

33. P. Memo. I at pp. 65-71; R. Memo. at pp. 36-44; P. Reply Memo. at pp. 21-27; R. Reply Memo. at pp. 12-14.

34. P. Memo. I. at p. 5; Compare R. Ex. H2 (cover letter, p. 76) with H2, App. C (P. Ex. 27C, App. G at p. 1).

35. See N. 2, supra.

36. See N. 2, supra.

37. See N. 2, supra.

38. See N. 3, supra.

39. See N. 3, supra.

40. See N. 3, supra.

41. See N. 25, supra.

42. See N._28, supra.

43. The testimony of Victoria Lynch[P. Ex. 44] and Eddie Dorset [P. Ex. 43] regarding the existence of a wholesale electricity market is interesting, to be sure, but lacks credibility.

44. P. Ex. 27B, App. F at pp. 29-31; R. Ex. H-1 at pp. 25-28.

45. P. Exs. 3A at p. 2; 27A at pp. 3-1, 3-2, 4-1, 4-2; 27B, App. F at pp. 29-31.

46. P. Exs. 27A at p. 4-3; 27B, App. F at p. 30.

47. R. Ex. H-1 at p. 25.

48. Record at pp. 69-74, 732, 1145-1150, 1453, 1454; P. Exs. 27A at pp. 3-1, 3-2, 4-3, 4-4; 27B, App. F at pp. 29-31.

49. Record at 1145-1150; P. Exs. 27A, pp. 4-1, 4-2, 4-3; 27B, App. F at pp. 17, 29-31, 139-360.

50. Id.

51. Id.

52. Id.

53. Record at pp. 59, 88-89, 1149; P. Ex. 3A at p. 2.

54. Id.

55. Record at pp. 88-89; P. Ex. 3A at p. 2.

56. P. Exs. 3A at p. 2; 27A at p. 4-3; 27B, App. F at pp. 28, 30.

57. Record at pp. 67-68, 1145-1146; P. Ex. 27B, App. F at pp. 30-31.

58. See e.g., Freemont-McMoran Resource Partners v. County of Lake, 12 Cal. App. 4th 634, 16 Cal. Rptr. 2d 428 (1993)(" Under (PURPA) and (FERC) utilities are required to purchase electricity from ' qualifying facilities '...at a price no greater than the utility's ' avoided cost ' (the cost the utility would have incurred by generating the electricity itself ").

59. Record at pp. 67-68, 1146-1147; P. Ex. 27B, App. F at pp. 30-31.

60. P. Ex. 27B, App. F at pp. 30-31, 111. For tax certiorari cases involving co-generation facilities see Matter of TBG Cogen Partners v. The Assessor of the County of Nassau, New York Law Journal, August 15, 2001, p. 21, col. 3 (Nassau Sup. 2001)(J. Winslow)(" The property...is improved with a co-generation plant that was constructed in 1998 to produce steam and electricity from natural gas-powered turbines. Grumman/Northrup-Grumman has been the Plant's sole purchaser of steam for the Plant's entire working life to date "); Watson Cogeneration Company v. County of Los Angeles, 98 Cal. App. 4th 1066, 120 Cal. Rptr. 2d 421 (2002)(" The facility was developed as a ' qualifying facility ' in accordance with the Public Utility Regulatory Policies Act of 1978...a federal legislative scheme intended to encourage the development of cogeneration and small power production facilities ");

61. New York passed the "6-cents law" [New York Public Service Law 66-c, enacted 1981 and repealed 1992], which required public utility companies to purchase electricity from any independent power producer for " 6-cents " a kilowatt [Record at p. 1147; P. Ex. 27B, App. F at pp. 109, 111]. As energy prices declined in the late 1980s and early 1990s, this statutorily set price became excessive and burdensome on both New York public utilities and electricity customers. The proliferation of NUGs may have led to significant overcapacity in New York's markets, creating a wholesale market for electricity transactions [i.e., both NUGs and PUCs were seeking to sell their excess capacity][P. Ex. 27B, App. F at pp. 109-111].

62. Record at pp. 67-68; P. Ex. 27B, App. F at pp. 30-31.

63. Record at pp. 67-68, 1146-1148; P. Ex. 27B, App. F at pp.30-31, 109-111.

64. P. Ex. 44; Record at pp. 75-76, 743-745; R. Ex. H1, p. 69.

65. Record at p. 72; P. Ex. 27B, App. F at p. 68; R. Ex. A at pp. 72-75.

66. Id.

67. Record at pp. 74, 112, 744; P. Ex. 44 at pp. 9-11.

68. Record at pp. 69, 732; P. Exs. 27A at p. 403; 27B, App. F ay pp. 31, 73-74.

69. Id.

70. Record at pp. 69-70, 77, 1148; P. Ex. 27A at pp. 4-3-4-4.

71. See Matter of Erie Boulevard Hydropower LP v. Town of Ephratah Board of Assessors, 2003 WL 21172636 (N.Y. Sup.), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004)(" The first defect in petitioner's DCF approach is the failure of its appraisers to use actual income based on two (PPAs)..."); Watson Cogeneration Company v. County of Los Angeles, 98 Cal. App. 4th 1066, 120 Cal. Rptr. 2d 421 (2002)(" selling its power...pursuant to the (PPA) (which) assured Watson a guaranteed purchaser for its entire output...Where as here, the income flow can be expected to remain stable, based on controlled pricing and assured usage, the value of the property ' can best be estimated in terms of actual income rather than imputed income '").

72. Record at pp. 70, 77, 732; P. Ex. 44 at pp. 32-33.

73. Record at p. 67, 1060-62; P. Ex. 44 at pp. 22-31); 45; 27C, App. H at pp. 16-54.

74. P. Ex. 25L, App. II [P.S.C. Opinion No. 96-12].

75. Id. at p. 1.

76. Id. at p. 15.

77. Id. at pp. 64-65.

78. Id. at pp. 64-66 (" We strongly encourage divestiture, particularly of generation assets, but do not require it immediately...While divestiture of energy service company operations is encouraged, for now we will allow utilities to continue to provide energy services to their customers either directly or through an affiliate ")].

79. P. Ex. 27C, App. H at pp. 153-159.

March 1999: Edison International's subsidiary, Edison Mission Energy, purchased the 1,884 MW Homer City plant from New York State Electric & Gas and Pennsylvania Electric Co.

June 1999: NRG Energy Inc. acquired the 760 MW Huntley plant and the 600 MW Dunkirk plant from Niagara Mohawk Power Co; Consolidated Edison Co of NY sold its 2,168 MW Ravenswood plant to KeySpan Corporation and its 842 MW Arthur Kill plant and 614 MW Astoria plant to NRG Energy.

August 1999: Consolidated Edison Co. Of NY sold its 1,090 MW Astoria plan, its 494 MW Gowanus plant and its 271 MW Narrows plant to Orion Power Holdings; Niagara Mohawk Power sold 72 hydro plants (661 MW) to Orion Power Holdings.

October 1999: NRG Energy, Inc. purchased the 1,700 MW Oswego station from Niagara Mohawk Power and Rochester Gas & Electric.

May 2000: Niagara Mohawk sold its 400 MW Albany plant to PSEG.

January 2001: Dynergy Inc. acquired the Danskammer plant from Central Hudson Gas & Electric and the Roseton plant from Central Hudson Gas & Electric, Niagara Mohawk and Consolidated Edison Co.

November 2001: Constellation Energy purchased Nine Mile Point #1 from Niagara Mohawk and 82% of Nine Mile Point #2 from Niagara Mohawk, New York State Electric & Gas, Rochester Gas & Electric and Central Hudson Gas & Electric.

80. Id. June 1999: Southern Energy, Inc. purchased 8 plants, totaling 7,776 MW from Orange & Rockland Utilities and Consolidated Edison.

81. The assertion of Petitioners' appraiser, Michael Remsha that " there was a market for the purchase and sale of plants in New York as early as 1997 or 1998 " [Record at p. 1444] is, clearly, not based upon any sales in New York State since there

were none in 1997 and 1998 [Record at pp. 1445-1446].

82. See ISO Power Trends 2005, A Report by the New York Independent System Operator April 2005 available at www.nyiso.com/public/newsroom/whats_new/index.jsp. ("... the NYISO's challenge was to introduce wholesale competition into a system designed by and for regulated, vertically integrated, utilities that had recently sold almost all of their generating assets to independent, largely unregulated entities...The NYISO came into existence as a consequence of a series of orders issued by (FERC) and actions by the (PSC). The PSC had conducted a lengthy proceeding examining the potential for restructuring New York's electric industry. These proceedings led to the creation of an ' independent system operator " (ISO) to operate the State's bulk electric transmission system in an even-handed and open manner, so as to permit competition among suppliers and purchasers of wholesale electricity...NYISO took a unique institutional form. It was to operate with a governance structure that provided for shared participation by its Market Participants, its management and its Board of Directors...the NYISO would be independent of the Market Participants...The Board was selected in 1998 and began to build the new organization "). (Last visited July 6, 2006). Compare to the California Power Exchange as discussed in Watson Cogeneration Company v. County of Los Angeles, 98 Cal. App. 4th 1066, 120 Cal. Rptr. 2d 421 (2002)(" During that same time period, California also was in the process of completing deregulation of the state power industry ...The statute also mandated creation of the California Power Exchange...to organize the wholesale market for electricity generation by selecting the lowest priced set of generators capable of meeting the state's load demand at any hour. The Power Exchange began operation on March 31, 1998 ").

83. R. Ex. H-1 at p. 30 (" For more than 30 years prior to 1998, the New York power system was operated by the (NYPP) which centrally dispatched power plants and operated the transmission grid to minimize its members' power production costs and maintain statewide reliability...During the transition to competition, the goal of NYPP was the creation of the (NYISO) that was to establish operating procedures for the region's transmission systems and create an independent market for the buying and selling of wholesale electricity ").

84. R. Ex. H-1 at p. 30 (" The establishment of the NYISO created a market in which buyers and sellers could purchase wholesale electricity, or its various components. The structure of the market continues to evolve but currently includes the following commodities: Installed Capacity, Day-ahead Energy Real-time

Energy, Ancillary Services, Operating Reserves, Spinning Reserves, Voltage Regulation, Black-start Capability. Installed capacity and either day-ahead or real-time energy comprise the largest component of wholesale electric prices and are the most widely traded of the NYISO commodities "); Matter of Erie Boulevard Hydropower LP v. Town of Ephratah Board of Assessors, 2003 WL 21172636 (N.Y. Sup.)(" the appraiser relied on market rate information derived principally from the New York Independent System Operator Real Time Electricity Rates and Day Ahead Electricity Rates that were accumulated between November 1999 and December 2000..."), aff'd 9 A.D. 3d 540, 779 N.Y.S. 2d 634 (3d Dept. 2004).

See also: NYISO Energy Markets at www.nyiso.com/pub;ic/products/energy_market/index.jsp?display=0 (" NYISO conducts energy market auctions in two phases. The Day Ahead Market is conducted prior to the commencement of each day. Forward contracts are established for each hour of the coming day. The Real Time Market is conducted when the load actually occurs. Most energy in the NYISO is transacted in the Day Ahead Markets ")(Last visited July 6, 2006).

85. See NYISO Market Data Exchange at www.nyiso.com/public.market_data/pricing_data.jsp (" Day-Ahead Market LBMP [Zonal, Generator, Hub Prices, Reference Bus], Real-Time Market LBMP [Zonal, Generator, Hub Prices], Time Weighted/Integrated Real-Time LBMP [Zonal, Generator, Reference Bus], Balancing Market (Hour Ahead) Advisory Prices [Zonal, Generator, Reference Bus], Ancillary Services [Day-Ahead Market, Hour-Ahead Market, Real-Time Market], Outages [Day-Ahead Scheduled Outages, Real-Time Scheduled Outages, Real-Time Actual Outages, Outage Schedule], Constraints [Limiting Constraints, DAM Limiting Constraints], Interface Flows [Internal/External Limits & Flows], PARs [PAR Schedules, PAR Flows, DAM PAR Schedule Diagrams], ATC/TTC [ATC/TTC, Preschedule ATC/TTC, Transfer Limitations-PDF, Transfer Limitations-CSV], Load Forecast/Commitment [ISO Load Forecast, Zonal Load Commitment], Actual Load [Real-Time Actual Load, Integrated Real-Time Actual Load, Load and SCUS Forecast data-Monthly Data Postings, Current Hourly Loads], Reports, Operational Studies & Systems Performance Reports, General Information)(Last visited July 6, 2006).

86. Record at pp. 168-171.

87. P. Memo. I at pp. 13-14; R. Memo. at pp. 5-6, 36-42, P. Reply Memo. 21-26, 29-20, R. Reply Memo. at pp. 12-15.

88. Orange & Rockland Utilities, Inc. v. Town of Haverstraw Assessor, 12 Misc. 3d 1194 (Rockland Sup. 2006)(" The Petitioners and Respondents have devoted considerable energy in answering these questions...

The Petitioners contend that prior to 1997 a wholesale market existed that was both liquid and based on publicly available information. Wholesale transactions were reported to the New York Power Pool [" NYPP "] which established a dispatch scheme based on marginal cost. Although the FERC and P.S.C. sought to develop a fully competitive market to set electricity prices, that market has never been totally devoid of regulatory oversight. Therefore, the wholesale electricity market has not been " deregulated " but rather was re-structured to function similar to a " stock market ". The NYISO was the natural progression to greater facilitation of wholesale market activity. The NYISO strengthened a pre-existing wholesale market.

The Respondents contend that the time period 1995 to 1999 encompasses what the Petitioners refer to as a " paradigm shift " in the economic environment in which facilities such as Bowline operate. During that period, however, Bowline was owned and operated as a rate-regulated electricity generation station . Such facilities have historically been deemed " specialties " to be valued using the cost method [RCNLD]. In the summer of 1999, in furtherance of P.S.C. policies intended to encourage divestiture and to alter the structure of electricity markets in New York State, Bowline was sold to Petitioners. Since that time Bowline has operated within the NYISO in an increasingly deregulated market. The Petitioners' contention that valuation methodologies other than RCNLD were permissible as early as 1998 required proof of sufficient sales in New York State of generating facilities in 1998. The Petitioners have failed to prove that there was a sufficiently liquid and competitive market for wholesale electricity to generate reliable market data to support an income approach for the tax years 1995 to 1999. The Petitioners have failed to distinguish between pre-1999 market data generated by competitive sales as opposed to regulated transactions. The Petitioners have failed to explain how data and market characteristics of the regulated market can reasonably provide the foundation for forecasting into the unregulated market, particularly, when the very purpose of deregulation was to alter the nature of the market. The Petitioners have failed to quantify the degree to which the market for electric commodities [including the prices paid for such commodities] prior to NYISO consisted, primarily, of competitive wholesale transactions or whether such transactions were those occurring in a regulated market ").

89. See N. 79, supra.

90. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001), at pp. 569-570.

91. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000), p. 179.

92. See e.g., Matter of Spring Valley Water Company v. Public Service Commission, 71 A.D. 2d 55, 422 N.Y.S. 2d 155 (3d Dept. 1979)(" This argument is primarily based upon the contention that the commission's use of the DCF method to estimate the cost of equity capital was irrational. This court previously stated that there appears nothing arbitrary or capricious in utilizing the DCF method "); Matter of New York Telephone Company v. Public Service Commission, 64 A.D. 2d 232, 410 N.Y.S. 2d 124 (3d Dept. 1978)(" expert witnesses...gave their opinions as to the rate of return on equity required by petitioner. The various experts employed a total of five different approaches to arrive at their figures, and it is apparent from the Commission's determination that it relied on the so-called discounted cash flow method...We perceive nothing inherently arbitrary or capricious in such reliance as long as the experts were not precluded from presenting other accepted methods of determining rate of return on equity ").

93. See e.g., Matter of Dissolution of Funplex, Inc., 252 A.D. 2d 923, 676 N.Y.S. 2d 321 (3d Dept. 1998)(" we are not persuaded by petitioner's argument that Johnson's ' discounted cash flow ' methodology, or the projections to which he applied that methodology, are critically flawed such that his valuation must be rejected entirely. The record does, however, reveal an error in Johnson's use of a ' capital deficiency ' adjustment "); Dempster v. Dempster, 204 A.D. 2d 1070, 613 N.Y.S. 2d 78 (4th Dept. 1994)(" The discounted cash flow method used by plaintiff's expert is similar to the capitalization of earnings method...which has often been used to value closely held corporations (however) we are unable to determine from this record whether the expert applied the discounted cash flow method properly in valuing that corporation... (matter remitted) for proper valuation ").

94. See e.g., Frontier Town Properties, Inc. v. State of New York, 36 A.D. 2d 148, 319 N.Y.S. 2d (3d Dept. 1971)(" His third method of valuation was the ' income or economic approach ' which utilized the ' discounted cash flow method '. This method of valuation required the appraiser to project the future income and

costs of the theme park...His valuations...were based primarily on a projected development of the theme park...The plans for the construction of new attractions were at best meager...evidence of probable attendance and increased revenue... was highly speculative and insufficient to support such valuations "); See also: Amdur, Property Taxation Of Regulated Industries, 40 Tax. Law. 339 (1987)(" There are two basic approaches to estimating the cost of equity...(2) ' Discounted cash flow '-determine the discount rate necessary to discount the expected cash flow (from dividends and appreciation) to a present value equal to the current market price of the stock
(DCF) is based on the concept that the return required by investors consists of compensation for two elements-illiquidity and risk ").

95. Record at pp. 2522-2528; R. Ex. H2, App. F (tables F-10 tp F-13). Moreover, Mr. Walker also testified that he recognized the 2000 and 2001 years were anomalies for pricing date in New York, as a result of a major nuclear station in Zone G going off-line and abnormal weather conditions [Record at pp. 2510-2511]. Yet, he used both years (without adjustments) to compute his four year averages [Record at pp. 2510-2511, 2520-2528; R. Ex. H-2, App. F (tables F-10-F-13)]. The net effect in using both anomalous years and wholly insufficient data was this overall electricity prices averages were impacted by NYISO data's significantly above average prices [R. Ex. H-3, App. Q; R. Ex. H-4]. By this approach, Mr. Walker's [PDC] captured the higher electricity prices, resulting in a volatility dispersion that favored higher electricity prices. That is, higher electricity prices in his DCF resulted from the fact that the average price for each year, as well as the averages for all four years that he used to derive his unitization factors for his price duration curves, included the undue higher electricity prices of 2000 and 2001 [R. Ex. H-4]. As a result the average of the average electricity prices computed for each year and used for the price duration curve caused the price duration curve to shift the computed unitization factors such that the computed dispersion factors were higher around the central tendency. This caused the electricity prices that were used for his DCF model to be higher.

96. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 570.

97. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at p. 182.

98. P. Memo. I at pp. 34-35.

99. P. Reply Memo. at p. 34.

100. P. Memo. I. at p. 31; Record at pp. 22-25, 245-247, 1125-1126, 1207, 1214-1225; P. Exs. 27A at pp. 14-1-14-2; 52, 53.

101. Record at pp. 1214, 1236-1237; P. Ex. 27A at pp. 14-4-14-7.

102. Record at pp. 1215, 1241-1242; P. Ex. 27A at pp. 14-7-14-8.

103. Record at pp. 1227-1228; P. Ex. 27A at pp. 14-20-14-21.

104. Record at pp. 1748-1749.

105. Record at pp. 1209-1212, 1227=1228, 1269; P. Ex. 27A at pp. 14-20-14-21.

106. Record at pp. 38-40, 50; P. Ex. 3A at p. 4.

107. Record at pp. 123, 140-142; P. Ex. 3A at pp. 12-14.

108. Record at pp. 40, 143-144; P. Ex. 3A at pp. 4, 12-15, App. C.

109. Record at pp. 92-104, 121; P. Ex. 3A at pp. 9-12, App. A, Tables A-6 to A-8.

110. Record at pp. 104-105.

111. Record at pp. 94-97; P. Ex. 3A at pp. 9-12, App. A at pp. A-1, A-1, Tables A-4 and A-5.

112. Record at pp. 110, 120-121, 175-176; P. Ex. 3A at pp. 11-12, App. A at pp. A-1, A-2, Tables A-4 and A-5.

113. Record at pp. 122-123, 143-144, 183-184; P. Ex. 3A, at pp. 12-15, App. C, Table C-1.

114. Record at pp. 120, 143-144, 175-180; R. Ex. 3A, pp. 14-20, App. A, Tables A-4-A-5.

115. Record at pp. 179-180; P. Ex. 3A at pp. 14-20; App. D, Table D-1.

116. Record at pp. 140, 160, 167-168; P. Ex. 3A at pp. 14-20, 24, App. C & D.

117. Record at pp. 187-192, 231-232; P. Ex. 3A at pp. 19-20, App. F.

118. Record at pp. 183-184, 231-232; P. Ex. 3A at pp. 19-20.

119. Record at 234-238 (" The Court: So your forecast then is based upon real data from 1997? The Witness: Yes. Q. And from 98, correct? A. In 1998, I don't have any real–on January 1 of 1998, I don't have any real data yet. So I am forecasting an average price that I expect to see in 1998...The Court:...But your volatility in 1998 is based upon an analysis of real figures in 1997. The Witness: Yes. The Court: So what's going on in 1997 in terms of volatility, that's what's going on in 1998. The Witness: And beyond. ").

120. Id.; P. Ex. 66.

121. Record at pp. 48-50, 90-91, 194-196; P. Ex. 3A at pp. 19-20, 23-24; App. F.

122. P. Exs. 4D, 4K at pp. 6-8.

123. P. Ex. 3A at p. 23; App. I.

124. Record at pp. 250-257; P. Ex. 3A at pp. 25-31.

125. Record at pp. 264-265; P. Ex. 3A at pp. 25-27.

126. Record at pp. 1240-42; P. Exs. 3A at pp. 14-1-14-5; 27A at pp. 14-4-14-9.

127. Record pp. 1137, 1227, 1230-1236; P. Ex. 27A at pp. 14-4-14-5.

128. Record at p. 863, 1136, 1213, 1216; P. Ex. 27A at pp. 14-4-14-6.

129. Record at pp. 1231-1236; P. Ex. 27A at pp. 14-4-14-6.

130. Record at p. 1136, 1213, 1216, 1231-1236; P. Ex. 27A at pp. 14-4-14-6.

131. P. Ex. 27A at p. 14-8.

132. Record at pp. 1244-1245; P. Ex. 27A at p. 14-9.

133. Record at pp. 1249-1250; P. Exs. 27A at p. 14-10; 27D, App. J at pp. 1-31-1-32.

134. Record at pp. 1261-1267; P. Exs. 27A at p. 14-12; 27D, App. J at pp. 45-50.

135. See Ns. 8 & 9, supra.

136. Record at pp. 1261, 1266-1267; P. Exs. 27A, at p. 14-12; 27D, App. J at p. 48.

137. Record at pp. 1270-1284; p. Ex. 27A at pp. 14-13-14-18, 14-21-14-22, App. A at pp. 34-70.

138. Record at p. 1284; P. Ex. 27A at pp. 14-20-14-22.

139. Record at pp. 1284-1285; P. Ex. 27A at pp. 14-20-14-22.

140. Record at p. 1288; P. Ex. 27A at pp. 14-23-14-24.

141. Evidently, Dr. Makovich relied in on even earlier data from a 1986 ERPI report which he escalated into 1997 dollars [Record at 141-142 ("...for the fossil units I relied on the EPRI data which gave me 1986 numbers that I escalated with the actual C.P.I....brought up to current dollars in 1997 ")].

142. Record at p. 186.

143. Record at p. 449.

144. P. Memo. I at pp. 34-35.

145. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 417.

146. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at p. 115.

147. Record at pp. 1476-1484.

148. P. Memo. I at p. 73.

149. P. Ex. 27A at pp. 13-12-13-14; Record at pp. 1498-1501.

150. P. Ex. 27A at pp. 13-12-13-13 (" In the coal-fired power plant industry, the best indicator of market or economic conditions is a relationship of the electricity price to the fuel price. The electricity price/fuel price ratio in this analysis is the average market electricity price of the subject and the

market coal price. The higher the ratio, the more profitable the facility. In this analysis the electricity price represents the average annual NYISO Zone G electricity price as reported by Platt's Megawatt Daily ").

151. R. Memo. at pp. 56-59 (" Mr. Remsha's assurance that it was reasonable to extrapolate one of two components of a yearly average of electricity prices based on one day in the entire year was based on nothing but raw speculation. And not only did Mr. Remsha rely on that single day of off-peak pricing to determine his average off-peak price for that year (2000), he used the same relationship between on-peak and off-peak prices he had divined for 2000 (in which the off-peak price was approximately 65% less than the on-peak price) to estimate the average price for the years 2001, 2002 and 2003 as well, simply assuming that it would be reasonable to maintain that relationship for each of those years. In 1999, however, the off-peak price had been approximately 46% less than the on-peak price. In 1998, it had been approximately 39% less, and in 1997, only 33% less [P. Ex. 27F, App. Q at p. 15]...Accordingly, the ' Zone G ' electricity prices for Mr. Remsha's ' market conditions ' adjustment were without any foundation "); Record at pp. 1506-1513.

152. P. Ex. 27A at pp. 13-1-13-12.

153. Record at p. 1533(20-24); P. Ex. 27A at p. 13-16

154. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at pp. 349-351.

155. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at p. 45.

156. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 357.

157. Record at p. 1322; P. Exs. 27A at pp. 15-8-15-13; 27E, App. M at pp. 291-361.

158. Record at pp. 1322-1328; P. Exs. 11A at pp. 5-1-5-7 (Tables 4 to 11); 27A at pp. 15-8-15-10.

159. P. Ex 11A at pp. 5-7-5-9.

160. P. Exs. 11A at pp. 5-7-5-9; 11, App. A.

161. P. Exs. 11A at pp. 5-7-5-9; 27A at p. 15-9.

162. P. Ex 27A at p. 15-9.

163. Record at pp. 1322-1328; P. Exs. 11A at pp. 5-1-5-7 (Tables 4-11); 27A at pp. 15-8-15-10.

164. P. Exs. 10; 11A at p. 1-1.

165. Record at pp. 781-790, 880-913, 926-937; P. Exs. 11A, Section 5; 11B; 11C; 13-17.

166. Record at pp. 814-815; P. Exs. 11A, Section 5 (Tables 3-12); 13-17.

167. Record at pp. 881-887; P. Ex. at p. 14 (first page, lines 147-148).

168. Record at pp. 881-887; P. Ex. 14 (first page, lines 147-148).

169. P. Ex. 14.

170. P. Ex. 11A, App. F at p. F000020 (line 152).

171. P. Exs. 14-17.

172. Record at pp. 870-871, 913; P. Ex. 11A at p. 5-2-5-3 (Tables 4-11).

173. Record at pp. 1322-1328; P. Ex. 27A at pp. 15-9-15-10.

174. Record at pp. 1330-1335; P. Exs. 11A at pp. 4-2-4-3; 27A at pp. 15-10-15-12.

175. Record at pp. 1330-1334; P. Ex. 27A at p. 15-12.

176. P. Exs. 27A at p. 15-12; 27E, App. M at pp. 258-265.

177. Record at p. 1336; P. Exs. 27A at pp. 15-10-15-12; 25C, App. G.

178. Record at pp. 1911(25)-1912(4).

179. Record at pp. 1960(17)-1961(8).

180. Record at pp. 1917(19)-1927(23),1933(3)-1943(7).

181. Record at pp. 1917(19)-1924(4).

182. Record at pp. 1924(5)-1926(13); R. Ex H-1, App. D at pp. D-1-D-6 (and tables referred to).

183. Record at pp. 1933(3)-1940(5).

184. Record at p. 1940(6-13); R. Ex. H-2, App. D at pp. D-6-D-8).

185. Record at pp. 2052-2056; P. Ex. 41.

186. Record at pp. 2052-2056; P. Ex. 41.

187. R. Ex H-2, App. E.

188. Record at pp. 2038-2042, 2364-2368.

189. Record at p. 2058.

190. Record at pp. 2038-2042, 2364-2368.

191. R. Ex. H-2, App. D at p. D-2.

192. R. Ex H-1, App. D at p. D-2.

193. Record at pp. 1983-1987.

194. Record at p. 1985.

195. R. Ex. H-2, App. D.

196. Record at pp. 1985-1987; R.Ex. H-2, App. E at p. E-7.

197. Record at pp. 1957-1958, 2287-2290, 2299, 2486, 2538; R. Ex. H-4, App. V.

198. R. Ex. H-4, App. V.

199. Record at pp. 1957-1958, 2287-2290, 2299, 2486, 2538; R. Ex. H-4, App. V.

200. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at pp. 89-90.

201. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at p. 90.

202. The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at p. 350.

203. Record at pp. 968-972,978-980; P. Ex. 27A at pp. 15-14 to 15-17.

204. Record at pp. 1337-1338,1349-1350; P. Exs. 27A at pp. 15-14-15-17; 27A, App. A at p. 20.

205. P. Ex. 22.

206. Record at pp. 968-972,978-980,1339,1346,1349,1350; P. Exs. 22, Sections 1.2,1.3 and 1.4; 27A at p. 15-14; 25B, App. F at pp. 4-5.

207. Record at pp. 968-972,978-980; P. Ex. 22, Sections 2 and 5.

208. Record at pp. 795-796, 974-977; P. Ex. 22, Section 1.2.

209. Record at pp. 795-796, 974-977; P. Ex. 22 at pp. 1-4.

210. Record at pp. 974-975; P. Ex. 22, Sections 2, 3, and 5.

211. P. Ex. 22, Section 8.

212. Record at p. 984; P. Ex. 22.

213. Record at pp. 989-991; P. Ex., App. D.

214. Record at pp. 989-991; P. Ex. 22 at p. 5-1.

215. Record at p. 987; P. Exs. 11A (Baseline Schedule); 22, Section 5 (Project Schedule).

216. Record at pp. 993-995.

217. P. Ex. 22, App. A.

218. Record at p. 1002; P. Ex. 24 (Line 481).

219. P. Ex. 22 (Tables 2-5); App. A.

220. Record at pp. 1347-1348; P. Ex. 27A at pp. 15-15, 15-16.

221. Record at p. 1349; P. Exs. 27A at p. 15-17; 28 at p. 15-17.

222. Record at pp. 2137(24)-2140(14).

223. Record at pp. 2137-2140.

224. Record at pp. 2137(24)-2140(14).

225. Record at pp. 2137(24)-2140(14).

226. Record at pp. 2373-2377,2380-2384; R. Exs. H-2, App. E at p. E-7, Worksheet E-2; H-3, App. K, p. K-1.

227. Record at p. 2380-2381,2414; R. Ex. H-2, App. E, Worksheet E-2.

228. R. Ex. H-2, App. E at p. E-6.

229. Record at pp. 2376, 2409; R. Ex. H-2, App. E, Worksheet, E-2.

230. R.Ex. H-3, App. K at pp. K-1, 2001AEO, 71, 2003AEO, 75.

231. Record at pp. 2373-2379,2409,2416,2419,2422-2430; R. Ex. H-3, App. K at pp. K-1, 2001AEO, 71, 2003AEO, 75.

232. Record at pp. 1332(5)-1333(5).

233. P. Ex. 27A at p. 15-16.

234. Record at pp. 1271(18)-1272(3);1274(18-20).

235. Record at p. 1334(7-14).

236. P. Ex. 27A, Section 15-10.

237. R. Ex. H-2, App. D.

238. Record at pp. 2009-2011.

239. R. Ex. H-3, App. D at p. D-7.

240. Record at 2014-2022. Compare R. Ex, H-2, App. D atp. D-7 with P. Ex. 40.

241. Record at pp. 2014-2022; P. Ex. 40; R. Ex. H-3, App. P, worksheet P-1.

242. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at pp. 70, 84. See also The Appraisal of Real Estate, Appraisal Institute, 12th Edition (2001) at pp. 398-399].

243. Record at pp. 1943(8)-1950(3).

244. Record at pp. 1981(16)-1982(19).

245. R Ex. H-2, App. D at pp. D-8 - D-9.

246. Record at pp. 2134(11-23)-2137(5-9).

247. Record at pp. 2140(15)-2143)6).

248. R. Ex. H-2, App. E, p. E-3.

249. Record at pp. 2023-2024.

250. Record at p. 2023; R. Ex. H-2, App. D at p. D-11.

251. Record at pp. 2024-2032; R. Ex. H-2, App. D at p. D-11.

252. Record at p. 2035.

253. R. Ex. H-2, App. D.

254. R. Ex H-2, App. D at p. D-11.

255. Record at pp. 2037-2048; R. Ex. H-2, App. D atp. D-78.

256. Record at pp. 2043-2044,2046-2048; R. Ex. H-2, App. D at p. D-76.

257. R. Ex. H-2, App. D at p. D-73.

258. Record at pp. 2362-2369.

259. P Ex. 6A, Section 6.

260. Record at pp. 1957-1959,2287-2290,2486,2538; R. Ex. H-3, App. E at pp. E-2, E-3.

261. Record at p. 2362; R. Ex. H-2, App. E at p. E-2.

262. Record at pp. 2363,2367-2369; R. Ex. H-2, App. E at p. E-2, E-3.

263. Record at pp. 2366-2369; R. Ex. H-2, App. E at p. E-2.

264. Record at pp. 2363-2369.

265. P. Ex. 27A at pp. 15-17-15-20.

266. Record at pp. 1354,1355; P. Ex. 27E, App. M at p. 208.

267. Record at pp. 1354-1355; P. Exs. 27A at p. 15-18-15-20; Ex. 27F, App. P at pp. 3-50.

268. Record at pp. 1354-1359; P. Ex. 27A at pp. 15-17-15-19; P. Ex. 27F, App. P.

269. Record at pp. 1355-1356; P. Ex. 27F, App. P at pp. 3-50.

270. Record at pp. 1355-1356; P. Ex. 27F, App. P at pp. 51-75.

271. Record at pp. 1351-1352.

272. Record at pp. 1353; P. Ex. 11A at p. 6-2.

273. Record at pp. 1353-1357; P. Ex. 11A, Sections 6.1,6.2.

274. Record at pp. 1356-1360; P. Exs. 27G, App. P, p. 1;27A at p. 15-17-15-19.

275. Record at pp. 1360-1364.

276. Record at pp. 1364-1366; P. Ex. 27A at p. 15-19.

277. Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets, American Society of Appraisers (2000) at p. 99.

278. Record at pp. 2152(22)-2155(7).

279. Record at p. 2155(8-20).

280. R. Ex. H-2, App. E at p. E-12.

281. R. Ex. H-2, App. E at p. E-12.

282. Record at pp. 2359-2361,2410; R. Ex. H-2, App. E at p. E-12.

283. Record at p. 1369; P. Ex. 27A at p. 15-20-15-24.

284. Record at p. 1369; P. Ex. 27A at pp. 4-19,15-21,15-22,15-23.

285. Record at pp. 1370-1372; P. Ex. 27G, App. R at p. 3,4,17-55.

286. P. Ex. 27G, App. R at p. 5-16.

287. Record at pp. 1371-1375; P. Ex. 27A at p. 15-20, 15-21.

288. Record at p. 1372; P. Exs. 27A at p. 4-19; 27G, App. R at p. 3.

289. Record at p. 1374; P. Exs. 27A at pp. 15-21,15-22; 27G, App. R at p. 1-4.

290. Record at pp. 1345-1376; P. Exs. 27A at p. 15-21,15-22; 27E, App. R at p. 1-4.

291. Record at pp. 1376-1379; P. Exs. 27A at pp. 15-22,15-23,15-24; 27G, App. R.

292. Record at p. 1377.

293. Record at pp. 1377-1379; P. Exs. 27A at p. 15-23; 27G, App. R at p. 56-85.

294. Record at pp. 1377-1379; P. Ex. 27A at p. 15-23.

295. Record at pp. 1377-1379; P. Ex. 27A at p. 15-23.

296. Record at pp. 1376-1380; P. Exs. 27A at p. 15-25; 27G, App. R at pp. 56-60.

297. Record at pp. 1376-1385; P. Ex. 27A at p. 15-24.

298. Record at pp. 1376-1385; P. Ex. 27A at p. 15-24.

299. Record at pp. 2144(24)-2149(12).

300. Record at pp. 2149(13)-2152(18); R. Ex. H-2, App. E at pp. E-10-E-12.

301. Record at pp. 2430-2433; R. Ex. H-2, App. E at pp. E-6-E-12.

302. Record at pp. 2300-2312,2321,2433.

303. Record at pp., 2300-2312,2321,2433.

304. Record at pp. 1960-1962,2312; R. Ex. H-2, App. D at p. D-2.

305. Record at pp. 2373-2379,2409,2416,2419,2422-2430; R. Ex. H-3, App. K at pp. K-1, 2001AEO, 71, 2003AEO, 75.

306. Record at p. 1388; P Ex. 27E, App. M at pp. 373-374.

307. P. Ex. 28 at p. 15-27.

308. Record at p. 1388; P. Exs. 27A at p. 15-28; 27E, App. M at pp. 373,374.

309. Record at pp. 1336-1340; P. Ex. 27A at p. 15-27; App. B at p. 1.

310. Record at pp. 1390-1391; P. Exs. 27A at p. 15-27; 27E, App. M at p. 373-374.

311. P. Ex. 28 at p. 15-27.

312. Record at pp. 1388-1389; P. Ex. 27G, App. S at p. 3.

313. Record at p. 1391; P. Exs. 28 at p. 15-28; 27G, App. S at p. 1-4.

314. Record at pp. 1393,1394; P. Ex. 28 at p. 15-27.

315. Record at pp. 1587(12)-1588(4); P. Ex. 27A, Section 14-4.

316. P. Ex 28, Vol.1, revised Section 15-27, Vol. 8, revised pp. 20,21, Vol. 9, revised p. 20 .

317. P Ex 28, Vol. 1, Section 15-27.

318. P. Ex. 28, Vol. 1, revised Sections 17-6 and 15-54.

319. Record at pp. 1405(13)-1406(10).

320. Record at pp. 1644(13)-1645(21).

321. Record at p. 1854(8-20).

322. Record at p. 1854(8-20).

323. P. M&E Memo.

324. P. M&E Memo. At p. 15.

325. R. M&E Memo.

326. P. M&E Memo. at p. 17; P. Ex. 28, Tab 1 (pp. 1-10)[P. Exs. 3A at pp. 1-18; 11E, App. Q, R-000001-R-000116].