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| NO. CV 03 0566126S | : | SUPERIOR COURT |
| DOMINION NUCLEAR, ET AL. | : | JUDICIAL DISTRICT OF |
| | : | NEW LONDON |
| | : | AT NEW LONDON |
| v. | | |
| TOWN OF WATERFORD | : | NOVEMBER 8, 2007 |

**MEMORANDUM OF DECISION**

This is a 221-count municipal tax appeal filed by the plaintiffs, Dominion Nuclear Connecticut, Inc. (Dominion), Central Vermont Public Service Corp. (CVPS) and Massachusetts Municipal Wholesale Electric Co. (MMWE), owners of the Millstone Nuclear Power Station (Millstone), contesting the valuation of their property by the assessor for the town of Waterford (town) on the Grand List of October 1, 2002.

Dominion purchased Millstone from Northeast Utilities as a going business on March 31, 2001 for a sale price of $1,288,768,000. The purchase was made in accordance with a contract for sale dated August 7, 2000, consisting of 100% ownership of Units 1 and 2 and 93.47% ownership of Unit 3.[1] The sale price included the real property, personal property, nuclear fuel, the workforce, materials and supplies, construction work in progress and other intangible assets.

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[1] The entities holding the remaining 6.53% interest in Unit 3 are plaintiffs CVPS and MMWE.

According to the town's appraiser, Mark Pomykacz (Pomykacz), the parties allocated from the purchase price $451,000 for a small offsite commercial building located in East Lyme, Connecticut and $104,000,000 for nuclear fuel, leaving a net grossed up price of $1,230,044,830 for Millstone's tangible and intangible assets. See defendant's Exhibit SS1, p. 45.

As part of the history of the subject property, on June 20, 2001, Dominion and the town resolved a prior tax appeal by stipulating that the fair market value of the real and personal property of Dominion, effective for the interim period beginning October 1, 2000 through the effective date of the next town-wide revaluation on October 1, 2002, was $1,042,942,031. The court also notes that while the town's assessor relied on the valuation of Dominion's real and personal property by the town's first appraiser, John Goodman (Goodman), the town's assessor disregarded Goodman's opinion that Unit 1 had no value. Furthermore, the town's assessor arrived at his own independent valuation of Unit 1 and added Unit 1's valuation to Goodman's valuation for Units 2 and 3.

For the present appeal, the parties stipulated that "[t]here are two principal issues that must be resolved by the Court in this tax appeal: (a) the value as of October 1, 2002, of the entire taxable real and personal property comprising Units 1, 2, and 3 of the Millstone electrical generating facility owned by the plaintiffs and located in the Town of Waterford . . . and (b) the value as of October 1, 2002, of the air pollution control equipment [APCE] located at Unit 3 . . . ." (Parties' Memorandum of Understanding, dated August 6, 2007, p. 1.)

## VALUATION OF REAL AND PERSONAL PROPERTY AT MILLSTONE

The assessor determined that the fair market value of Dominion's real estate and personal property at Millstone, for the October 1, 2002 Grand List, was a combined total of **$1,213,709,400**, broken down as follows:

Unit 1

| | | |
|---|---|---|
| Personal Property | | $24,000,000 |
| Real Estate | | $ 1,000,000 |
| | Unit 1 Total | $25,000,000 |

Unit 2

| | | |
|---|---|---|
| Personal Property | | $176,250,000 |
| Real Estate | | $176,250,000 |
| | Unit 2 Total | $352,500,000 |

Unit 3

| | | |
|---|---|---|
| Personal Property | | $379,746,200 |
| Real Estate | | $379,746,200 |
| | Unit 3 Total | $759,492,400 |

| | |
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| Land and Additional Buildings | $ 76,717,000 |

See defendant's post-trial brief, dated February 2, 2007 (hereinafter defendant's 2/2/07 brief), p. 23, citing plaintiffs' Exhibit 1. See also testimony of Assessor Michael Bekech, transcript of February 6, 2006, pp. 9-12.

The plaintiffs rely on the valuation of their expert, Michael Remsha (Remsha), who valued Dominion's real estate and personal property at Millstone at **$1,000,000,000**, as of October 1, 2002.

The town presented its own expert, Pomykacz, who valued Dominion's real estate and personal property at Millstone, as of October 1, 2002, at **$1,343,600,000**, a higher figure than that of the assessor.[2]

Description of the subject property

Millstone, located north of Long Island Sound, spans approximately 526 acres of land in Waterford. The subject site abuts and overlooks the Sound and includes 2.5 miles of coastline. The site is cut in half by Amtrack railroad tracks, running east to west. A Connecticut Light and Power Company transmission line traverses the subject property, running north to south. The southern half of the site contains the Millstone electrical generating facility. The northern half is basically vacant land.

The Millstone facility consists of three nuclear reactors. Millstone was originally issued a construction permit by the Atomic Energy Commission in May 1966. Unit 1 began operating on March 1, 1971; Unit 2 on December 26, 1975 and Unit 3 on April 23,

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[2] "In § 12-117a tax appeals, the trial court tries the matter de novo and the ultimate question is the ascertainment of the true and actual value of the [taxpayer's] property. . . . At the de novo proceeding, the taxpayer bears the burden of establishing that the assessor has overassessed its property. Once the taxpayer has demonstrated aggrievement by proving that its property was overassessed, the trial court [will] then undertake a further inquiry to determine the amount of the reassessment that would be just. The trier of fact must arrive at [its] own conclusions as to the value of [the taxpayer's property] by weighing the opinion of the appraisers, the claims of the parties in light of all the circumstances in evidence bearing on value, and his own general knowledge of the elements going to establish value . . . ." (Citations omitted; internal quotation marks omitted.) United Technologies Corp. v. East Windsor, 262 Conn. 11, 22-23, 807 A.2d 955 (2002). Under these circumstances, the court has no authority to consider the fair market value of the subject property in excess of the valuation placed upon the property by the assessor if the court does not find aggrievement on the part of the taxpayer.

1986. Unit 1 was shut down in 1995, permanently retired from service on July 21, 1998 and is being decommissioned as a nuclear power plant. See plaintiffs' Exhibit 17, §11-12. Dominion presently maintains Unit 1 to store spent nuclear fuel from the past operation of this unit until the federal government develops a permanent storage facility to store spent nuclear fuel from this facility and other nuclear facilities across the country. The location and development of the national storage facility has yet to be determined.[3]

Unit 2 is a pressurized light water reactor (PWR)[4] with a main turbine generator constructed by Combustion Engineering with a rated output of 895 megawatts (MW) gross and 871 MW net. The Operating License of Unit 2 was issued on September 26, 1975 and expires July 31, 2015.

Unit 3 is a PWR reactor with a main turbine generator constructed by Westinghouse with a rated output of 1,153 MW gross and 1,137 MW net. The Operating

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[3] The term applied to the shut-down of Unit 1 is "SAFSTOR" which is defined "as a nuclear facility condition where the reactor is maintained and monitored to allow the radioactivity to decay prior to being dismantled. The plant will be in a cold, dark, and dry condition, except for the spent ('used') fuel pool 'island.'" (Plaintiffs' Exhibit 16, p. 8.)

[4] Unit 1 was a boiling water reactor (BWR) where "the heat from the fission reaction boils water and creates steam that flows directly to the turbine. That rotates the turbine, which rotates the generator, which produces the electricity that can then be sold in the marketplace. . . . [In] a pressurized water reactor or a PWR design, which is actually somewhat similar [to a BWR], except that the heated water is kept under pressure to prevent it from boiling. And it actually creates steam in a steam generator . . . ." (Testimony of Michael Remsha, transcript of February 8, 2006, p. 22.)

License for Unit 3 was issued on January 1, 1986 and expires on November 25, 2025. Dominion's 93.47% interest in Unit 3 is 1,063 MW net.

The total installed capacity of Units 2 and 3 to generate electricity for commercial use is 2,024 MW.

In March 2002, Dominion announced that it will file in 2004 with the Nuclear Regulatory Commission (NRC)[5] for twenty-year extensions of the operating licenses for Units 2 and 3.

Remsha discussed the operation of the nuclear power plant at Millstone as follows: "The nuclear steam system is the associated equipment necessary to produce the pressurized steam that drives the turbines, provide heat removal, and provide emergency core cooling. Equipment groups include the control rod device system, pressurizer, core spray system, high pressure cooling injection system, primary reactor recirculating system, reactor core isolation system, reactor water cleanup system, residual heat removal system, and standby liquid control system.

"The control rod device system consists of a bundle of rods containing neutron-absorbing material that provides control of the reactor rate of reaction and the amount of

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[5] The NRC is the federal commission that regulates the operation of all nuclear power plants in the United States, requiring nuclear power plant operators to implement rigorous aging management programs ensuring that all structures, equipment and systems in a nuclear plant related to safety are designed, fabricated, erected, tested and maintained to the highest quality control standards. See defendant's Exhibit Q.

heat generated, which in turn produces the steam. The rods are made of stainless steel tubing and contain boron carbide, which absorbs the neutrons.

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"The turbogenerator system serves to convert the steam into electricity. The reactor heats the water that passes upward past the fuel assemblies. Water is not allowed to boil since the water is heated to 550º Fahrenheit and kept at a pressure of about 2,200 pounds per square inch. Water pressure is maintained by a pressurizer and is pumped to the steam generator through tubes. The two power units at Millstone have two and four reactor cooling system loops, inside the containment. In the secondary cooling system, cooler water is pumped from the feedwater system and passes on the outside of the steam generator tubes. The water is then heated and converted to steam. This steam then passes through a main steam header and then to the turbine, which is connected to and turns the turbogenerator [that produces the electricity for consumer use]. This steam is then condensed and returned to the feedwater system."

(Plaintiffs' Exhibit 17, § 7-5 to § 7-6.)

Millstone is the largest electrical generating station in New England and produces roughly half of Connecticut's electric power. Prior to 2001, Millstone was owned by Northeast Utilities and regulated by the Department of Public Utility Control (DPUC). As a regulated industry, the DPUC determined Millstone's annual revenue by taking the original cost of the real and personal property of Northeast Utilities, less depreciation, and then allowing Northeast Utilities to take a percentage return on the original cost less

depreciation. In this way, the revenue of Northeast Utilities was not tied to the market for electricity but rather to a cost plus[6] operation. The town's assessor adopted the same cost approach in valuing Millstone's real and personal property for assessment purposes. On the October 1, 1999 Grand List, the town valued Millstone at approximately $2,938,000,000. See defendant's Exhibit SS1, p. 34.

With the passage of P.A. 98-28 in 1998 (codified as General Statutes § 16-244), the legislature sought to deregulate electricity generators in Connecticut. Deregulation mandated equal access for all electricity generators to the transmission and distribution system of electricity in the state. Deregulation created a market for transmission and distribution companies, electricity consumers and generators of electricity. After deregulation, it was not guaranteed that plant generators of electricity would recapture their costs of operation since generators, such as Millstone, would have to offer their generation of electricity at a rate competitive with the prices offered by other generators in a free market. As a result of deregulation, the value of electricity generating plants fell in the early years of deregulation because generating facilities were now based on profitability rather than cost plus.

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"[A] cost plus contract . . . [is] one where one of the parties undertakes to pay all costs incurred by the other party in the performance of the contract and a fixed fee over and above such costs." (Internal quotation marks omitted.) Branco v. Patton, 24 Conn. App. 820, 821, 588 A.2d 249 (1991). See also definition in Merriam Webster's Collegiate Dictionary (10th Ed.) ("fixed fee . . . added to actual cost").

Although Connecticut deregulated power plants generating electricity, Dominion was still subject to comprehensive NRC regulations.

The main reason put forward by the town for the assessor setting the valuation of the subject real and personal property on October 1, 2002 at $1,213,709,400, is that between the date of August 7, 2000 when Dominion contracted to purchase Millstone and the date of revaluation on October 1, 2002, the market value of the subject real and personal property assets increased in value due to a positive change in the market for nuclear fuel generating facilities. Support for the town's position comes from its appraiser, Pomykacz, who stated: "Since the time of the sale, the Facility has increased its capacity factor, the market price for electricity has increased, the national average operating costs of such facilities has declined and the national market price for nuclear power plants has appreciated. Therefore[,] we are of the opinion that the value of the Facility was higher as of the valuation date than when it was sold in March 2001." (Defendant's Exhibit SS1, p. 45.)

However, Pomykacz's opinion does not comport with his comment that "[d]ue to legal license expirations and technology obsolescence, nuclear facilities lose substantial value as they age." (Defendant's Exhibit SS1, p. 52.) The defendant also notes that Pomykacz's analysis of the historical capacity factors at Millstone from the date of the contract of sale in August 2000 to the date of revaluation on October 1, 2002, showed Millstone was just emerging from several years of dormancy after being shut down in 1996 as well as having to deal with the transition from a regulated to a deregulated

environment. See defendant's 2/2/07 brief, pp. 93-94. As the defendant points out, there was a decline in the capacity factor of Millstone from 2000 to 2002. See defendant's 2/2/07 brief, p. 94 n.47.

Pomykacz declined to consider these negative factors because he concluded that "[t]hree national trends were converging on prices of nuclear facilities during the time periods between the sales and our valuation date. The trends include falling operating costs . . . rising capacity factors . . . and the fact that actual electricity prices, the basis for profits, exceeded budgeted prices for several years in a row. The higher than expected prices were the result of unexpected price increases in natural gas prices, and the unexpected failure of natural gas prices to decline as expected once they rose. While the rise in natural gas prices had a negative effect on many gas-fired facilities, it had a positive effect on nuclear facilities, as their fuel type was not impacted." (Defendant's Exhibit SS1, p. 51.)

In response to Pomykacz's opinion that Millstone increased in value from the date of sale to the date of revaluation, a period of 18 months, the plaintiffs point out that Goodman concluded in his report that market conditions were stable from August 1 to October 1, 2002 so that no adjustments were necessary. See plaintiffs' 2/2/07 brief, p. 35. The plaintiffs also point out that their appraiser, Remsha, concluded that the market for the generation of electricity was flat from the sale date of Millstone to the date of revaluation, emphasizing that the reason for deregulation was to reduce electricity prices, not increase them. See plaintiffs' 2/2/07 brief, p. 36.

The assessor, in setting the valuation of the subject property for the revaluation date of October 1, 2002, relied on Goodman's opinion to appraise Units 2 and 3 for the October 1, 2002 revaluation.[7] Goodman concluded that the value of Units 2 and 3, as of October 1, 2002, was $1,190,000,000 at 100% value, excluding intangibles, but not adjusted for pollution controls that may be exempt from taxation. In considering the sales approach to value, Goodman looked at comparable sales, especially the Seabrook, New Hampshire sale, that occurred close to the revaluation date of October 1, 2002 and was in the same power pool as Millstone. Goodman recognized that the Seabrook sale included intangibles and found that it was difficult to extract the value of intangibles. However, when considering Dominion's purchase of Millstone, Goodman did extract intangibles to the extent of $173,000,000.

Although Goodman considered the sales approach to value, he reported that "[g]iven the difficulty of adjusting the sales of other nuclear plants to Millstone, we conclude that the sales comparison approach cannot be reliably applied in this appraisal." (Plaintiffs' Exhibit 4, p. 16.) Goodman also concluded that "[t]he income approach is very sensitive to changes in the revenue forecast. Because the revenue forecast from the

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[7] Goodman's appraisal report gives his opinion of value as of August 1, 2002 and October 1, 2002. See plaintiffs' Exhibit 4 (PE 000181). However, Goodman noted: "In August 2000 Dominion Resources, Inc., and Northeast Utilities (and most of the other co-owners) agreed to the sale of the three plants to Dominion with an expectation that the sale will be closed in April 2001. While this agreement is not a completed sale, it must be considered in the valuation of the plants as of any date subsequent to August 2000." (Plaintiffs' Exhibit 9 (JG 000148)).

DOE [Department of Energy] is subject to revision in future years, great reliance cannot be placed on the income approach." (Plaintiffs' Exhibit 4, p. 15.)

Goodman, in his valuation of the subject, made no adjustment for the Decommissioning Trust Fund (DCTF) that went along with the sale of Millstone to Dominion because he concluded that the Millstone DCTF was fully funded and also that the DCTF was not really an asset of Millstone but was solely required by the NRC to fund the disposal and storage of spent nuclear fuel. The funding for the DCTF comes from rate payers, not the owners of nuclear facilities.[8]

In addition, the DPUC found that the decommissioning trusts were adequately funded when they were transferred along with Millstone's assets. See plaintiffs' Exhibit 4, p. 2.

In the process of appraising the value of Units 2 and 3, Goodman placed no value on Unit 1 because he considered it a storage facility for spent nuclear fuel that was a liability having no market value. The town's assessor held a contrary opinion to Goodman, finding that Unit 1 had value because it was a storage facility for Dominion.

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[8] "The Nuclear Waste Policy Act was enacted [by Congress] in 1983 and assigned the responsibility for the disposal of spent nuclear fuel to the Department of Energy ('DOE'). Yucca Mountain, Nevada, has been designated as the site for the geologic disposal of high-level nuclear waste. To recover the cost of permanent spent fuel disposal, the legislation created a Nuclear Waste Fund through which money is collected from the consumers of the electricity generated by commercial nuclear power plants. Currently, the Nuclear Waste Fund ('the Fund') has $21,883,000,000 committed to the fund. Unit #1 has paid $50,157,704 into the Fund and will provide another $149,586,591 when the DOE removes the first batch of spent fuel from Unit #1." (Plaintiffs' Exhibit 16, p. 16.)

The assessor concluded that the spent fuel located in Unit 1 was personal property and valued this personal property at $24,000,000. In arriving at the valuation of the personal property at Unit 1, the assessor noted that Unit 1 contained a storage facility for equipment and a separate storage facility for spent fuel. All of the spent fuel came from the operation of Unit 1 before it was shut down. Spent fuel consists of individual rods stored in a pool. At Millstone, the spent fuel was stored in safe storage pools known as SAFSTOR, as previously defined.

The assessor, using the appraisal concept of substitution, visited a number of nuclear power plants in the Northeast and found that most were using a dry-cast method to store spent fuel. In conducting this survey, the assessor concluded that the cost of dry-cast storage units was $1,000,000 per unit. Dry-cast brackets, or storage units consisting of concrete pads, are the size of a football field. Generally these units have baskets containing bundles of spent rods. The assessor concluded that Millstone would have 48 dry-cast brackets housing the existing spent fuel at $1,000,000 per basket. The assessor then deducted 50% of the $48,000,000 value for depreciation to arrive at a valuation of $24,000,000 for the personal property at Unit 1. To this value, the assessor added an additional $1,000,000 for the value of the real estate attributed to Unit 1. The combined total of $25,000,000 for Unit 1, as determined by the assessor, was then added to Goodman's valuation of Units 2 and 3.

The court further notes that the town's second appraiser, Pomykacz, determined a valuation of $1,343,600,000 for the real and personal property of Dominion as of October

1, 2002, when a short time earlier, on March 31, 2001, Dominion, in an arms-length transaction, purchased the whole business (minus the 6.53% owned by other parties), real, personal and intangible property, for a total of $1,288,768,000. Whether the market value of the subject property increased to such an extent and in such a short period of time to justify increasing the valuation of the business, as reported by Pomykacz, is an issue that must be analyzed very closely.

Pomykacz found that the increase in value over the sale price to Dominion approximates 4% ($1,288,768,000 divided by $1,343,600,000). However, Pomykacz's valuation only includes the tangible property, whereas the sale price to Dominion included the tangible real and personal property as well as the intangibles. The plaintiffs argue that Pomykacz's valuation rose an incredible 20% during the 18-month period between the sale date and the assessment date.

The plaintiffs credibly point out four problems with Pomykacz's upward trend in valuation following the date of sale. First, Goodman, the defendant's first appraiser, found that the market conditions between August 1, 2002 and October 1, 2002 were stable and that there were no substantive changes to the subject property. Second, in arriving at the conclusion of an upward trend, Pomykacz utilized the sale of Seabrook in his calculations, even though that was not a reliable sale. Third, Remsha opined that the economics of ownership of a nuclear facility remained stable or even declined during this period of time. Fourth, Pomykacz, in contemporaneous writings, asserted that utility

companies were suffering from a dramatic industry-wide decline. See plaintiffs' 2/2/06 brief, p. 36.

An additional problem with Pomykacz's analysis is that Dominion's increase in value from the time of its acquisition of the subject property to the date of revaluation on October 1, 2002 is based on the business enterprise approach. Any increase in value can be attributed to any number of intangible factors such as the business acumen of new management, market forces involved in setting the price of electricity and new power plant purchase agreements. These factors may increase the value of the total business, but not necessarily the value of the tangible real and personal property, which generally depreciate with time. "Depreciation occurs over the life of an improvement or a component; in theory an improvement or component loses all of its value over its life." See The Appraisal of Real Estate (12th Ed. 2001) p. 384.

Remsha, Dominion's appraiser, arrived at a valuation of the subject property, as of October 1, 2002, using the cost approach and the sales approach. However, instead of using the income approach to value, Remsha used the business enterprise value approach, which essentially is an extraction process.[9] Remsha arrived at the following values: $1,050,000,000 under the sales approach; $1,030,000,000 under the business enterprise

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[9] The extraction process "is a technique in which land value is extracted from the sale price of an improved property by deducting the value contribution of the improvements, estimated at their depreciated cost. The remaining value represents the value of the land." The Appraisal of Real Estate (12th Ed. 2001) pp. 339-40. In this case, the extraction consists of determining the total value of the business and deducting the value of the intangibles to arrive at the value of the real and personal property.

approach and $918,000,000 under the cost approach. Remsha's final conclusion of value of the tangible real and personal property at Millstone was $1,000,000,000.

In arriving at a sales comparison approach value of $1,050,000,000, Remsha noted that after completing an analysis of nuclear power plant sales, he concluded that there was an active market for operable nuclear power plants. Furthermore, "[a]fter adjusting the sale prices of the plants, the sales comparison approach must be considered as a reliable indicator." (Plaintiffs' Exhibit 17, § 14-1.) The problem with using the sales approach, in this instance, is that the definition of the sales comparison approach, when valuing real estate, is much different when valuing a complex business such as a nuclear power plant. When valuing real estate, the term market sales approach means finding the fair market value of real estate that "is derived from a comparison to recently sold similar properties in the vicinity, with appropriate value adjustments based on the elements of comparison." (Internal quotation marks omitted.) United Technologies Corp. v. East Windsor, 262 Conn. 17 n.10. In other words, in the valuation of real estate, the appraiser must compare real estate to real estate, not real estate to the valuation of a business. See J. Youngman, Property Valuation and Taxation, Lincoln Institute of Land Policy, (2006 Ed.) p. 12. In drawing the distinction between property value and business value, Youngman noted that it is "the rental value of a commercial site, not the business income of the enterprise occupying it [that] provides an index of property value. . . ."

In describing the use of the sales approach method, Remsha stated that the sales approach method "may also be used to value complex manufacturing property for which

there is a reasonably well-developed market. The difference is that with a unique property such as a nuclear power plant, the assets sold represent not only real estate, but also personal property, a trained and assembled workforce, contracts and agreements, and other intangible assets comprising a going concern or business enterprise. In addition, nuclear power plants frequently are sold with power purchase agreements, nuclear fuel, and decommissioning trust funds that must be allocated from the reported sale price to represent only the assets being appraised." (Plaintiffs' Exhibit 17, § 11-1.) As previously noted, Remsha is comparing apples to oranges.

Remsha, after considering five sales of nuclear power plants, focused on the Millstone sale and the Seabrook sale as his basis for determining value under the sales comparison approach. Remsha determined that the Millstone sale included nuclear fuel and the decommissioning trust fund of $768 million.[10] The Seabrook sale, which closed in November 2002, had a decommissioning trust fund valued at $232,700,000 and nuclear fuel valued at $61,900,000. See plaintiffs' Exhibit 17, § 11-14. Although Remsha, in his appraisal report, placed the most weight on the subject sale and the Seabrook sale, at trial, he rejected the use of the Seabrook sale as a credible sale

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[10] The estimated decommissioning trust cost is $1.432 billion in 1997 dollars. See plaintiffs' Exhibit 17, § 11-12.

comparable to the subject. See plaintiffs' Exhibit 17, § 11-16.[11] So much for Remsha's previous comment that there was an active market for nuclear power plants.

In arriving at a final value of $1,050,000,000 using the comparable sales approach, Remsha used a range from $1,015,932,000 to $1,448,568,000, and as previously noted, placed the most weight on the subject sale. Of particular importance, was Remsha's comment that "[a]ll of the sales utilized in this analysis represent nuclear power plants that are in operation and were sold as an operating business, and hence, the sales price inherently includes some intangible asset value." (Plaintiffs' Exhibit 17, § 11-16.) See also plaintiff's Exhibit 17, § 11-15.

Upon his analysis of five sales, Remsha concluded that the fair market value of Dominion, both real estate and tangible personal property, was $1,050,000,000. In effect, by eliminating the Seabrook sale, Remsha had only one sale remaining from which to judge the valuation of the subject: the subject itself.

Based on the analysis of Remsha's approach to value using the sales approach and Pomykacz's reluctance to use the sales approach as a credible appraisal tool to determine the fair market value of the subject property, no good purpose is served for this court to give any credence to Remsha's valuation of the subject, using the sales approach, at $1,050,000,000.

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The Plaintiffs also concur that the Seabrook sale should not have been used for any purpose "based on the lingering issue of what was or was not included in the announced sale price for that facility." (Plaintiffs' 2/2/07 brief, pp. 35-36.)

**BUSINESS ENTERPRISE VALUATION AND HIGHEST AND BEST USE**

Turning to the business enterprise approach to value, Remsha found the overall business value of Dominion on the date of sale was $1,220,491,302. See plaintiffs' Exhibit 17, § 12-15.

Remsha defined the term business enterprise "as the value of the combination of net working capital, tangible assets, and intangible assets that comprise a going business concern. Alternatively, it can be defined as the total invested capital of the business composed of long-term debt and stockholders' equity." (Plaintiffs' Exhibit 17, § 12-1.)[12]

The definition of business enterprise value or going concern value includes:

- Real Property;
- Personal Property broken down into furniture, fixtures, and equipment (FF&E) and machinery;
- Net Working Capital
- Cash and cash equivalents such as inventory and supplies that must be on hand to operate the business less short term debt, accounts payable and accrued assets.
- Intangible Property which is made up of (1) contracts, (2) name (goodwill), (3) patents, (4) copyrights, (5) an assembled work force, (6) management team (7) cash, (8) computer software, (9) operating manuals and procedures and (10) other residual intangibles.

See The Appraisal of Real Estate (12th Ed. 2001) p. 642. See also plaintiffs' Exhibit 17,

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Intangible personal property, for tax purposes, has been defined as "property which is not itself intrinsically valuable, but which derives its chief value from that which it represents." Capital City Country Club v. Tucker, 613 So.2d 448, 452 (Fla. 1993).

§ 12-1 and § 12-2.

Since both Remsha and Pomykacz use the term "business enterprise value", that term will be used here. Suffice it to say, because a residual intangible personal property component exists in certain enterprises, there must be an allocation of the market value of real property and tangible and intangible personal property. See The Appraisal of Real Estate (12th Ed. 2001) p. 641.[13]

Using the business enterprise value of $1,220,491,302, Remsha deducted working capital in the amount of $34,678,800, which is 5% of forecasted revenues of $693,576,000, the revenues of the business at the appraisal date, and intangible assets of $155,300,000. This results in an indicator of value for Dominion's tangible real and personal property at $1,030,512,502, rounded to $1,030,000,000, as of October 1, 2002.

Considering the cost approach to value, Remsha made the following conclusions for the valuation of the land and improvements at Millstone:

Reproduction cost new

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|---|---|
| (The construction of a new nuclear power plant using historical costs.) | $6,622,000,000 |

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The use of the business enterprise value approach is a controversial issue. See D. Lennhoff, A Business Enterprise Value Anthology, Appraisal Institute, (2001) p. 66. The business enterprise value (BEV) approach "is a complicated but not complex concept, not well understood by the courts and attorneys, and interpreted by appraisers in various ways. Further, any contribution to the going-concern value that BEV makes is usually not an issue for the typical client. . . . Allocation of that value among component parts is not requested or desired. As a result, the concerns of the appraiser in making such allocations, as required by USPAP, usually involve a hypothetical situation." Id.

Less

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| Functional obsolescence due to excess capital costs (Using the cost to construct a combined cycle gas generating plant.) | $5,640,500,000 |
| Physical deterioration | 343,525,000 |
| Functional obsolescence due to excess operating costs | (259,000,000) |
| Functional/economic obsolescence due to necessary capital expenditures | 0 |
| Economic obsolescence | 0 |
| Cost approach indicator of value of improvements | $ 896,975,000 |

Plus

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| Land value | 21,000,000 |
| | $ 917,975,000 |
| Cost approach indicator of value (rounded) | $ 918,000,000 |

See plaintiffs' Exhibit 17, § 13-40.

**ANALYSIS**

It is interesting to note that while Remsha concluded that the highest and best use of the subject was as a nuclear power plant (see plaintiffs' Exhibit 17, § 9-4), he concluded that the highest and best use of the land, which formed the underpinnings of the nuclear power plant, was for industrial park development (see plaintiffs' Exhibit 17, § 13-33) based upon his land appraiser, Timothy Mitchell. Mitchell broke up the subject 526 acres of land into a 210.662 acre parcel located in a heavy industrial zone and a 253.68 acre parcel located in a light industrial zone and selected land sales comparable to the split zones. One does not match the other. The highest and best use of the subject as a

continuation of its present use is incompatible with a finding that the highest and best use of the land, in isolation from the present improvements on the land, is for a different use.

"A property's highest and best use is commonly defined as the use that will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real estate. . . . In determining its highest and best use, the [court may also] consider whether there was a *reasonable probability that the subject property would be put to that use in the reasonably near future* . . . ." (Citation omitted; emphasis added; internal quotation marks omitted.) Bristol v. Tilcon Minerals, Inc., 284 Conn. 55, 64-65, 931 A.2d 237 (2007). It should be noted that The Appraisal of Real Estate (12th Ed. 2001) p. 334, dictates as follows: "Land value must always be considered in terms of highest and best use. Even if the land has improvements, the land value is based on its highest and best use as though vacant and available for development to its most economic use. Consideration of the land as though vacant is a commonly accepted procedure that facilitates the orderly analysis and solution of appraisal problems that require land to be valued separately."

However, in the present case, the land cannot be separated from the improvement and treated as vacant. Doing so only leads to speculation which adds nothing in terms of valuation. See Robinson v. Westport, 222 Conn. 402, 409, 610 A.2d 611 (1992), holding that purely imaginative or speculative values should not be considered but rather the use of the property should be that which is reasonably probable. The opinions of both the plaintiffs' and defendant's land appraisers concluded that the subject land had a highest

and best use different from that of a nuclear electrical generating facility. These opinions are purely theoretical and inconsistent with the facts in this case.[14]

On October 1, 2002, the subject real property, as previously noted, consisted of 526 acres of land with a nuclear power plant located on it producing 2,024 MW of electricity yearly. Unit 1 of the subject contained a storage facility for spent nuclear rods that cannot be removed until the federal government provides a suitable storage facility at another location. None of the appraisers contemplated a removal of these spent rods within the foreseeable future.

From the facts in this case, there was no reasonable probability that on October 1, 2002, the subject property could or would be put to a use different from that of the present use. See Bristol v. Tilcon Minerals, Inc., supra, 284 Conn. 65. The present use of the subject can also be compared to a special purpose property. See Sun Valley Camping Cooperative, Inc. v. Stafford, 94 Conn. App. 696, 713, 894 A.2d 349 (2006), in which the court defined a special purpose property "as real estate appropriate for only one use or a limited number of uses, whose highest and best use is probably a continuation of its present use."

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"Analyzing the highest and best use of the land as though vacant helps the appraiser identify comparable properties. Whenever possible, the property being appraised should be compared with similar properties that have been sold recently in the same market. Potentially comparable properties that do not have the same highest and best use are usually eliminated from further analysis." The Appraisal of Real Estate (12th Ed. 2001) p. 60. In this case, comparable properties with a different highest and best use from the subject land and treated as vacant are not relevant to the issue of Millstone's valuation.

Based on the analysis of conflicting theories, the court finds that the highest and best use of the subject land and improvements is for its continued use as a nuclear power electric generating facility. This finding is consistent with the opinions of both Remsha and Pomykacz in their final analysis of the use of the subject property and their findings of value. Unlike the appraisers, this court cannot separate out the subject land from its improvements and value the land as vacant. Although the appraisers feel compelled to value the subject land as vacant using the cost approach in compliance with USPAP (Uniform Standards of Professional Appraisal Practice), it makes no sense to follow this practice when on October 1, 2002, the land was improved with a nuclear power plant producing half of the electricity used by Connecticut consumers. Unless the value of the land as vacant is greater than the value of the land with the improvements on it, the highest and best use of the land, for valuation purposes, must be the same use as the improvements. See The Appraisal of Real Estate (12th Ed. 2001) p. 334. In this case, the appraisers should not have considered demolishing the existing nuclear power plant in order to treat the land as vacant, given the remaining economic life attributed to the subject by both Remsha and Pomykacz.

Using the business enterprise approach, Pomykacz noted that "[i]n the deregulated market, as of the valuation date, the income approach is the primary method utilized by market participants. The fundamental assumption with regard to the income approach is the value of the Facility is based upon its anticipated earnings over the service life of the Facility. The principle underlying the income approach is that the benefits of receiving

income, as well as the quality and duration of that income in the future, prescribes the market value of the Facility." (Defendant's Exhibit SS1, p. 108.) The court assumes that when Pomykacz refers to the income approach, he actually means the business enterprise approach.

Pomykacz found that the total value of the overall subject facility, using the business enterprise approach, was $1,587,000,000. However, Pomykacz deducted intangible assets which he concluded had a value of $123,700,000, from $1,587,000,000 to arrive at his total indicator of value of real and personal property of $1,463,300,000. See defendant's Exhibit SS1, p. 114. Pomykacz summarized the total value of intangible assets as follows:

| | |
|---|---|
| Workforce in place | $ 38,100,000 |
| Operating manuals | $ 20,200,000 |
| Software | $ 32,700,000 |
| Indicated working capital | $ 32,700,000 |
| | $123,700,000 |

See defendant's Exhibit SS1, p. 113.

Although Pomykacz considered all three approaches to value (cost, sales comparison and business enterprise), he noted that "[i]n a deregulated market, buyers and sellers of electricity generation facilities typically develop analyses of income and expense (cash flows) to arrive at an arms-length (agreed-upon) acquisition price. Our income approach analysis emulates a cash flow analysis that a typical market participant would develop and utilize for their due diligence. Thus, it is our opinion that the income

approach provides the strongest indication of market value for Millstone, as of the valuation date." (Defendant's Exhibit SS1, p. 108.)

In considering the sales comparison approach, Pomykacz, in using incomplete adjustment of comparables, arrived at an indication of value of $1,270,000,000, as of October 1, 2002. See defendant's Exhibit SS1, p. 106.

Pomykacz explained the reason for the incomplete adjustment of comparable sales as follows: "The reasons behind our inability to make adjustments to other sales in the marketplace include the confidentiality provisions, and the non-full disclosure of terms surrounding acquisitions, the mixed portfolios of assets involved in acquisitions, and the fact that real property values could not be separated from personal or intangible assets." (Defendant's Exhibit SS1, p. 106.) In effect, the sales approach used by Pomykacz involved the same considerations he used under the business enterprise concept.

Similarly, in arriving at a value of the subject real property, using the cost approach, as of October 1, 2002, Pomykacz recited that "[t]he primary reason why the cost approach is unreliable is that it is based on the estimated cost to reproduce or replace the Facility with a new nuclear plant. . . . [N]o new US nuclear plants have been commissioned in the last 20 years and construction cost estimates are speculative." (Defendant's Exhibit SS1, p. 107.) Pomykacz's conclusion of value utilizing the cost approach for Millstone was $1,570,000,000 covering Units 1, 2 and 3 plus the land. See defendant's Exhibit SS1, p. 107. In his cost approach, Pomykacz declined to substitute a

combined-cycle gas turbine facility for a nuclear power plant, as did Remsha and Goodman.

The court notes the divergence of opinions between Remsha, Pomykacz and Goodman. This, in fact, shows how difficult it is to value the subject real and tangible personal property as of October 1, 2002. Remsha initially considered the cost approach, the sales comparison approach and the business enterprise approach to be reliable indicators of value and then later disregarded the use of the sales approach. Pomykacz concluded that only the business enterprise approach was a reliable indicator of value. Goodman concluded that only the cost approach was viable.

In developing the cost approach for the subject, Remsha determined that it would cost $6,622,000,000 to construct the subject as a new nuclear facility. Remsha used the term "reproduction cost new" (RCN) in the development of his cost approach to value. He define RCN as "the estimated amount required to reproduce a duplicate or replica of the entire property at one time in like kind and materials in accordance with current market prices for materials, labor, and manufactured equipment; contractors' overhead and profit; and fees; but without provision for overtime, bonuses for labor, or premiums for material or equipment." (Plaintiffs' Exhibit 17, § 13-2.) Remsha developed the figure of $6,622,000,000 for the subject's reproduction cost new after reviewing Dominion's site, utility and building plans and other historical costs kept by Dominion Resources, Inc., and "[u]sing appropriate indexes, factors were developed to translate the historical cost to reproduction cost new as of October 1, 2002." (Plaintiffs' Exhibit 17, § 13-6.)

However, Remsha was of the opinion that in today's energy-producing market, a nuclear power generating plant would not be constructed. Instead, a gas power generating plant would be constructed.[15] Relying on this observation, Remsha determined the cost to build a nuclear power plant, as of the revaluation date, should be offset by the cost to build a gas generating plant. By deducting the difference, Remsha concluded that the "excess capital costs" was functional obsolescence to be deducted from the original cost to construct a nuclear power plant in today's market. As an example, Remsha determined that the current cost to build a nuclear power plant such as Dominion's was $981,500,000 instead of over six billion dollars.

Three comments are in order. First, Remsha notes that no nuclear power plant permits for construction have been issued since 1978, a period of almost thirty years and "[n]ew nuclear power plants are not being built today because of the massive investment required, mandated environmental requirements, and the negative perception of the general public of nuclear plant safety." (Plaintiffs' Exhibit 17, § 13-11.) Construction costs, as of October 1, 2002, of over $6,500,000,000 lends support to Remsha's comment, that as of the revaluation date, the subject would not be built. As noted by Pomykacz, "[n]uclear plants are one of the most expensive types of power plants to construct. In the past, they were constructed by rate-regulated utilities prior to

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This statement by Remsha is in contrast to his comment that "[s]ince nuclear power does not produce airborne emissions, such as greenhouse gases, and has a lower fuel cost when compared with natural gas, the economics of nuclear power continue to improve. As a result, nuclear plants have sold recently at a higher values." (Plaintiffs' Exhibit 17, § 4-11.)

deregulation. It is questionable whether nuclear plants would even be built in today's deregulated markets, especially with the high cost of capital, the safety and security concerns, and the lengthy construction time (five to ten years)." (Defendant's Exhibit SS1, p. 65.) Pomykacz's reproduction cost new was $6,200,000,000, as compared to Remsha's $6,622,000,000. See defendant's Exhibit SS1, p. 63.

Second, the substantial reduction of the reproduction cost new, from $6,622,000,000 to a final conclusion of value of less than 1,000,000,000, as reported by Remsha, lends support to Pomykacz's opinion that the cost approach is not a good indicator of value because construction cost estimates are speculative given the fact that no new nuclear plants have been commissioned in the United States in the past twenty years. See defendant's Exhibit SS1, p. 107. Goodman confirmed Pomykacz's remarks noting that "[t]here have been no nuclear powered generation plants built in the United States for over 10 years because of the extremely high capital cost, the high cost of permitting the plant, and public opposition to nuclear power. The last reactor to be built in the United States was ordered in 1973. Because of this, most all new generating plants constructed or planned in the U.S. in recent years and for the foreseeable future are of combined-cycle gas turbine (CCGT) design." (Plaintiffs' Exhibit 4, p. 19.)

Third, Remsha, in developing his costs, came up with approximately 85% functional obsolescence due to excess capital costs of the subject based upon a comparison of the Millstone nuclear facility with a combined-cycle gas generating plant. See plaintiffs' Exhibit 17, § 13-21. The problem with this analysis is that Remsha again

was comparing the proverbial apples and oranges. In developing the depreciation of the subject for functional obsolescence alone, which amounted to $5,640,500,000, such a large depreciation deduction against the reproduction cost new of $6,662,000,000 strips this analysis of any credibility. Given Remsha's opinion that the highest and best use of the subject is its continued use as a nuclear power plant, it is difficult to rationalize using gas-fired, combined-cycle and combustion turbine plant data under the cost approach, especially when gas pipelines were not available on the revaluation date nor at any other time since. See plaintiffs' Exhibit 17, § 13-11 and § 13-12.

The concept of developing excess capital costs in the use of the cost approach to value real estate was recognized by the court in the Matter of Consolidated Edison Co. v. City of New York, 2007 NY Slip Op 4682, 8 N.Y.3d 591, 869 N.E.2d 634 (2007) (hereinafter the ConEd matter). In the underlying ConEd case, 33 A.D.3d 915, 916, 823 N.Y.S.2d 451 (2$^{d}$ Dep't 2006), the issue was the valuation, for the purpose of real property taxation, of three power generation units and transmission facilities located on Staten Island. The question before the court was whether excess capital construction costs, which are costs derived by deducting replacement cost from reproduction cost, is an acceptable practice in the valuation of real property. In holding that it was, the Appellate Division stated that "[d]epreciation for functional obsolescence due to excess construction costs . . . adjusts reproduction costs to account for reductions in the value as measured by those costs due to changes in materials and technology and as such is an appropriate factor in determining the current value of a specialty property that would

otherwise be overvalued by the use of reproduction cost alone. . . . That the amount of depreciation is calculated by comparing reproduction cost to replacement cost . . . is not a basis to reject the methodology, at least in the absence of a reasoned valuation basis for doing so." Id., 917-18.[16]

In the present case, Remsha and Goodman tried to substitute a combined-cycle gas turbine plant for a nuclear power plant in generating electricity to develop functional obsolescence. This particular action is misplaced because a gas generating plant could not have been constructed at Millstone in any event. As noted by the Appellate Division in the ConEd case, "[r]eplacement cost is objectionable as a method of appraisal for real property tax purposes because it measures future value, rather than value on the taxable status date which is the valuation issue for real property taxation purposes." (Citation omitted.) Id., 917.

In 2002, Millstone was used as a nuclear power plant, not a gas power plant. For the purpose of determining value of the subject as of October 1, 2002, it would be pure speculation to assume that at this period of time, a gas power plant could be used when Dominion had recently purchased a nuclear power plant. See Robinson v. Westport, supra, 222 Conn. 409.

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"Depreciation is the difference between the market value of an improvement and its reproduction or replacement cost at the time of appraisal. The depreciated cost of the improvement can be considered an indication of the improvement's contribution to the property's market value." The Appraisal of Real Estate (12th Ed. 2001) p. 363. Furthermore, "[f]unctional obsolescence [is] a flaw in the structure, materials, or design that diminishes the function, utility, and value of the improvement." Id.

One other factor in Remsha's development of the data for the cost approach is his reluctance to allocate an entrepreneurial fee or profit with total construction costs in excess of $6,000,000,000. Remsha concluded "that for a nuclear power plant such as the subject plant, entrepreneurial fee or profit is considered to be zero or negative." (Plaintiffs' Exhibit 17, § 13-11.) "When the direct and indirect costs of developing a property are used to provide an indication of value, the appraiser must also include an economic reward sufficient to induce an entrepreneur to incur the risk associated with a building project." The Appraisal of Real Estate (12th Ed. 2001) p. 360. Certainly, a zero or negative entrepreneurial profit or fee for a construction project of this magnitude would be unrealistic unless the entrepreneurial profit or fee was buried within the contract price.

An additional problem with Remsha's development of valuation, using the cost approach, is his valuation of Unit 1 as if it exists as a separate piece of property apart from Unit 2 and Unit 3, which of course, it does not. In a separate appraisal of Unit 1, Remsha concluded that the value of Unit 1 was negative and therefore had a value of zero on October 1, 2002. See plaintiffs' Exhibit 16, pp. 31-32. For the valuation of Unit 1, Remsha focused on the cost approach. Although Remsha calculated the reproduction cost new at $1,155,000,000, based upon a DOE estimate of cost for a new nuclear power plant of $1,750/kW, Remsha commented that "[c]urrent construction of power plants typically utilizes gas turbine technology that costs significantly less, only $563/kW (DOE data). Applying this lower construction cost to the subject's size results in a current cost of only about $372,000,000. Hence, the current cost of the subject plant is estimated at

$372,000,000." (Plaintiffs' Exhibit 16, p. 28.) Remsha treated the difference between the construction cost of a nuclear facility from that of a gas turbine facility as a functional obsolescence in the amount of $783,000,000. See plaintiffs' Exhibit 16, p. 29. In effect, Remsha's cost of construction new of Unit 1 in the amount of $373,000,000 is approximately half of the functional obsolescence for a nuclear facility such as the present Unit 1. As of October 1, 2002, it would be sheer speculation to conclude that a gas turbine facility could be constructed on the subject site. This process used by Remsha, as previously noted, simply lacks credibility because the subject nuclear power plant is not a gas turbine facility.

In addition to the development of the construction costs, as part of the cost approach, the valuation of the land by Remsha and by Pomykacz leaves much to be desired. Remsha used a land value of $21,000,000 for the subject, as of October 1, 2002, noting that there was excess land in the 526 acres of the subject that could be developed independently and used comparable land sales purchased for heavy industrial development. Given the court's previous discussion of the highest and best use of the subject property and the conditions that existed on the property as of October 1, 2002, Remsha's valuation of the land is neither realistic nor credible. Pomykacz's land value of $65,715,000 in considering the cost approach and relying on the land appraisal of Miner & Silverstein Appraisal Company, likewise, is just as speculative as Remsha's valuation and curious because it is more than three times Remsha's land value of $21,000,000.

From the court's analysis of the appraisal methods used by Remsha, the cost approach and the sales approach do not provide a credible process to determine the fair market value of the subject real and personal property as of October 1, 2002. Likewise, Pomykacz recognized that the cost approach and sales approach are not a reliable process in determining the subject property's fair market value. Therefore, the court is left to consider only the business enterprise method championed by both Remsha and Pomykacz.

The basic problem the court has with Remsha and Pomykacz using the business enterprise approach is that the appraisers are determining the value of a going business, not the value of the subject real estate and personal property. As part of the process of extracting the real estate and the personal property from the business value, the appraisers need to determine the value of the intangibles to arrive at what they determine is the total combined value of the subject's real estate and personal property.

Although Goodman did not rely on the results of the income approach, he did go through the mechanics of this process using the yield capitalization method to convert future benefits into present value by discounting each future benefit at an appropriate yield rate and deducting intangibles. Using this process, Goodman arrived at a value of $1,217,900,000, excluding any value for Unit 1. Goodman noted that "[i]t must be pointed out that, unless carefully constructed, an income approach to value captures all of the assets used in a business – real property; personal property; intangible assets such as workforce and favorable contracts; and going concern. One of two techniques should be

used to minimize the possibility of valuing more than tangible assets. If the goal is to value only the tangible property, the preferred method is to capitalize the income that is solely attributable to tangible property. Ideally, this technique would utilize market rents for the lease of the tangible real and personal property as a generating station. Alternatively, if total income is used, the value of the intangible assets must be deducted before reaching an indication of value for the tangible real and personal property under the income approach." (Plaintiffs' Exhibit 4, p. 5.)

To repeat, Remsha's valuation using the business enterprise approach started with an indicator of value of $1,220,491,302 and ended with the deduction of working capital of $34,678,800 and the value of intangible assets of $155,300,000 to arrive at a final indication of value of $1,030,512,502, rounded to $1,030,000,000.

Pomykacz's valuation, considering the business enterprise approach, used the discounted cash flow method in arriving at a value of $1,583,000,000 and used the direct capitalization method to arrive at a value of $1,609,000,000. Pomykacz's final conclusion of value under the business enterprise approach, including Units 1, 2 and 3, plus excess land and the non-operational buildings, was $1,587,000,000.[17]

In order for Pomykacz to arrive at the valuation of Dominion's real estate and personal property as of the last revaluation date, he deducted the value of the intangibles from his overall valuation of $1,587,000,000. In placing a value on the workforce of

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[17] Pomykacz noted that the value of $1,587,000,000 "includes real property, personal property, intangibles, and taxable and [non-taxable] property." (Defendant's Exhibit SS1, p. 109.)

Dominion as an intangible, Pomykacz made the following comments: "The Facility's trained and assembled workforce was valued separately as an intangible asset. The methodology employed to value the workforce included an estimated percentage of the total payroll of $118 million in 2002 and an added adjustment for planned workforce reductions in 2002/03 and benefits. We analyzed these figures and concluded that 15 percent of the estimated payroll would be required to replace these workers, and an additional 10 percent would be required to train them. This resulted in a total estimated value of the workforce in place of [$38.1] million, or 25 percent of the estimated payroll (including benefits) of $152.5 million." (Defendant's Exhibit SS1, p. 111.)[18]

Other intangible assets deducted by Pomykacz, from his overall business enterprise valuation, were the value of the operating manuals, the software assets and the working capital. The operating manuals were valued at $20,200,000. Pomykacz identified these manuals by use of an eyeball appraisal, looking at the shelves containing the manuals and coming up with a ballpark figure at an estimated cost of $5,000 per manual. However, Pomykacz noted that many of the manuals could be purchased over the counter

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"Our income analysis captures the value of the operations at Units 2 and 3. It does not reflect the value of the excess land at the Facility. It does not reflect the value of the non-operations buildings at the Facility, as the expenses for operating the buildings and the avoided costs from owning and using them are captured in our income analysis. To estimate the overall value of the Facility and the assets on the site, including the entire site, we must add to our income analysis value conclusion, the value of the excess land and the value of the non-operations and Unit 1 buildings [where] appropriate. We have been supplied with value estimates for the excess land and the non-operations buildings in the Miner and Silverstein Appraisal." (Defendant's Exhibit SS1, p. 104.)

and settled on an estimated replacement cost of the manuals at $3,500 per document. The software assets were identified and valued at cost and then depreciated to arrive at an estimated value of $32,700,000. As to the working capital as an intangible asset, Pomykacz took 5% of annual revenues to arrive at $32,700,000.

By deducting $123,700,000, which is the total amount of intangibles of the workforce, operating manuals, software and working capital from the overall value of $1,587,000,000, Pomykacz's value of Dominion's real and personal property, as of October 1, 2002, was $1,463,300,000. From this final amount of $1,463,300,000, Pomykacz further deducted fuel at $119,700,000, water pollution credits at $24,200,000 and air pollution control credits of $2,200,000 to arrive at a final value of real and personal property of $1,317,000,000.

As a general concept, the income capitalization approach is used to value real estate through the capitalization of the property's earning power. See The Appraisal of Real Estate (12th Ed. 2001) p. 50. In Connecticut, the earning power of real estate is generally translated into rental income. The income approach, in appraising property, uses "a valuation method that determines property value by derivation of the rental value of the property and may include anticipated future income that has been discounted to a present value." Loiseau v. Board of Tax Review, 46 Conn. App. 338, 341, 699 A.2d 265 (1997).[19] See also Uniroyal, Inc. v. Board of Tax Review, 174 Conn. 380, 385-86, 389

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"The income capitalization approach consists of the following seven steps: (1) estimate gross income; (2) estimate vacancy and collection loss; (3) calculate effective gross income (i.e.,

A.2d 734 (1978), where the court noted that "General Statutes § 12-64 provides that all non-exempt real estate shall be liable to taxation at a uniform percentage of its present true and actual valuation . . . to be determined by the assessors. The terms true and actual value are defined in § 12-63 to mean the fair market value thereof and not its value at a forced or auction sale. Fair market value is generally best ascertained by reference to market sales. Where this method is unavailable, however, other means are to be found by which to determine value. A variety of such alternative methods for calculation of true and actual value have been approved by this court: . . . [such as the income] capitalization of actual income approach[.]" (Citations omitted; internal quotation marks omitted.)

The difference between the income capitalization approach and the business enterprise approach is as follows: the income capitalization approach relates to the income produced in the market solely related to the real estate; whereas the business enterprise approach relates to the income produced by the operation of a business. The income capitalization approach is market-oriented, whereas the business enterprise approach is investor-oriented. "Market value is objective, impersonal, and detached; investment value is based on subjective, personal parameters. To develop an opinion of

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deduct vacancy and collection loss from estimated gross income); (4) estimate fixed and operating expenses and reserves for replacement of short-lived items; (5) estimate net income (i.e., deduct expenses from effective gross income); (6) select an applicable capitalization rate; and (7) apply the capitalization rate to net income to arrive at an indication of the market value of the property being appraised. . . . The process is based on the principle that the amount of net income a property can produce is related to its market value." (Internal quotation marks omitted.) Abington, LLC v. Avon, 101 Conn. App. 709, 711-12 n.4, 922 A.2d 1148 (2007).

market value with the income capitalization approach, the appraiser must be certain that all the data and forecasts used are market-oriented and reflect the motivations of a typical investor who would be willing to purchase the property at the time of the appraisal." The Appraisal of Real Estate (12th Ed. 2001) p. 476.

Investment value is defined as "[t]he specific value of an investment to a particular investor or class of investors based on individual investment requirements, distinguished from market value, which is impersonal and detached." Id. "Whenever property has a particular utility to a business or enterprise, its value will reflect that utility and, indirectly, intangible business values as well. This problem arises in every form of taxation that prescribes differential treatment for tangible and intangible property. The federal income tax law, for example, permits no depreciation such as business goodwill. This means that the purchase of an ongoing business requires allocation of the payment for income tax purposes, not only between depreciable buildings and non depreciable land, but also between depreciable assets and goodwill." See J. Youngman, supra, Property Valuation and Taxation, p. 12.

The business enterprise approach to value, as used by both Remsha and Pomykacz, deals with the particular needs of Dominion's investors, not the market value of real estate. Therefore, its use to measure the value of the realty and personalty portion of the business is suspect. As an example, the main criteria for Dominion's purchase of its share of Millstone was the rate of return on its investment.

As noted by the Iowa Supreme Court in Merle Hay Mall v. Board of Review, 564 N.W.2d 419, 424 (Ia. 1997), "[t]he business enterprise value theory is not a generally recognized appraisal method." In discussing the business enterprise value theory, the Merle Hay Mall court noted as follows:

> "It is undisputed that this method was designed in the late 1980s by a group of shopping mall owners in cooperation with real estate appraisers and real estate professors in a group called 'SCAN' (shopping center assessment network). The need for such a project, according to some evidence, was exacerbated by a dramatic rise in the sale prices of shopping malls.
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> "Further, the business enterprise value concept seems to be used almost exclusively in tax assessment cases[.] . . . Apparently, no assessor in Iowa applies this theory, and there is no uniformly accepted methodology to do so."

Id., 424-25.

It is difficult for the court to reconcile the opinions of Remsha and Pomykacz, as they relate to the use of the business enterprise value, when so much of the underpinnings of their determination of value rests on the valuation of intangibles. Both Remsha and Pomykacz accepted the appraisal practice to identify and deduct the value of Millstone's intangible assets from its business enterprise value.

Both Remsha and Pomykacz estimated depreciation expenses in order to calculate the income taxes to be deducted in arriving at the debt free cash flow in each year of their respective use of the discounted cash flow holding periods. Yet in so doing, both address issues related to investor needs, not the market value of real estate. Income taxes are the

obligation of the owner of property, not an operating expense of the property. See The Appraisal of Real Estate (12th Ed. 2001) p. 521. A reconstructed operating statement "represents an opinion of the probable future net operating income of an investment. Certain items included in operating statements prepared for property owners should be omitted in reconstructed operating statements prepared for appraisal purposes. These items include . . . income tax . . . ." Id.

In addition to the inclusion of income taxes as a consideration in the development of the business enterprise part of their appraisal process, both Remsha and Pomykacz depreciated intangible assets. Recognizing that intangible personal property such as the workforce, working capital and software are not intrinsically valuable, but valued for what they represent[20], it is difficult to rationalize the quantification of the depreciation of intangibles. Remsha defines "business enterprise" as "the value of the combination of net working capital, tangible assets, and intangible assets that comprise a going business concern. Alternatively, it [is] the total invested capital of the business composed of long-term debt and stockholders' equity." (Plaintiffs' Exhibit 17, § 12-1.) In dealing with the definition of "business enterprise," as it relates to intangibles, Remsha, as an example, projected the appropriate discount rate or weighted average cost of capital (WACC) in developing a projected debt-free cash flow of a project. In so doing, Remsha reviewed the

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See Capital City Country Club v. Tucker, supra, 613 So.2d 452.

average capital structure of the nuclear power industry and came up with the following conclusions:

> "The cost of equity capital was estimated by means of both the capital asset pricing model ('CAPM') and a bond yield plus risk premium approach.
>
> "Yields on various debt securities as of the appraisal date were analyzed for an indication of the cost of debt capital.
>
> "The indicated costs of equity and debt capital, after adjusting for the tax deductibility of debt service costs, were proportionally weighted in accordance with an appropriate capital structure for an indication of the discount rate or WAAC.
>
> "The WACC was adjusted for a preproperty tax cash flow."

(Plaintiffs' Exhibit 17, § 12-3 to § 12-4.)

In trying to bring some sense to the conflicting opinions of the appraisers, it is important to summarize and distinguish where they differ and where they agree in the use of the three generally accepted methods of valuation. See Abington, LLC v. Avon, supra, 101 Conn. App. 711-12 n.4.

Income Approach:

Goodman rejected the income approach as an unreliable process to determine the value of the subject property. The basic reason for Goodman's rejection of the income approach is that "[t]he income approach is very sensitive to changes in the revenue forecast. Because the revenue forecast from the DOE is subject to revision in future years, great reliance cannot be placed on the income approach." (Plaintiffs' Exhibit 4, p. 15.)

Contrary to Goodman's rejection of the income approach, Pomykacz and Remsha both opined that rather than use the income approach, it was appropriate and reliable to use the business enterprise approach in valuing the subject property. In doing so, Pomykacz, using the business enterprise approach, found the overall business value of the subject, including the real property, personal property, intangibles, taxable and non-taxable property, to be $1,587,000,000.

Remsha, using the business enterprise approach, found the overall business value of the subject to be $1,220,491,302.

Pomykacz stated that "it is our opinion that the income approach provides the strongest indication of market value for Millstone, as of the valuation date." (Defendant's Exhibit SS1, p. 108.)

Remsha stated that "[t]he income approach reflects actual investor expectations of the nuclear power industry. The analysis included economic conditions and future projections of a stabilized income stream. The discount and capitalization rates were based on market indicators and prices for equity investments and debt instruments. Hence, the income approach is considered a reliable indicator of value." (Plaintiffs' Exhibit 17, § 14-1.)

From the standpoint of credibility, it is difficult for the court to rationalize why the difference between Pomykacz and Remsha is over $366,000,000 if both appraisers performed an objective valuation resulting in what is supposed to be the market value of the subject real and personal property. The court also notes that Goodman's use of the

income approach relied on the future revenue projections of the DOE, while Pomykacz and Remsha developed their own revenue projections by using a variety of factors such as economic conditions and future market indicators for future equity investments and future debt instruments. From Dominion's standpoint, as an investor-purchaser, the most important consideration was the rate of return from operating Millstone to produce a certain profit margin.

Sales Approach:

Goodman, in rejecting the use of the sales approach as an indication of value, stated the following:

> "It is difficult to extract relevant sales comparison data from the plant sales announced from the late 1990's through the appraisal date. The plant sales cannot be used to develop a reliable estimate of the value of the tangible real property improvements of Millstone in part because:
>
> - The sales price represents an investment value - value to a specific buyer - and not market value;
> - The property rights conveyed include significant intangible assets that cannot be extracted from the sales price;
> - The influence of financing terms and additional conditions of sale on the sales price cannot be identified; and
> - The locations in the power pool of the plants that were sold are not physically near Millstone and its interconnection to the transmission grid."

(Plaintiffs' Exhibit 4, p. 16.)

Pomykacz, as did Goodman, rejected the use of the sales approach, noting that "[h]istorically, the sales comparison approach has not been employed to value electric

generating plants, primarily due to the lack of sales data. . . . Confidentiality provisions and non-full disclosure of sale terms preclude an appraiser from adjusting comparable sales to make adequate comparisons." (Defendant's Exhibit SS1, pp. 53-54.)

Remsha, contrary to Goodman and Pomykacz, initially found the sales approach to be a viable process noting that an "analysis of nuclear plant sales shows that complete operable nuclear power plants have an active market. After adjusting the sale prices of the plants, the sales comparison approach must be considered as a reliable indicator." (Plaintiffs' Exhibit 17, § 14-1.) Remsha held to this opinion in spite of his comment that "with a unique property such as a nuclear power plant, the assets sold represent not only real estate, but also personal property, a trained and assembled workforce, contracts and agreements, and other intangible assets comprising a going concern or business enterprise. In addition, nuclear power plants frequently are sold with power purchase agreements, nuclear fuel, and decommissioning trust funds that must be allocated from the reported sale price to represent only the assets being appraised." (Plaintiffs' Exhibit 17, § 11-1.) As noted earlier, Remsha discarded the use of the sales approach.

Cost Approach:

Pomykacz disregarded the use of the cost approach finding that the cost approach was of little significance since it required massive adjustments for physical, functional and economic obsolescence.

Remsha, on the other hand, found the cost approach to be a reliable method to develop the fair market value of the subject using the reproduction cost new less

functional, physical and economic obsolescence plus the market value of the land. See plaintiffs' Exhibit 17, § 13-2.[21]

Considering reproduction cost new, Remsha used the historical costs developed from records kept by Dominion and translated these historical costs to reproduction costs new, as of October 1, 2002. However, in dealing with the obsolescence of the subject, Remsha reasoned that new nuclear power plants would not be built today because of the high cost of construction, environmental concerns and the public attitude towards the use of nuclear fuel and instead, generation companies would consider a combined-cycle gas generating turbine system. Based on this assumption, Remsha compared the construction costs of a combined-cycle gas turbine facility to the cost to build a nuclear power plant. He concluded that the excess cost of constructing a nuclear power plant over the cost to construct a combined-cycle gas generating turbine facility amounted to a functional

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In the use of the cost approach, "an appraiser must distinguish between two cost bases . . . . [r]eproduction cost [and] [r]eplacement cost." The Appraisal of Real Estate (12th Ed. 2001) pp. 349-50.

"Reproduction cost is the estimated cost to construct, at current prices as of the effective appraisal date, an exact duplicate or replica of the building being appraised, using the same materials, construction standards, design, layout, and quality of workmanship, and embodying all the deficiencies, superadequacies, and obsolescence of the subject building.

"Replacement cost is the estimated cost to construct, at current prices as of the effective appraisal date, a building with utility equivalent to the building being appraised, using modern materials and current standards, design, and layout." (Internal quotation marks omitted.) Aetna Life Ins. Co. v. Middletown, 77 Conn. App. 21, 30-31 n.11, 822 A.2d 330, cert. denied, 265 Conn. 901, 829 A.2d 419 (2003), quoting The Appraisal of Real Estate (10th Ed. 1992) pp. 318-19.

obsolescence due to excess capital costs of 85% or $5,640,500,000 of the total historical cost of $6,622,000,000. What Remsha appears to say is that in today's market, a generator of electricity would rather build a gas generator to produce electricity at a significant lower cost to build. This position is in contrast to the fact that Dominion purchased a nuclear power plant in 2001, not a gas generating plant.

Even with Remsha's crossover analysis, he is still faced with a nuclear operating facility as of October 1, 2002, not a gas-fired generating facility. If Remsha based his fair market valuation of the subject on the supposition that a new combined-cycle gas turbine facility (CCGT) would be constructed in today's market and deducted this cost from the current cost to build a nuclear power facility as functional obsolescence, it is not credible for Remsha to proceed to deduct 35% as physical deterioration at Millstone resulting in an additional deduction of $343,525,000 ($981,500,000 x 35%). As the defendant points out, this amounts to a total deduction of 90% of reproduction cost new. See defendant's 2/2/07 brief, p. 73. It is of further interest that Remsha opined that it cost more to operate a CCGT than a nuclear power plant. Remsha quantified this difference at $258,893,106 and added this negative functional obsolescence back to the reproduction cost new for a total cost approach indication of value of the improvements of $896,975,000.

From the standpoint of credibility, the court cannot accept Remsha's rationale that gas is preferable to nuclear energy in today's energy-generating market to produce electricity. Only 18 months prior to the revaluation date, Dominion opted out of locating a combined-cycle gas generating turbine facility and instead purchased the subject nuclear

power plant. Of course, there was no evidence in this case that such a gas facility was available for purchase, and second, Dominion was already in the nuclear power generation business by operating nuclear facilities in other states. Dominion also had the knowledge and the resources to purchase and operate the subject as a nuclear power generator.

Given the limited number of operators in the power generation field, it would appear that Dominion had little competition in purchasing the subject based upon its determination that the purchase was a profitable venture. Dominion had considered building a gas plant at Millstone, but rejected this idea because it would cost somewhere between $60,000,000 and $210,000,000 to extend a gas pipeline to Waterford as well as the fact that gas was not immediately available in great supply in Connecticut.

Similar to Remsha, Goodman used the same cost approach of reproduction cost new less functional obsolescence as excess capital cost to develop the difference between replacement cost new and cost of replacement. Goodman, using the theory of substitution[22], noted that the first step in developing the cost approach was to consider the cost to replace the output of Millstone. In developing a substitute replacement facility, Goodman commented as follows:

> "The subject is a nuclear powered generation plant. There have been no nuclear powered generation plants built in the United States for over 10 years because of the extremely high capital cost, the high cost of

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"A buyer would pay not more for Millstone than the cost to construct an electric generation station of equal desirability and utility without undue delay." (Plaintiffs' Exhibit 4, p. 19.)

> permitting the plant, and public opposition to nuclear power. The last reactor to be built in the United States was ordered in 1973. Because of this, most all new generating plants constructed or planned in the U.S. in recent years and for the foreseeable future are of combined-cycle gas turbine (CCGT) design." (Plaintiffs' Exhibit 4, p. 19.)

Following the above review and analysis of Remsha, Pomykacz and Goodman, this court notes that even the assessor's valuation of the subject lacks credibility for a number of reasons:

> (1) The assessor had previously agreed with Dominion, for assessment purposes that, from the period of October 1, 2001 to the effective date of the next revaluation on October 1, 2002, the total value of the real property and personal property at Millstone was $1,042,942,031, a valuation substantially less than the $1,213,709,400 placed on the same property by the assessor on October 1, 2002.
>
> (2) The assessor initially relied on the valuation performed by Goodman, yet found Goodman's opinion lacking since Goodman found no value to Unit 1, when the assessor concluded that it did have value.
>
> (3) The assessor's final valuation of Units 2 and 3, showing the valuation of the personal property and the real estate to be of equal value for both units, affects the credibility of the assessor's determination since there was no evidence to support this kind of allocation. See defendant's 2/2/07 brief, p. 23.

Also, it is not realistic, and therefore, not credible for a nuclear power plant of Millstone's size to have the valuation of the real estate and personal property at Units 2 and 3 split fifty-fifty. See, e.g., Post-Newsweek Cable, Inc. v. Board of Review, 497 N.W.2d 810, 817 (Ia. 1993). An arbitrary allocation of the valuation of the real estate and personal property fifty-fifty flies in the face of the detailed process engaged by all three appraisers to place a value on the subject real estate and personal property.

In summary, Remsha and Pomykacz arrived at the value of the subject relying on the business enterprise approach. Goodman arrived at the value of the subject relying on the cost approach. For the following reasons, none of the appraisers' methods generate real confidence that the foundations for their analyses result in a credible determination of fair market value of the subject as of October 1, 2002:

> (1) The lack of credibility for Remsha's opinion of value, based on the business enterprise value and the cost approach, following his elimination of the sales approach.
>
> (2) The lack of credibility for Pomykacz's opinion, based on the business enterprise approach, in addition to Pomykacz concluding that the real estate and personal property value at Millstone increased in value from the date of purchase on March 31, 2001 to the revaluation date of October 1, 2002.
>
> (3) The original sale price of Millstone, 18 months earlier at $1,288,768,000, including real estate, personal property, fuel and intangibles such as the workforce, work in progress and goodwill, is disproportionate to the $1,213,709,400 value placed on the real estate and personal property a short time later by the assessor.

As a general principle, an assessor in a tax appeal case need not justify his or her determination of value. Furthermore, the burden is always on the taxpayer to show that the assessor's valuation is in excess of fair market value causing the taxpayer to be an aggrieved party. The charge to the court is to use a two-step process to first determine aggrievement, and if present, to determine the fair market value of the subject property as of the date of the last revaluation. See United Technologies Corp. v. East Windsor, 262 Conn. 22-23.

Also, as a general principle, valuation is considered to be a factual issue requiring the trier's independent judgment. In determining valuation, "[n]o one method of valuation is controlling and . . . the [court] may select the one most appropriate in the case before [it]. . . . Moreover, a variety of factors may be considered by the trial court in assessing the value of such property. . . . [T]he trier arrives at his own conclusions by weighing the opinions of the appraisers, the claims of the parties, and his own general knowledge of the elements going to establish value, and then employs the most appropriate method of determining valuation. . . . The trial court has broad discretion in reaching such conclusion . . . ." (Internal quotation marks omitted.) Sheridan v. Killingly, 278 Conn. 252, 259, 897 A.2d 90 (2006).

While the court is convinced that the valuation placed upon the real and personal property of Dominion, as of October 1, 2002, was in excess of its fair market value, leaving the plaintiff as an aggrieved party, the presentation by the experts, in this case leaves the court in a quandry because of a lack of faith in the methods and processes used in their determination of fair market value. Such a quandry has been addressed in the similar case of Post-Newsweek Cable v. Board of Review, 497 N.W.2d 817, discussed above, quoting Heritage Cablevision v. Board of Review, 457 N.W.2d 594, 598 (Ia. 1990), as follows: "When the varying techniques produce divergent valuations, it does not necessarily follow that market value is accurately divined by averaging the divergent results or in applying the divergent results under arbitrarily weighted formulas. A trier of fact deciding an appeal . . . may be better served in such situations by accepting that

evidence which it finds to be most reliable and rejecting that which is determined to be unreliable."

## CONCLUSION AS TO VALUE

All three appraisers in this case recognized that Dominion was a prudent purchaser when it acquired Millstone, and considering Remsha's statement that a prudent purchaser would pay no more than the cost of acquiring an equally desirable substitute, the price paid by Dominion in 2001 for the nuclear power plant at Millstone would be equivalent to the purchase of an equally desirable substitute.

Dominion's purchase price of $1,288,768,000 for the acquisition of Millstone is the only verifiable and objective matter of substance that the court can find and cannot ignore. The purchase price included real estate, personal property, fuel, and intangibles. The sale price of $1,288,768,000 included nuclear fuel at $103,967,658 and the offsite property at $451,000. Since the sale price covered 100% of the value of Units 1 and 2 and 93.47% of Unit 3, the full grossed up purchase price for Millstone was $1,347,976,000. See plaintiffs' Exhibit 4, p. 19.

Deducting the allocation of fuel in the sale price of $104,000,000 (rounded) and the allocation of $451,000 for the offsite property from the grossed up purchase price of $1,347,976,000, the 100% of the net sales price amounts to $1,243,525,000.

Following a review of the computations of the three appraisers allocating the various costs of the intangibles, with regard to the credibility of the appraisers'

conclusions, the best evidence for the court to consider, as the most credible value of the intangibles[23], under all the circumstances, consists of the following:

| | |
|---|---|
| a. Assembled and trained management team and workforce (Remsha - Plaintiff's Exhibit 17, tab H, p. 2.) | $35,867,058 |
| b. Computer software (Pomykacz - Defendant's Exhibit SS1, p. 110.) | 32,700,000 |
| c. Operating manuals and procedures (Pomykacz - Defendant's Exhibit SS1, p. 112.) | 20,200,000 |
| d. Working capital (Pomykacz - Defendant's Exhibit SS1, pp. 112-13.) | 32,700,000 |
| **Total Intangibles** | $121,467,058 |
| **(rounded)** | **$121,467,000** |

In arriving at a fair market value of the subject real and personal property, as of October 1, 2002, the court realizes that, in a sense, it has also used the same business enterprise method that the appraisers used, which the court found to be problematic because of the difficulty in separating out the valuation of Millstone's intangibles and the tangible property from the valuation of the business operation as a whole. Yet, in the process of finding a way of determining value, two significant facts stand out.

First, Dominion and the town agreed upon a fair market value for the real and personal property of the subject running up to October 1, 2002. Second, the arms-length transaction between Dominion and Northeast Utilities on March 31, 2001 occurred

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There was no evidence that the 6.53% ownership of CVPS and MMWE had any impact on the value of the intangibles. This ownership interest appears to be for investment purposes rather than to operate Millstone alongside Dominion.

shortly before the revaluation date of October 1, 2002, resulting in a market sale price for the subject that included real, personal and intangible property. These two specific facts call upon the court to allocate the value of the intangibles, fuel and non-related property from the total purchase price Dominion paid to arrive at the fair market value of the subject real and personal property. It bears repeating that "[a] trier of fact deciding an appeal . . . may be better served in such situations by accepting that evidence which it finds to be most reliable and rejecting that which is determined to be unreliable." Post-Newsweek Cable, Inc. v. Board of Review, supra, 497 N.W.2d 817.

In reaching a final valuation of the real and personal property of Millstone, as of October 1, 2002, considering the difficulties encountered by the court in reviewing the various methods of valuation used by the three appraisers and the arguments presented by the parties, the court makes the following finding:

| | |
|---|---|
| Net grossed up purchase price by Dominion | $1,243,525,000 |
| Less value of the intangibles | $ 121,467,000 |
| **Fair Market Value of Millstone, as of October 1, 2002** | $1,122,058,000 |
| **(rounded)** | **$1,122,000,000** |

## VALUATION OF THE APCE AT UNIT 3

In a prior decision, Dominion Nuclear v. Waterford, Docket No. CV 030566126, Superior Court, judicial district of New London (May 27, 2005), the court held that only CVPS and MMWE, the plaintiffs holding a 6.53% interest in Unit 3, were entitled to claim the air pollution control equipment (APCE) property tax exemption for the Grand List of October 1, 2002. The court further held that the plaintiff Dominion, for the reason set forth in that opinion, lost the right to claim such an exemption for the remaining 93.47% interest.

The issue here is the determination of the total value of the APCE located at Unit 3, as of October 1, 2002, for the purpose of the plaintiffs, CVPS and MMWE, claiming this exemption.

As background, and as discussed in the May 27, 2005 decision, Northeast Utilities, the previous owner of Units 1, 2 and 93.47% owner of Unit 3, along with CVPS and MMWE, the 6.53% owners of Unit 3, applied to DEP in 1993 to have certain structures and equipment exempt from municipal property tax pursuant to § 12-81 (52).[24] On November 1, 1994, DEP issued a certification granting the exemption.

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[24] General Statutes § 12-81 provides, in relevant part, as follows: "**Exemptions**. The following-described property shall be exempt from taxation: . . . (52) **Structures and equipment for air pollution control**. (a) Structures and equipment acquired by purchase or lease after July 1, 1967, for the primary purpose of reducing, controlling or eliminating air pollution, certified as approved for such purpose by the Commissioner of Environmental Protection. . . ."

The APCE at Unit 3 had a total system cost of $358,085,547. See defendant's Exhibit ZZZ, tab 3. In a memorandum by DEP, dated October 20, 1994, it was reported that a meeting was held on August 18, 1994 and that a discussion occurred between DEP staff, Northeast Utilities representatives and the town's assessor that the grand total of the APCE, for the tax abatement, was revised down from $449,066,600 to $358,085,547. See defendant's Exhibit ZZZ, tab 4. In a memorandum from DEP staff to the file, dated November 1, 1994, the parties concurred that the total qualifying amount for exemption was $358,085,547, and after taking an estimated depreciation of 23%, deducted $82,359,676, to arrive at a fair market value of exempt property at $275,725,871. See defendant's Exhibit ZZZ, tab 6.

Given the valuation of the APCE, as of November 1994, there is no indication that the assessor changed this value for subsequent grand lists. However, General Statutes § 12-109 requires assessors to list and value annually all tax-exempt property in the town and provides as follows: "All property exempted from taxation except public highways, streets and bridges, shall be listed, valued and assessed annually by the assessor for each municipality and such valuation shall be added by the assessor to the grand list in such manner as to be separate from the valuation of property not exempted from taxation." Eight years later, as of October 1, 2002, the assessor had not placed a value on the APCE at Unit 3. See plaintiffs' Exhibits 1, 2 and 3 listing only the values of the water pollution control exemptions on the Grand Lists for 2002, 2003 and 2004.

The plaintiffs' appraiser, Remsha, concluded that the value of the APCE at Unit 3 had a value, as of October 1, 2002, of $104,771,000. See plaintiffs' Exhibit 17, § 14-4. Remsha, in arriving at his final value, calculated the reproduction cost new (RCN) for all of the component parts of Units 2 and 3 and deducted the physical depreciation, less the value of the land. Remsha did not value the APCE independently; instead he made an allocation of the APCE as a percentage of the total value of Units 1, 2 and 3.

For Unit 3, the defendant's appraiser, Pomykacz, concluded that the value of the APCE was $2,200,000, as of October 1, 2002. On its face, it would appear that the reduction of the value of the APCE, at least from the first indication of value in 1993 to 2002 from approximately $358 million to $2 million, is difficult to rationalize. This is a difference of over $100,000,000 from Remsha's conclusion of value. In calculating the value of the APCE, Pomykacz used the value previously determined for the tangible real and personal property, less fuel at $1,343,600,000, and allocated 0.17% of $1,343,600,000 to arrive at $2,200,000. See defendant's Exhibit SS1, p. 116.

Although Pomykacz paid lip service to the negotiated value of $358,085,547 for the APCE for Unit 3 between DEP, Northeast Utilities and the assessor in 1994, he apparently ignored this valuation and fell back to taking a percentage (0.17%) of his total overall value of the tangible real and personal property, less fuel at $1,343,600,000. See defendant's Exhibit SS1, p. 116.

While the court finds that the valuation of the APCE in 1994 was resolved by DEP, the plaintiffs and the assessor have, since that time, used a percentage of the overall

valuation of Millstone found by their appraisers. The valuation set by negotiation with DEP, Northeast Utilities and the assessor in 1994 appears to be more credible because this value appears to be based upon the actual cost of the structures and equipment less depreciation, which, in effect, is the cost approach most closely tied to those particular assets. See defendant's Exhibit ZZZ, tab 6.

Turning to the cost approach, Pomykacz noted that "[s]ince the degree of physical, functional, and economic depreciation and obsolescence attributable to the water pollution control exemption is expected to match that of the real and personal property, this percentage relationship will remain constant through the years, making it an accurate measure for the value of the water pollution control exemption in relation to the overall value of the real and personal property, as of the Valuation Date, October 2002." (Defendant's Exhibit SS1, p. 115.)

Pomykacz further noted that "[f]or the same reasons . . . we expect all forms [of] depreciation to impact the air pollution control property at the same rate as the overall real and personal property. Thus, if the exemption [were] still [the] same as it was in 1999, then the same percentage would be applicable today." (Defendant's Exhibit SS1, p. 116.) The problem with Pomykacz's statements is that the valuation process in 1999, based upon cost plus, was much different from the market approach valuation process used by Pomykacz in 2002.

The value of the APCE at Unit 3 in 1994 included structures and personal property originally valued at $358,085,547 and depreciated 23% in the first year of

calculation to the reduced value of $275,725,871. From 1994 to 2002, a period of 8 years, the issue becomes what percentage of depreciation of the APCE is appropriate to arrive at a credible fair market value of the APCE as of October 1, 2002.

The three principal methods for estimating depreciation are as follows: (1) the market extraction method; (2) the age-life method and (3) the breakdown method. See The Appraisal of Real Estate (12th Ed.) p. 383. "Market extraction and age-life calculations are the primary methods used by most appraisers to estimate the total depreciation in a property." Id.

The APCE assets at Unit 3 and their original cost value consisted of the following:

| | |
|---|---|
| 1) Reactor containment structure | $156,925,004 |
| 2) Reactor plant – containment vacuum system | 4,120,198 |
| 3) Reactor plant – quench and recirculation spray | 97,067,650 |
| 4) Reactor containment secondary enclosure | 16,591,543 |
| 5) Hydrogen recombiner | 15,985,441 |
| 6) Supplemental leak collection system | 16,199,269 |
| 7) Auxiliary & fuel building filtration | 16,160,088 |
| 8) Engineered safety features building ventilation and closed cooling | 8,334,149 |
| 9) Radioactive gaseous waste | 20,774,124 |

10) Instrumentation & control components
Radiation gaseous effluent monitoring equipment 5,928,081

**TOTAL $358,085,547**

See defendant's Exhibit ZZZ, tab 1.

Recognizing the wide variety of structures and equipment used in the air pollution control system in Unit 3 and the lack of any evidence presented that the appraisers used the breakdown method to calculate depreciation, it is necessary to turn to the age-life method since there is evidence presented that deals with this issue. The effective age of the structures and equipment is critical here, not the actual age of these assets.

"Effective age is the age indicated by the condition and utility of a structure and is based on an appraiser's judgment and interpretation of market perceptions. Even in the same market, similar buildings do not necessarily depreciate at the same rate. The maintenance standards of owners or occupants can influence the pace of building depreciation. If one building is better maintained than other buildings in its market area, the effective age of that building may be less than its actual age. If a building is poorly maintained, its effective age may be greater than its actual age. If a building has received typical maintenance, its effective age and actual age may be the same." The Appraisal of Real Estate (12th Ed. 2001) p. 385.

The analysis conducted by Remsha and Pomykacz, using a percentage of the total value of Millstone, based on the business enterprise value, to arrive at a valuation of the APCE of Unit 3, is not helpful nor credible.

The credible facts present for the court to consider are as follows:

(1) the original valuation of the APCE at Unit 3 at $358,085,547;

(2) $275,725,871 equals the original value depreciated by an estimated 23% by all of the involved parties;

3) the water pollution control structures and equipment at Unit 3 were depreciated an estimated 33% in 2003 and 2004 from the 2002 valuation and

4) Pomykacz opined that the APCE at Unit 3 would depreciate at the same rate as the water pollution control equipment at Unit 3.

These facts present a rational basis to value the APCE as of October 1, 2002.

Rather than accept Remsha's valuation of the APCE at Unit 3 at $104,771,000 and Pomykacz's valuation of the same APCE at $2,200,000,[25] it is more credible to take the original APCE valuation in 1994 at $275,725,871 (which is the depreciated value of $358,085,547) and then depreciate the APCE assets further over the period of 8 years, from 1994 to 2002, by two-thirds or 66%, to arrive at a final valuation for the APCE assets of $91,908,623, rounded to $92,000,000. Although the court's finding of value of the APCE is substantially higher than Pomykacz's valuation, and lower than Remsha's valuation, this amount appears to be a rational resolution in light of the limited credible evidence to guide the court in its determination.

Given the court's finding that the fair market value of the subject real and personal property, as of October 1, 2002, was **$1,122,000,000,** and the valuation of the

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The court is mindful of the admonition by the Supreme Court in Northeast Datacom, Inc. v. Wallingford, 212 Conn. 639, 647, 563 A.2d 688 (1989) that "[c]ourts must be cautious in choosing between conflicting systems since those calculations, although made in the best of faith, can lead to widely divergent results." (Internal quotation marks omitted.)

APCE, as it applies to CVPS and MMWE, as of October 1, 2002, was **$92,000,000**, judgment may enter in favor of the plaintiffs, sustaining their appeal, without costs to the parties.

Arnold W. Aronson
Judge Trial Referee