THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2020-0475

Appeal of Town of Chester & Town of Hudson

Rule 10 Discretionary Appeal from
Administrative Decision of the Board of Tax and Land Appeals

BRIEF FOR THE TOWNS OF CHESTER AND HUDSON

TOWNS OF CHESTER AND HUDSON, NH
By Their Attorneys:

DONAHUE, TUCKER & CIANDELLA, PLLC
Christopher L. Boldt, Esq.
Bar No. 15301
Eric A. Maher, Esq.
Bar No. 21185
William K. Warren, Esq.
Bar No. 270168
16 Acadia Lane
Exeter, New Hampshire
(603)778-0686
cboldt@dtclawyers.com
emaher@dtclawyers.com
wwarren@dtclawyers.com

Oral Argument By: Eric A. Maher

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II. QUESTIONS PRESENTED

1. Whether the New Hampshire Board of Tax and Land Appeals' ("**BTLA**") decision was unjust and unreasonable when the BTLA applied the New Hampshire Department of Revenue Administration's ("DRA") median equalization ratios to the fair market value of PSNH's Land Interests provided by the Towns' expert, George E. Sansoucy PE, LLC ("GES") when that opinion of value was derived entirely from the respective Towns' already-proportionate assessments for PSNH's Land Interests and where PSNH did not dispute the value of those Land Interests? See Appd'x Vol I at 45–54; Appd'x Vol II at 76–83 (Day 10 Transcript at 7:17–14:15).[1]

2. Whether the BTLA's decision was unjust and unreasonable when the BTLA denied the Towns' Motion for Partial Reconsideration ("Towns' Motion") for failure to raise the issue of the proper application of the equalization ratio to the Land Interest when (a) the counsel for the Towns raised concerns as to the application of the equalization ratio during the proceedings, (b) the BTLA did not actually apply the equalization ratio until its Decision on the merits dated June 23, 2020, and (c) the Towns moved for reconsideration within thirty days of the BTLA's June 23, 2020 decision? See Appd'x Vol I at 45–54.

3. Whether the BTLA's decision was unjust and unreasonable when the BTLA denied the Towns' Motion on the basis that the Towns

[1] The Towns have provided a two-volume appendix containing the majority of cited materials for the Court's convenience. Citations to the appendix will be cited as "Appd'x [Volume] at [Page Number]." References to the certified record will be cited as "C.R. at [Page Number]."

provided a stipulation as to the GES determination of fair market value, when said stipulation reflects no comment or suggestion as to how the BTLA should apply the equalization ratio? See Appd'x Vol I at 45–54.

4. Whether the BTLA's decision was unjust and unreasonable when the BTLA denied the Towns' Motion on the basis that the alleged error was "harmless," when the error resulted in (a) Chester's liability to be $42,537.90 greater for Tax Year 2016 and (b) Hudson's liability to be $51,455.50 greater, in total, for Tax Years 2014 through 2016? See Appd'x Vol I at 45–54.

III. CONCISE STATEMENT OF THE CASE

This case arises from the Tax Year 2014 through 2017 Tax Appeals brought by PSNH against 102 municipalities, two of which include the Towns of Chester and Hudson ("the Towns").[2] PSNH challenged that the Towns' assessments of PSNH's property was unjust and disproportionate. The focus of PSNH challenge was the Towns' of PSNH's electric utility property.

Notwithstanding that the focus of PSNH's challenge was the assessment of PSNH's electric utility property, in accordance with Appeal of Sunapee, 126 N.H. 214 (1985), both PSNH's expert, Concentric Energy Advisors ("Concentric"), and the Towns' expert, GES, adopted the assessed values of PSNH's fee land and buildings as the fair market value for fee land and buildings and both experts incorporated the average assessment value of vacant land into their respective valuations of PSNH's use of the public rights-of-way ("PROW") and transmission easements. At no time did PSNH argue or assert, nor does the record support, that the assessments of PSNH's fee land and buildings, or the vacant land assessments used in the PROW and transmission easement analyses were disproportionate. Indeed, the reliance on the assessments meant the value of those interests were already proportionate and need not be adjusted.

The issue in this case lies with how the BTLA equalized the GES opinion of value and determined whether an over-assessment existed in the Towns. The BTLA found that the GES opinion of fair market was more

[2] While there were several municipalities that participated in the case and filed exhibits and pleadings together, for clarity of reading, this Brief will refer to the Towns of Chester and Hudson as the parties that submitted such exhibits and pleadings.

credible than Concentric's. The BTLA, however, determined whether the Towns over-assessed PSNH by applying the equalization ratio to the entire GES opinion of value and compared that equalized value to the aggregate assessments in each municipality and each tax year. In so doing, the BTLA erred because the components of value associated with PSNH's Land Interests were already proportionate and need not be adjusted by application of the equalization.

The BTLA's error was compounded by the BTLA's decision on the Towns' Motion for Partial Reconsideration. The BTLA erroneously determined that the Towns' Motion was untimely, that the Towns agreed to the manner in which the BTLA equalized the GES opinions of value, and that any error associated with the equalization process was de minimis. The BTLA's determinations were unlawful and unreasonable in each regard and the Towns now seek to have this Court correct the BTLA's error.

If left uncorrected, the BTLA's decision will result in a windfall for PSNH that is plainly unwarranted. While PSNH and the BTLA have characterized this as a "harmless error," the brunt of that error will fall not only on the Towns, but on their taxpayers. Given a complete dearth of evidence that would entitle PSNH to such extraordinary relief, the balance of the equities in this case falls squarely with the Towns and the residents who will bear the costs of the BTLA's error. The BTLA's decision on this narrow issue must be reversed.

IV. STATEMENT OF THE FACTS

This appeal follows the decision of the BTLA in the consolidated tax appeals brought by PSNH pursuant to RSA 76:16-a against approximately 102 municipalities for Tax Years 2014 through 2017, two of which are the Towns of Chester and Hudson. As the litigation progressed, the number of municipalities involved in the case was reduced to 47. See Appd'x Vol I at 4. The focus of PSNH's challenge was the Towns' assessment of PSNH's electric utility property, which consisted of PSNH's distribution, transmission, and, the J. Brodie Smith Hydro-electric Generating Station located in the City of Berlin ("Smith Station"), as well as the associated transmission easements and use of PROW related to those electric utility assets. See Appd'x Vol II at 4.

The property owned by PSNH can be placed in four general categories, three of which were the focus of PSNH's Tax Appeals: (1) PSNH's electric distribution property, which consists of poles and wires carrying up to 115 kilovolts, related substations, and PSNH's use of the PROW related to those assets; (2) PSNH's electric transmission property, which consists of poles and wires carrying at least 115 kilovolts, related substations and other structures, and transmission easements; and (3) PSNH's electric generation facilities. See Appd'x Vol II at 87–98. The fourth general category of property owned by PSNH is PSNH's fee land and buildings (also referred to as "work centers"), the assessments for which PSNH did not challenge. See Appd'x Vol II at 63. PSNH's use of the PROW, transmission easements, and PSNH's fee land and buildings will be hereinafter referred to as "PSNH's Land Interests."

On May 29, 2018, in the early stages of this litigation, the BTLA issued a Prehearing Conference Order and Hearing Notice, which, in pertinent part, required all parties to submit stipulations regarding the aggregate assessment values of PSNH's property, the tax rate, and the median equalization ratio for each Municipality for each tax year by June 18, 2018. Appd'x Vol II at 35–36. In response to that Prehearing Conference Order and Hearing Notice, the parties submitted final stipulations for all communities and for tax years 2014 through 2016 to the BTLA in July of 2018. See Appd'x Vol II at 78–79. The parties later submitted the same information for Tax Year 2017, when PSNH 2017 Tax Appeals were consolidated into this matter. See Appd'x Vol II at 78–79.

At trial, the Towns submitted expert appraisals prepared by GES (the "GES Appraisals"). See Appd'x Vol II at 99. The GES Appraisals valued all of PSNH's taxable property in a given municipality on a municipality-by-municipality basis. See id. The property values by GES included PSNH electric utility plant, which includes, but is not limited to, (a) PSNH's distribution poles, wires, substations, (b) PSNH's transmission poles, towers, conductors, substations (collectively, with PSNH's distribution assets, "T&D Assets") and (c) Smith Station. See id. Additionally, GES valued PSNH's use of the PROW, see RSA 72:23, I, and PSNH's transmission easements. Appd'x Vol II at 100–121. Lastly, GES incorporated the value of PSNH's fee land and buildings into the GES final opinions of value. Appd'x Vol II at 100–101.

With regard to fee land and buildings, GES adopted the assessments for said property. Appd'x Vol II at 100–101. With regard to PSNH's use of the PROW and transmission easements, GES's value was derived from the

average assessment for fee land in each Municipality, which established a base per acre value which was then adjusted based on the interest being appraised. Appd'x Vol II at 101, 113.

PSNH presented an appraisal prepared by Ann Bulkley of Concentric Energy Advisors, Inc. ("Concentric"), wherein Ms. Bulkley provided an opinion of value for PSNH's property for each of the Towns for each tax year. Appd'x Vol I at 5. PSNH did not challenge the accuracy or proportionality of the property that did not constitute electric utility property, such as land owned in fee and brick-and-mortar buildings. Appd'x Vol II at 63. As such, Ms. Bulkley assumed that the assessed value of that fee land and buildings owned by PSNH approximated the fair market value for those fee land and buildings. See id. Consequently, Ms. Bulkley's opinion of value of PSNH's fee land and buildings coincided with the Towns' assessment of those fee land and building parcels. See id. With regard to PSNH's use of the PROW and transmission easements, Ms. Bulkley's opinion of value was similarly derived from the average assessment for fee land in each Municipality. Appd'x Vol II at 92–98.

On November 21, 2019, during the hearing on the merits, the BTLA ordered the parties to submit a new set of stipulations that contained, in pertinent part: (a) the aggregate assessments for each Municipality and for each tax year; (b) the equalization ratios for each Municipality and for each tax year; (c) GES's final determination of fair market value; and (d) Concentric's opinion of fair market value. Appd'x Vol II at 68–69. On December 9, 2019, the Towns, through counsel, expressed concern as to the Board's order, namely the Board's intended use of the equalization ratios and the opinions of value to be produced in response to the Board's order.

Appd'x Vol II at 82–83. The Towns' counsel noted that, due to the unique circumstances associated with the assessment of utility property, there may be a "double equalization" issue if the equalization ratio were to be used to determine whether PSNH had been over-assessed as the assessments for PSNH's property had already been equalized. Id. Notwithstanding these concerns, the BTLA continued to order the production of the stipulations, and on December 23, 2019, the Parties submitted the stipulations that the BTLA ordered. Appd'x Vol II at 84–86.

On June 24, 2020, the BTLA issued a Decision on the Merits in which it determined that the Concentric Appraisal was not the "most reasonable or credible estimate[] of market value," awarded abatements to the extent that the GES opinions of value (after application of the equalization ratio) reflected that PSNH's property in the aggregate was over-assessed, and denied PSNH's request for an abatement in all other instances. Appd'x Vol I at 20–21, 34. In determining whether PSNH had been disproportionately assessed and, thus, entitled to an abatement, the BTLA applied the stipulated median equalization ratio for a given municipality to the fair market values determined by GES for each municipality to generate a "Market Value Adjusted by Level of Assessment" (referred to hereinafter as the "equalized market value"). Appd'x Vol I at 20, 40–43. For each Municipality and each Tax Year, the BTLA compared the equalized market value with the aggregate assessed value to determine if PSNH's Properties were proportionately taxed. Appd'x Vol I at 23, 40–43. The BTLA determined that a five percent difference between the equalized market value and the assessed value was reasonable, and the BTLA only granted PSNH's requests for abatement

when the determined over-assessment was in excess of five percent of the aggregate assessment for each tax year and in each Municipality. Id.

With regard to Chester and Hudson, the BTLA found as follows with regard to the aggregate assessments, fair market value of PSNH's property, equalization ratio, equalized market value, and over-assessment:

Town	Year	Aggregate Assess.	GES Fair Market Value	Equal. Ratio	Equalized Market Value	BTLA Determined Over-Assessment
Chester	2014	$19,362,900	$17,702,900	95.7%	$16,941,675	$2,421,225
Chester	2015	$37,905,200	$38,268,400	93.9%	$35,934,028	$1,971,172
Hudson	2014	$90,983,300	$81,559,400	97.8%	$79,765,093	$11,218,207
Hudson	2015	$96,388,296	$82,948,300	92.7%	$76,893,074	$19,495,222
Hudson	2016	$95,894,900	$85,832,700	87.9%	$75,446,943	$20,447,957

Appd'x Vol I at 40–41.

In applying the median equalization ratio to the GES opinions of fair market value, however, the BTLA overlooked the fact that the GES opinion of fair-market value included the values of Land Interests that were already proportionate, being based on the assessments in each Town's CAMA system. See Appd'x Vol II at 100–120. PSNH did not assert that the assessments for PSNH's fee land and buildings were disproportionate or inaccurate, nor did PSNH assert that the land assessments in the Towns' CAMA system were inaccurate or disproportionate. Because the values of PSNH's Land Interests were based on the Towns' assessments and were derived, in whole or in part, from the Towns' CAMA systems, it was not necessary to equalize those values – the values for those Land Interests were already proportionate. Therefore, in applying the median equalization ratio to the entirety of the GES opinion of fair market value, the BTLA

essentially double equalized the value of those Land Interests, which, in the case of Chester and Hudson, resulted in the BTLA determining an erroneously high over-assessment calculation.

On July 23, 2020, several municipalities, which included Chester and Hudson, moved for the BTLA to partially reconsider its Decision to correct the above-referenced "Double Equalization" error. Appd'x Vol I at 46–54. In that Motion, the Towns argued that the BTLA should have applied the median equalization ratio only to PSNH's T&D assets – which were not derived from the CAMA system or land assessments in each municipality – and then added the equalized value of PSNH's T&D assets to the value of PSNH's Land Interests. Appd'x Vol I at 46–47. The Towns provided the BTLA with a spreadsheet reflecting the proper means by which the BTLA should have applied the equalization and calculated over-assessments. Appd'x Vol I at 49–54. For Chester and Hudson, the resulting methodology would have altered the BTLA's determined over-assessments, and thus, the Towns' liability as follows:

Town	Year	BTLA Determined Over-Assess.	Percent of Assess.	Corrected Over-Assess.	Percent of Assess.	Difference	Tax Rate	Liability Impact
Chester	2014	$2,421,225	12.50%	$2,349,643	12.31%	$71,582	$23.17	$1,657.30
Chester	2016	$1,971,172	5.20%	$1,862,373	4.91%	$108,799	$21.58	$42,537.90
Hudson	2014	$11,218,207	12.33%	$11,090,017	12.19%	$128,190	$18.34	$2,351.00
Hudson	2015	$19,495,222	20.23%	$18,537,484	19.23%	$957,738	$18.80	$18,005,47
Hudson	2016	$20,447,957	21.32%	$18,855,585	19.66%	$1,592,372	$19.53	$31,099.02

Appd'x Vol I at 53. Of particular note is Chester in Tax Year 2016, wherein the percent of the over-assessment changes from 5.20% to below 4.91%, which would render Chester not liable for Tax Year 2016. Id.

On August 12, 2020, PSNH objected to the Towns' Motion for Partial Reconsideration. Appd'x Vol II at 4–17. PSNH argued that the Towns failed to satisfy their burden for the BTLA to grant reconsideration, arguing that the Towns should have raised their concerns earlier in the proceedings. Appd'x Vol II at 8–15. Further, PSNH argued that the BTLA's application of the equalization ratio was appropriate because the Towns' expert assumed that the assessments for the Land Interests represented fair market value and, in abatement proceedings, the BTLA applies the equalization ratio to the determinations of value to determine proportionality. Appd'x Vol II at 11–13. PSNH also argued that the Towns should be "held to their stipulations," notwithstanding that the BTLA ordered the production of those stipulations and the Towns raised concerns as to how the BTLA would apply the equalization ratio when the Towns were ordered to submit those stipulations. Appd'x Vol II at 14–15. Lastly, PSNH argued that the resulting errors were harmless and need not be corrected by the BTLA. Appd'x Vol II at 15–16.

On September 18, 2020, the BTLA denied the Towns' Motion for Partial Reconsideration, stating that the GES values "were supplied by the [Towns] themselves in the stipulations agreed to by them." Appd'x Vol II at 28–29. The BTLA then adopted the arguments reflected in PSNH's Objection. Id.

This appeal follows.

V. SUMMARY OF THE ARGUMENT

The BTLA's decision on the merits was unjust and unreasonable. During the course of these proceedings, PSNH neither challenged the Towns' assessments of PSNH's fee land and buildings nor the land assessments used in the valuation of PSNH's transmission easements and PSNH's use of the PROW. The BTLA, therefore, should have concluded that PSNH's Land Interests had been proportionately assessed, and the Board should not have attempted to equalize values that were already proportionate. In doing so, the BTLA erroneously applied the equalization ratios to already-proportionate property values, creating inaccurate calculations of both overassessments and underassessments. Because PSNH only challenged assessments of its electric utility property, the BTLA should have only applied the equalization to the values of PSNH's electric utility property. The BTLA's decision should, therefore, be reversed.

It was also unjust and unreasonable for the BTLA to deny the Towns' Motion for Partial Reconsideration on the grounds that the Towns failed to timely raise the above issue for several reasons. First, the BTLA's decision imposes a time limitation that is not permitted under RSA chapter 71-B and RSA chapter 541. Second, the BTLA's decision ignores that the Towns contemporaneously expressed concern as to how the BTLA would apply the equalization ratio, noting that there could be a problem with the "double equalization" of certain property values. Third, the record does not support that, in submitting the subject stipulations, the Towns agreed to the manner in which the BTLA would use the information in those stipulations,

particularly where the BTLA did not demonstrate its application of the equalization ratio until the BTLA issued its Decision on the Merits.

The BTLA's decision, denying the Towns' Motion was also unjust and unreasonable when the BTLA determined that the Towns had somehow agreed through the submission of stipulations to the manner in which the equalization ratio would be applied. The record contains no support for that conclusion. In fact, the record clearly demonstrates that the Towns were concerned as to how that equalization ratio would be applied.

Finally, it was unjust and unreasonable for the BTLA to deny the Towns' Motion due to "harmless error," particularly with regard to Chester and Hudson. For Tax Years 2014 and 2016, the BTLA's error resulted in an additional $44,195.20 in liability for Chester. For Tax Years 2014 through 2016, the BTLA's error resulted in an additional $54,455.50 in liability for Hudson. These inflated burdens are neither "harmless" nor "de minimis."

Based on the foregoing, the Court should reverse the BTLA's decision denying the Towns' Motion.

VI. STANDARD OF REVIEW

This Court's "standard for reviewing BTLA decisions is set forth by statute." Appeal of Keith R. Mader 2000 Revocable Tr., 173 N.H. 362, 365 (2020). This Court "will not set aside or vacate a BTLA decision except for errors of law, unless [the Court is] satisfied, by a clear preponderance of the evidence, that such order is unjust or unreasonable." Id. "The appealing party has the burden of demonstrating that the BTLA's decision was clearly unreasonable or unlawful." Id. at 365–66. "The BTLA's findings of fact are deemed prima facie lawful and reasonable," however, "[t]he interpretation of a statute or a regulation is to be decided ultimately by this [C]ourt." Id. This Court "will set aside an order of the board" if it finds "that [the BTLA] misapprehended or misapplied the law." Appeal of Reid (N.H. Bd. Of Tax & Land Appeals), 143 N.H. 246, 248 (1998); see also Appeal of Kiwanis Club of Hudson, 140 N.H. 92, 93 (1995).

VII. ARGUMENT

This Court should reverse the BTLA's decision because the BTLA's decision was unjust and unreasonable for four reasons. First, the BTLA erred in applying the DRA's median equalization ratios to PSNH's Land Interests because PSNH never challenged the assessments of those interests and the BTLA adopted values that were already proportionate. Second, the BTLA's denial of the Towns' Motion on timeliness grounds was unjust and unreasonable because the Towns timely raised the issues set forth in their motion during trial and in a timely motion for reconsideration and, regardless, the BTLA's time limitation is contrary to RSA chapter 541. Third, the BTLA's denial of the Towns' Motion was unjust and unreasonable based on the stipulations ordered by the BTLA because the stipulations did not indicate, in any manner, how the BTLA intended to apply the stipulated equalization ratios to the market values submitted by the Towns. Fourth, the BTLA's denial of the Towns' Motion on the grounds that the Board's errors were "harmless" was unjust and unreasonable because the BTLA's improper application of equalization ratios unreasonably resulted in significant additional tax liability for the Towns.

A. The BTLA's erroneously applied the equalization ratio to PSNH's proportionately assessed Land Interests.

This Court should reverse the BTLA's denial of the Towns Motion because the BTLA erroneously applied the equalization ratios to the value of PSNH's Land Interests when the value of those Land Interests adopted by the BTLA was derived entirely from the Towns' assessments for

PSNH's Land Interests, and PSNH did not dispute the assessed value of those Land Interests. The only evidence before the BTLA relating to PSNH's Land Interests was that the Land Interests had been assessed proportionately. The BTLA's application of the equalization ratio to already-proportionate values of those Land Interests was unjust and unreasonable. By applying the equalization ratio to PSNH's Land Interests, the BTLA essentially "double equalized" the value of PSNH's Land Interests, resulting in an erroneous calculated overassessment and significantly inflated tax liability to the Towns' detriment.

It is well-settled that in filing a tax abatement appeal before the BTLA, the taxpayer bears "the burden of proving by a preponderance of the evidence that they are paying more than their proportional share of taxes." Porter v. Town of Sanbornton, 150 N.H. 363, 367 (2003) (citing Society Hill at Merrimack Condo. Assoc. v. Town of Merrimack, 139 N.H. 253, 254 (1994)). "To carry the burden of proving disproportionality, the taxpayer must establish that the taxpayer's property is assessed at a higher percentage of fair market value than the percentage at which property is generally assessed in the town." Id. at 368. The taxpayer's "burden to prove the general level of assessment is difficult, and may be met by evidence of the [DRA's] equalization ratio for the [municipality] only if the [municipality] has stipulated to the validity of, or actually uses, that particular equalization ratio when it assesses property." Appeal of City of Nashua, 138 N.H. 261, 265 (1994).

The State equalization ratio developed by the DRA is a ratio of the assessed value of each property sold in the past year divided by that property's market value. Appeals of Bow, Newington & Seabrook, 133

N.H. 194, 196 (1990). The purpose of the equalization ratio, or the general level of assessment, is to calculate the proportion of a municipality's assessments compared to fair market value. See RSA 21-J:9-a; Milford Properties v. Milford, 119 N.H. 165, 168 (1979) (reflecting use of State equalization ratios in determining proportionality).

Where a taxpayer owns more than one property within a given municipality, "a request for abatement on one will always require consideration of the assessment on any other parcels for which the owner is also the taxpayer." Appeal of City of Lebanon, 161 N.H. 463, 469 (2011); see also Appeal of Sunapee, 126 N.H. 214, 216–17 (1985). For example, in in Appeal of Sunapee, the taxpayers owned two parcels, a "house lot" and a "vacant lot," within a single municipality and sought an abatement by the board of selectmen for the vacant lot. 126 N.H. at 216. The taxpayers did not request an abatement on the house lot. Id. The board of selectmen declined to grant an abatement, and the taxpayers appealed to the BTLA, seeking an abatement on both parcels. Id. After an evidentiary hearing, the BTLA reduced the assessments on both the house lot and the vacant lot. Id. The Town appealed to this Court, arguing that the BTLA erred in granting an abatement on the house lot. Id. This Court agreed, finding that the BTLA's jurisdiction is governed by RSA 76:16-a, I, which authorizes a taxpayer to seek relief from the BTLA only "[i]f the selectmen neglect or refuse to . . . abate." Id. The Court held that under this statute, the BTLA's jurisdiction is "limited to the subject of a taxpayer's original request to the selectmen." Id. Because the taxpayers did not request that the selectmen grant an abatement on the house lot, the Court ruled that the BTLA did not have jurisdiction to grant an abatement on the house lot. Id. The Court

held, however, that the BTLA did not err in considering the house lot, explaining that "[w]hen a taxpayer owns two parcels . . . , a request for an abatement on the first will always consideration of the assessment on the second." Id. at 217. This is because "a taxpayer is not entitled to an abatement on any given parcel unless the aggregate valuation placed on all of his property is unfavorably disproportionate to the assessment of property generally in the town." Id.

More recently, in Appeal of City of Lebanon, 161 N.H. 463, 469 (2011), this Court considered a similar situation in which a taxpayer owned two parcels within a single municipality but was the taxpayer with respect to only one of those properties. The Court clarified its holding in Appeal of Sunapee, ruling that "when a taxpayer owns more than one parcel in any given municipality, a request for abatement on one will always require consideration of the assessment on any other parcels for which the owner is also the taxpayer." Appeal of City of Lebanon, 161 N.H. at 469. The Court reasoned that this approach comported with the State Constitution and New Hampshire Supreme Court jurisprudence by "requiring the taxpayer to present evidence of assessments only on property for which it has a tax burden." Id.

Here, the Court's reasoning in Appeal of Sunapee and Appeal of City of Lebanon reflects the error in the BTLA's application of the equalization ratio to PSNH's Land Interests. Similar to those cases, the arguments raised in PSNH's abatement applications here were related exclusively to the valuation and overassessment of electric utility property. See Appeal of Sunapee, 126 N.H. at 216; Appeal of City of Lebanon, 161 N.H. at 465; see e.g. C.R. BTLA Docket No. 27782-14 at 14-52 (Chester's

Tax Year 2014 Checklist, containing PSNH's Abatement Application); C.R., BTLA Docket No. 27811-14PT at 5 (Hudson's Tax Year 2014 Checklist, containing PSNH's Abatement Application). At trial, PSNH's arguments of disproportionality and overassessment were aimed exclusively at the assessment of PSNH's electric utility assets and the related PROW and transmission easement. See, e.g., Appd'x Vol II at 63, 87–98. While PSNH challenged the appropriate adjustments to the land values to arrive at a value for the use of the PROW and the transmission easement, it bears repeating that PSNH did not challenge the proportionality of the land assessments used to establish a base value of those interests; Ms. Bulkley's opinion of value was derived from the average assessment for fee land in each Municipality. Appd'x Vol II at 63, 87–98. PSNH did not assert that the assessments of PSNH's fee land and buildings were disproportionate or excessive. To the contrary, PSNH's own expert witness, Ms. Bulkey, assumed that the assessed value of that fee land and buildings owned by PSNH approximated the fair market value for those fee land and buildings. See Appd'x Vol II at 63. The Towns presented no evidence that the assessments of PSNH's fee land and buildings and the land assessments used to value PSNH's use of the PROW and transmission easements were inaccurately assessed—either excessively or insufficiently. Like Concentric, GES adopted the assessed values of fee land and buildings and adopted values from the average assessment for fee land and buildings to develop a fair market value for PSNH's use of the PROW and transmission easements. Appd'x Vol II at 100–101, 113. In that regard, the circumstances are analogous to one where a taxpayer owns multiple parcels, but only challenges the assessment on one parcel. See,

e.g., Appeal of Sunapee, 126 N.H. at 216–17. Like in those instances, while the trier of fact could consider the assessment on those other parcels, the BTLA could not grant an abatement on those other parcels: PSNH has effectively conceded that such interest was assessed proportionately. Therefore, the BTLA should not have applied the equalization ratio to PSNH's land interests, effectively granting abatements to PSNH for unchallenged parcels.

These circumstances are also similar to the circumstances of Appeal of Pub. Serv. Co. of N.H., 124 N.H. 479 (1984) and Pub. Serv. Co. of N.H. d/b/a Eversource Energy v. City of Portsmouth, Rockingham Cty. Super. Ct., No. 218-2016-CV-00899 & 218-2017-CV-00917 (July 22, 2019) (Order, Messer, J.) ("PSNH v. Portsmouth"). In Appeal of Pub. Serv. Co. of N.H., PSNH appealed decisions of the New Hampshire Board of Taxation (now the BTLA) denying PSNH's petitions for abatement of property in several communities. Id. at 482. PSNH specifically disputed "the assessed value for tax purposes of property (other than land, rights of way, and easements) owned by PSNH." Id. (emphasis added). The Board's inquiry was properly limited to the correct method of valuing the transmission and distribution assets for which PSNH sought abatements. See id. at 282–83. The Board of Taxation ultimately ruled that PSNH had not established a satisfactory method of valuation, and therefore failed to meet its burden of proof. Id. at 284. On appeal, PSNH challenged the Board's findings. Id. at 484–85. This Court affirmed the Board of Taxation's rulings, noting that "[t]he record indicates that the primary concern of all parties at the [Board of Taxation] hearing . . . was to establish a uniform method of valuation that could not later be challenged through

the introduction of further evidence." Id. at 486. Neither the Board of Taxation nor this Court addressed the assessment of land interests that PSNH did not challenge. See generally id. at 481–87. See also Pub. Serv. Co. of N.H. v. Town of Ashland, et al., 1982 N.H. Tax LEXIS 114, at *8–*11 (NH BTLA Oct. 19, 1982).

Like in Appeal of Pub. Serv. Co. of N.H., PSNH never challenged the Towns' assessments of PSNH's fee land and buildings and did not challenge the proportionality of the land assessments used in the valuation of PSNH's use of the PROW and transmission easements; such assessments were never in dispute. See Appd'x Vol II at 63, 87–98. As such, the BTLA should have limited its application of the equalization ratio to the value of the assets that PSNH actually challenged, which is to say, the assessments of PSNH's electric utility property. See Appd'x Vol II at 63, 87–98. Instead, the BTLA over-stepped its statutory charge and erroneously applied the equalization ratios to Land Interests that were already proportionate and, without just cause, artificially inflated the Towns' liability. Appeal of Sunapee, 126 N.H. at 216–17.

In PSNH v. Portsmouth, the Rockingham County Superior Court considered a nearly identical issue that is presently before this Court. In that case, PSNH did not challenge the city's assessment of certain fee land and buildings. Appd'x Vol II at 134. By order dated May 20, 2019 the court (Messer, J.) granted PSNH an abatement of taxes for Tax Years 2015 and 2016. See id. The city moved for reconsideration, arguing that the court overlooked or misapprehended the parties' stipulation as to the assessed value of PSNH's fee land and buildings. Id. Specifically, the city noted that PSNH did not challenge the city's assessment of certain fee land

and buildings, and accordingly, the court erred in applying equalization ratios to those assessments. See id. The court agreed and, ruling that it had erred in applying equalization ratios to the city's assessments for PSNH's fee land and buildings, the court vacated its findings of fact as to those assessments identified in the city's motion for reconsideration. Appd'x Vol II at 135–36.

Like in PSNH v. Portsmouth, PSNH did not challenge the Towns' assessments of PSNH's fee land and buildings, and did not challenge the proportionality of the land assessments used in the valuation of PSNH's use of the PROW and transmission easements. See Appd'x Vol II at 63, 87–98. Like in PSNH v. Portsmouth, the BTLA improperly applied equalization ratio when the value of PSNH's Land Interests was already proportionate.

In addition to the Towns' position being in accordance with cases of this Court and the Rockingham County Superior Court, the Towns' position serves principles of equity, particularly where the BTLA's application of the equalization ratio to PSNH's Land Interests creates inequities in the tax abatement process. In municipalities with an equalization ratio of less than 1, for example, applying the ratio to an already-proportionate value would result in an equalized value that is disproportionately low, improperly suggesting an overassessment to the Town's detriment. On the other hand, in municipalities with an equalization ratio of greater than 1, applying the ratio to an already-proportionate value would result in an equalized value that was higher than the already-proportionate value, improperly suggesting an underassessment to the taxpayer's detriment. Thus, where there is no dispute as to the proportionality or accuracy of an assessment for a

particular parcel, it is clearly unjust and unreasonable for the BTLA to equalize the concededly proportionate value of that property.

The argument above is not simply academic—the inequities noted above happened here. With regard to Chester in Tax Year 2016, for example, the application of the equalization ratio of 93.9% to the already-proportionate value of PSNH's Land Interests erroneously increased the calculated over-assessment by $108,799.00, causing Chester to cross the BTLA's reasonableness 5% threshold and subjecting Chester to $42,537.90 liability. In the case of Hudson in Tax Year 2016, the application of the equalization ratio of 87.9% to the already-proportionate value of PSNH's Land Interests erroneously increased the calculated over-assessment by $1,592,372.00, subjecting Hudson to $31,099.02 in liability.

PSNH is likely to argue that the Towns agreed to the BTLA's application of the equalization ratio to PSNH's Land Interests when the Towns submitted stipulations on December 23, 2019. PSNH's technical argument is merely a means by which to sidestep the fact that the BTLA applied the equalization ratio to the already-proportionate value of PSNH's Land Interests, resulting in the calculated over-assessments being higher, to the Towns' detriment. Beyond the fact that PSNH's argument ignores the clear inequities created by the BTLA's application of the equalization ratio, PSNH's argument also ignores that, when the BTLA ordered that the parties produce those stipulations, the Towns expressed concern that the BTLA's application of equalization ratios to already-proportionate values would effectively result in a "double equalization" on values that were already proportionate. Further, PSNH's argument ignores that in

submitting the subject stipulations, the Towns did not agree to the application of the data points submitted through those stipulations.

In short, PSNH's dispute in these cases related solely to the valuation of electric generation, transmission, and distribution property, and PSNH's use of the PROW and transmission easements related to that electric utility property. See, e.g., C.R. BTLA Master Docket at 1299-1302. The arguments raised by PSNH in its abatement applications to the Towns relate exclusively to the valuation of electric utility property. See e.g. C.R. BTLA Docket No. 27782-14 at 14-52 (Chester's Tax Year 2014 Checklist, containing PSNH's Abatement Application); C.R., BTLA Docket No. 27811-14PT at 5 (Hudson's Tax Year 2014 Checklist, containing PSNH's Abatement Application). At no point in the hearing did PSNH assert that any municipality, let alone the Towns of Chester and Hudson, over-assessed the value of non-utility properties, such as vacant parcels, work centers, warehouses, or office buildings. See, e.g., C.R. BTLA Master Docket at 1299-1302. Indeed, PSNH's expert opined that the value of non-utility properties was as assessed by the Towns, an assertion adopted by PSNH. Appd'x Vol II at 63. Under the principles set out in Appeal of Sunapee and Appeal of City of Lebanon, PSNH simply is not entitled to a windfall in the form of abatements from assessments that the company never challenged.

For the reasons stated above, in calculating the equalized values of PSNH's property interests, the BTLA should have only applied the DRA's equalization ratios to PSNH's T&D Assets because PSNH only challenged the Towns' assessments of T&D Assets. The BTLA should have then added the equalized value of the T&D Assets to the already-proportionate

value of PSNH's Land Interests to derive the aggregate equalized value of PSNH's assets in each Municipality. The BTLA's failure to properly apply the equalization ratio erroneously inflates the Chester and Hudson's liability: $44,195.20 of liability for Chester in the two Tax Years appealed by PSNH and $51,455.49 for Hudson in the three Tax Years appealed by PSNH. The decision of the BTLA was manifestly unjust and unreasonable, and it should be reversed.

B. The BLTA unlawfully denied the Towns' Motion on timeliness grounds.

In denying the Towns' Motion, the BTLA adopted the arguments in PSNH's Objection to the Towns' Motion. One of the arguments raised by PSNH adopted by PSNH was that the Towns' Motion should be denied because the Towns were required to raise their concerns "at the earliest possible time" and that the Towns did not do so. The BTLA's adoption of PSNH's arguments was unlawful and unreasonable for two reasons. First, the Towns did raise the issue at the earliest possible time. Second, the BTLA decision to impose a time period for seeking reconsideration stricter than RSA 541:3 is ultra vires. The Towns will address both points in turn.

Turning to the first point, the Towns challenged the BTLA's application of the median equalization ratios at the earliest possible time when the Towns' counsel raised concerns at trial as to how the BTLA would use the stipulated assessment values and equalization ratios, specifically noting that the BTLA's methods could result in a "double equalization" of certain values. See Appd'x Vol II at 82–83. The Towns' counsel questioned whether the first column of stipulations required by the

BTLA were intended "to be the apples-to-apples comparison of fair market value before equalization" or if they were to be "as equalized by the towns." Appd'x Vol II at 81. The Towns' counsel went on to explain that he was posing the question because "the starting point to me would be the fair market value before equalization." Appd'x Vol II at 82. Shortly thereafter, the Towns' counsel explained, "Just seemed like it was a double equalization exercise to have the third column be as equalized; that's what threw us." Appd'x Vol II at 83. It is clear from these passages that at trial, the Towns specifically raised concerns as to the starting point of the BTLA's analysis, the BTLA's intended application of median equalization ratios to the evidence presented, and the possibility of double equalization.

Additionally, and contrary to PSNH's arguments, it was not clear until after the BTLA issued the Decision on the Merits that the BTLA intended to apply equalization ratios to already-proportionate values. When the BTLA ordered that the parties produce additional stipulations on the ninth day of trial, the BTLA did not state with clarity or certainty how the stipulations would be used by the BTLA. See, e.g., Appd'x Vol II at 68–69. The Towns were therefore required to ask for further clarification on the next trial day (nearly three weeks later) because it appeared, based on what little the Towns had been told, that the BTLA intended to apply equalization ratios to already-proportionate values. See Appd'x Vol II at 79–77. The limited clarification offered by the BTLA lacked clarity, and it was not until the Board issued its Decision on the Merits that the Towns ascertained the BTLA had erroneously applied equalization ratios to PSNH's already-proportionate Land Interests. Accordingly, the Towns could not possibly have objected to the specific methods employed by the

BTLA before receiving its Decision on the Merits. At that point, the Towns again raised the issue in the Towns' Motion, arguing that the BTLA overlooked and misapprehended the fact that components of value related to PSNH's Land Interests were already proportionate and that the BTLA erred in applying equalization ratios to values that were already proportionate. Appd'x Vol I at 46–47.

Even if, for the sake of argument, the Towns did not adequately raise the issues appealed during the BTLA's trial on this matter, the issues presented in this appeal are properly before the Court because they were raised in the Towns' Motion that was filed in accordance with RSA 541:3. PSNH appears to have argued that the BTLA's rules of procedure foreclose consideration of the Towns' alleged error. See PSNH's Mot. Summ. Affirmance at 4–5. To the extent that the BTLA's rules of procedure impose a stricter deadline for seeking reconsideration/rehearing, those rules are ultra vires.

Appeals of BTLA decisions are pursuant to RSA chapter 541. See RSA 71-B:12. RSA 541:3 provides:

> [w]ithin 30 days after any order or decision has been made by the commission, any party to the action or proceeding before the commission, or any person directly affected thereby, may apply for rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion all grounds for rehearing.

(Emphasis added.) As this Court has previously held, an issue is preserved for appeal, even though the party did not raise the issue at the earliest moment, when that party timely raised the issue within thirty days of a decision on the merits. See Appeal of Richards, 134 N.H. 148, 158 (1991).

Further, this Court has held that a party may raise any issue that a party may have with regard to the conduct of administrative proceedings, so long as that party raises that issue within thirty days of the administrative agency's decision on the merits. See Appeal of N. New Eng. Tel. Operations, LLC, 165 N.H. 267, 271-72 (2013).

PSNH (and by extension the BTLA) cited Rule Tax 201.37(g) as a basis for denying the Towns' Motion. That provision provides, in pertinent part:

> Parties shall submit all evidence and present all arguments at the hearing. Therefore, rehearing motions shall not be granted to consider evidence previously available to the moving party but not presented at the hearing or to consider new arguments that could have been raised at the hearing . . . .

N.H. CODE OF ADMIN. R., Tax 201.37(g). Although the Board is empowered to adopt rules and regulations for carrying out its statutorily defined functions, the Board is not empowered to modify this Court's standard of review or a party's procedural rights conferred by statute. See RSA 71-B:8 ("The board may make reasonable rules and regulations for carrying out its functions . . . not inconsistent with the provisions of this chapter."); RSA 71-B:12 (providing that appeals of BTLA shall be subject to RSA chapter 541). "An agency must also comply with the governing statute, in both letter and spirit, and agency regulations which contradict the terms of a governing statute exceed the agency's authority." Appeal of Town of Nottingham (N.H. Dep't of Envtl. Servs.), 153 N.H. 539, 550 (2006) (internal citations and quotations omitted).

As applied, the BTLA's reliance on Rule Tax 201.37(g) as a basis for denying the Towns' Motion was unlawful, unreasonable, and ultra

vires. Under RSA 541:3, parties to administrative proceedings can move for rehearing on any issue decided during the proceeding within thirty days after any order. The BTLA's application of Rule Tax 201.37(g) forecloses a party from relief if they do not apply for rehearing/ reconsideration at the earliest possible time. The BTLA is not authorized to do this under its enabling legislation. Appeal of Town of Nottingham, 153 N.H. at 550 (2006). Therefore, when the BTLA adopted PSNH's arguments that the Towns' Motion should be denied because the Towns did not raise it at the earliest possible time—notwithstanding the Towns' compliance with RSA 541:3—the BTLA acted unlawfully and unreasonably.

As such, this Court should reverse the BTLA's denial of the Towns' Motion.

C. The BTLA's denial of the Towns' Motion based on the Towns' submission of stipulations ordered by the BTLA was unjust and unreasonable.

It was unjust and unreasonable for the BTLA to deny the Towns' Motion on the basis that the Towns provided a stipulation as to the GES determination of fair market value because said stipulation reflects no comment or suggestion as to how the BTLA should apply the equalization ratio.

At the outset, it is important to note that the stipulations at issue in this case are readily distinguishable from traditional stipulations that are voluntarily entered into by the parties. See Czumak v. N.H. Div. of Developmental Servs., 155 N.H. 368, 373 (2007) (discussing nature of stipulations). Specifically, the stipulations at issue here were ordered by the BTLA in the midst of trial, notwithstanding the Towns' legitimate

concerns about how they would be used. Appd'x Vol II at 68–69, 76–83. The BTLA specifically ordered the parties in this case to submit stipulations reflecting, in pertinent part: (a) the aggregate assessments for each Municipality and for each tax year; (b) the equalization ratios for each Municipality and for each tax year; (c) GES's final determination of fair market value; and (d) Concentric's opinion of fair market value. Appd'x Vol II at 68–69. Notably, the BTLA's order did not suggest how the Board intended to utilize the stipulations or require the Towns to stipulate how those data points would be applied. Indeed, the BTLA did not suggest how the BTLA intended to apply the equalization ratios, and it did not suggest that the BTLA would apply equalization ratios to PSNH's already-proportionate Land Interests. See id.

Further, the record clearly demonstrates that, contrary to PSNH's assertions, the Towns did not stipulate as to how these data points would be used. In fact, the contrary occurred. In response to the BTLA's order, the Towns expressed concern as to the Board's request, namely the Board's intent regarding the use of the equalization ratios and the opinions of value to be produced as part of the Board's order. Appd'x Vol II at 82–83. The Towns specifically noted that there may be a "double equalization" issue if the equalization ratio were to be used to determine whether PSNH had been over-assessed given that the assessments for PSNH's property were already proportionate. Appd'x Vol II at 82–83. These statements demonstrate that the Towns did not agree to the use or application of the facts to which they were required to stipulate in these proceedings. Notwithstanding the Towns' concerns, however, the BTLA continued to order the production of the stipulation. Appd'x Vol II at 84–86. It was, therefore, unjust and

unreasonable for the BTLA to deny the Towns' Motion for Partial Reconsideration on the ground that the Towns—in direct response to an order from the BTLA—stipulated to the facts of the DRA's equalization ratios and the GES estimate of fair market value. Such a conclusion of devoid of any support in the record.

To the extent the BTLA denied the Towns' Motion for Partial Reconsideration based solely on the fact that the Towns stipulated to certain equalization ratios and fair market values, the decision was unjust and unreasonable, and it should therefore be reversed.

D. It was unjust and unreasonable for the BTLA to deny the Towns' Motion for Partial Reconsideration on the grounds that any error was "harmless" or "de minimis."

It was unjust and unreasonable for the BTLA to deny the Towns' Motion for Partial Reconsideration on the basis that the alleged error was "harmless" because the error increased Chester's liability for Tax Year 2014 by $42,537.90 and increased Hudson's liability for Tax Years 2014 through 2016 by $51,455.50. PSNH attempts to undercut the unreasonableness of the BTLA's decision on the merits by baldly asserting that the BTLA made a finding of fact by rejecting the Towns' arguments regarding double equalization. See PSNH's Mot. Summ. Affirmance at 11–12. Upon reviewing the tax impacts that the BTLA's decision had on Chester and Hudson, however, it becomes clear that the BTLA's decision was unreasonable and unlawful.

In this case, the BTLA determined that because PSNH's Land Interests were "relatively minor" in comparison to its T&D Assets, it was not necessary to consider the correct methodology for determining the

proportionality of the taxes on those Land Interests. See Appd'x Vol I at 33. However, in these consolidated tax appeals, the BTLA was to consider the facts and circumstances with regard to each municipality individually. Had the BTLA done so, the BTLA would have ascertained that in Hudson and Chester, PSNH's Land Interests did not constitute a "relatively minor" component of value. For example, for Tax Year 2016, PSNH's Fee Land and Buildings in Hudson had an aggregate assessment of $2,009,400.00, which is certainly not de minimis. The impact of the BTLA's decision is sufficient to cause the Towns to have moved for reconsideration and for PSNH to object (and continue to object).

Here, the BTLA's approach was unreasonable and unlawful in view of the fact that its application of equalization ratios to already-proportional Land Interests resulted in an additional $42,537.90 tax liability for Chester in Tax Year 2014, and an additional $51,455.50 for Hudson in Tax Years 2014 through 2016. Given these figures, it is plain that no reasonable fact-finder would have dismissed the Towns' concerns and that the additional tax liability imposed by the BTLA was not de minimis as a matter of law.

VIII. CONCLUSION

The decision of the BTLA was unjust and unreasonable. The BTLA plainly overlooked or misapprehended that the value of PSNH's Land Interests contained in both the Concentric and GES opinions of value were already proportionate. Therefore, the BTLA erred in equalizing those values. This error unjustly and unreasonably increased the Towns' liability in this case, and the BTLA's decision should, therefore, be reversed.

Likewise, the BTLA's decision denying the Towns' Motion was unjust and unreasonable because the Towns timely raised this double equalization issue at trial, the Towns never stipulated to how the BTLA would apply the DRA's median income ratios, and the resultant harm was far from de minimis. The Towns of Chester and Hudson, therefore, respectfully request that this Honorable Court reverse the decision of the BTLA.

The BTLA's errors, if left uncorrected, will result in a windfall to PSNH. Should those errors be sustained, the burden of PSNH's windfall will land squarely on the shoulders of the Towns' taxpayers. Although PSNH and the BTLA have attempted to characterize this unjustified and added burden as "harmless error," it is anything but harmless to the Towns and, to a far greater extent, the individual residents who will ultimately pay for the BTLA's mistakes. The equities of this case weigh heavily in favor of the Towns and their taxpayers. The decision of the BTLA on this narrow point must be reversed.

Dated this 2nd day of April, 2021.

Respectfully Submitted:

TOWNS OF CHESTER AND HUDSON, NH

By Their Attorneys:

DONAHUE, TUCKER & CIANDELLA, PLLC

/S/ William K. Warren
Christopher L. Boldt, Esq.
Bar No. 15301
Eric A. Maher, Esq.
Bar No. 21185
William K. Warren, Esq.
16 Acadia Lane
Exeter, New Hampshire
(603)778-0686
cboldt@dtclawyers.com
emaher@dtclawyers.com
wwarren@dtclawyers.com

COMPLIANCE WITH SUPREME COURT RULE 16(11)

I hereby certify that the foregoing Brief For the Towns of Chester and Hudson complies with Supreme Court Rule 16(11) and contains a total of 8,968 words exclusive of the Table of Contents and Table of Authorities.

/S/ Eric A. Maher
Christopher L. Boldt, Esq.
Eric A. Maher, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been transmitted via the Court's electronic filing system this 2nd day of April, 2021, to Margaret Nelson and Derek Lick, counsel for Public Service Company of New Hampshire d/b/a Eversource Energy, and has been hand delivered or transmitted via U.S. first-class mail, postage prepaid to the Board of Tax and Land Appeals, 107 Pleasant Street, Concord, NH 03301, and to the New Hampshire Attorney General's Office, 33 Capitol Street, Concord, NH 03301.

/S/ Eric A. Maher
Christopher L. Boldt, Esq.
Eric A. Maher, Esq.