THE STATE OF NEW HAMPSHIRE

SUPREME COURT

2020 TERM
FALL SESSION

CASE NO. 2020-0475

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A
EVERSOURCE ENERGY

v.

THE TOWNS OF CHESTER AND HUDSON

ON APPEAL FROM A DECISION AND ORDER OF
THE BOARD OF TAX AND LAND APPEALS
DOCKET NOS. 27782-14PT, 28804-16PT, 27811-14PT,
2818-15PT & 28724-16PT
MASTER FILE DOCKET NO.: 29973-14-15-16-17PT

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE D/B/A EVERSOURCE ENERGY – APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

COURT CASES

ADMINISTRATIVE CASES

STATUTES

ADMINISTRATIVE RULES

OTHER

STATEMENT OF THE CASE

This is in an appeal by the Towns of Chester and Hudson ("Chester" and "Hudson" or the "Towns") challenging portions of a Decision (the "Decision") of the New Hampshire Board of Tax and Land Appeals (the "BTLA") concerning the taxable property of Public Service Company of New Hampshire d/b/a Eversource Energy ("Eversource") located in Chester for Tax Years 2014 and 2016 and in Hudson for Tax Years 2014, 2015 and 2016.

Pursuant to RSA 76:17, Eversource filed a number of tax appeals with the BTLA concerning the market value and proportional assessment of its taxable property located in various municipalities (the "Municipalities") for Tax Years 2014, 2015, 2016 and 2017. Following a consolidated hearing held over four weeks, in June 2020 the BTLA issued its Decision, concluding that abatements should be granted in a number of the pending appeals, including the appeals concerning certain transmission and distribution ("T&D") assets located in Chester and Hudson based upon the market value estimates of the Municipalities' expert, George E. Sansoucy, LLC ("GES"). In arriving at its determination, consistent with standard practice, the BTLA equalized GES's fair market value conclusions by applying the appropriate Department of Revenue Administration ("DRA") median equalization ratios in order to arrive at fair and proportional assessments.

Several Municipalities filed a Motion for Partial Reconsideration with the BTLA, including Chester and Hudson, arguing for the first time on reconsideration that the BTLA should not apply the DRA's median

equalization ratios (which the BTLA requested from the parties in advance of its Decision) to components of GES's fair market valuation calculations in determining disproportionality and ordering refunds of taxes paid to Eversource. Following the BTLA's denial of their Motion, only Chester and Hudson appealed to this Court pursuant to Rule 10.

The singular focus of Chester and Hudson's appeal is the equalization of GES's fair market value conclusions regarding Eversource's land and use of the public right-of-way ("PROW") by the relevant DRA median equalization ratios. The Towns' current argument, presented to this Court, was raised for the first time after the close of hearings and after all post-hearing briefing was submitted. Chester and Hudson's tactical decision to decline to argue how the equalization ratios should have been applied to either side's fair market value conclusions prior to the issuance of the BTLA's Decision precludes consideration at this time.

Moreover, Chester and Hudson's appeal ignores the fact that the BTLA – pursuant to New Hampshire law and standard assessing practice – properly adjusted GES's aggregate market value conclusions by the applicable equalization ratios to arrive at fair and proportional assessments. Not only did the BTLA properly rely upon the equalization ratios stipulated-to by counsel for Eversource and counsel for Chester and Hudson in reaching its decision, but the methodology advocated for in the current appeals runs directly counter to the methodology performed Chester and Hudson's own expert.

Accordingly, there is no basis to reverse the BTLA's Decision, and the Decision should be affirmed.

STATEMENT OF FACTS

Eversource is an electric utility company providing electricity to residential and business customers in communities across New Hampshire. *See,* Towns' Appd'x Vol. I at 4 – BTLA Decision.[1] In order to serve its customers, Eversource maintains not only a T&D network, but owns fee land and conventional buildings across the State and owns certain easements for its transmission facilities. It is also required to pay taxes based upon its use of the PROW. *See,* RSA 72:23, I; *N. New Eng. Tel. Operations, LLC v. Town of Acworth*, 173 N.H. 660, 672 (2020).

Pursuant to RSA 76:16-a, Eversource filed tax appeals with the BTLA concerning the market value and proportional assessment of its taxable property located in certain municipalities for Tax Years 2014, 2015, 2016 and 2017 on the basis that the appealed municipal assessments were excessive and disproportional. Towns' Appd'x Vol. I at 4 – BTLA Decision. The BTLA consolidated Eversource's tax appeals for Tax Years 2014 – 2017 for hearing. Prior to the time of hearing, many of the appeals were settled; ultimately, appeals involving 47 municipalities were considered by the BTLA. *Id.* Appeals for 46 municipalities involved the market value and proportional assessment of property associated with Eversource's T&D system, including use of the PROW and transmission easements as well as fee owned land and conventional buildings such as work centers. *Id.* Among the appeals concerning the market value and proportional assessment of Eversource's T&D system were those

[1] Where appropriate, Eversource cites to Chester and Hudson's Appendices "Towns' Appd'x [Volume] at [Page Number]." Materials not included in Chester and Hudson's Appendices are included in Eversource's contemporaneously filed Appendix "Eversource's Appd'x at [Page Number]."

concerning Eversource's taxable estate located in Chester (for Tax Years 2014 and 2016) and Hudson (for Tax Years 2014, 2015 and 2016). *Id.*

Consolidated hearings were held before the BTLA over a four-week period in November and December of 2019. Eversource presented the expert testimony of John Reed and Ann Bulkley of Concentric Energy Advisors, Inc. ("Concentric"). Ms. Bulkley, as Eversource's appraisal expert, testified to her evaluation of Eversource's T&D assets and generation assets and her conclusion as to their highest and best use and resulting market values. Eversource's Appd'x at 12-24, 32, 38, 46-49 – Tr., Day 2, pp. 139-40, 196-98, 239-40; Day 3, pp. 57, 60; Day 8, p. 223; Day 11, pp. 134-35. She separately valued Eversource's conventional buildings, land and land interests, including its use of the PROW for its distribution system. *Id.*

At the close of Eversource's case-in-chief, the Municipalities moved for a directed verdict. Eversource objected. The BTLA denied the Municipalities' request. Eversource's Appd'x at 4 – Order, dated November 19, 2019.

The Municipalities then presented their case, including the expert testimony of George Sansoucy and Brian Fogg of GES. *Infra* at 22-25. GES had also prepared an appraisal report of Eversource's property. Notably, under the results of that appraisal report properly adjusted for proportionality, Eversource was due refunds in a majority of the municipalities under appeal. Towns' Appd'x Vol. I at 36-43 – BTLA Decision.

The appraisal report prepared by GES establishes that they relied on the values of certain land parcels as determined by the individual municipal

assessors to reflect fair market value for the purposes of determining the base value of Eversource's use of the PROW and its transmission easements; GES then made various adjustments to arrive at a final indications of value. Eversource's Appd'x at 56-72 – GES's Appraisal Report, pp. 2, 102, 262-73 (Tables 62-65). Eversource's expert, Concentric, took the same approach with respect to land held in fee by Eversource and the land assessments used to determine the market value of Eversource's use of the PROW and its transmission easements. *See*, Eversource's Appd'x at 73-76 – Concentric's Appraisal Report, pp. 5, 6, 26, Schedule E.

Mr. Fogg and Mr. Sansoucy of GES both testified to their valuation approach before the BTLA. Mr. Fogg testified at length that GES concluded that the municipal assessments of Eversource's buildings, fee land and the base land values of the PROW and transmission easements reflected market value for those components of property in the respective Municipalities. *See, e.g.*, Eversource's Appd'x at 25-38 – Tr., Day 7, pp. 42-44 (confirming that GES relies on the "fair market values of parcels under the town's CAMA system" and then describing GES's process in confirming that the municipal assessments fairly reflected market value); Tr., Day 7, pp. 177-78 (discussing how GES relied on the assessed value as reflective of market value and that use of the PROW was valued separately); Tr., Day 8, pp. 219-223 (explaining the process that GES undertook to reach its conclusions that the municipal assessments of the building, land and base component of the PROW reflected market value.)

Critically – and consistent with GES's appraisal – Mr. Fogg testified that GES did not adjust the final assessments (as indicated on Exhibit 43)

when conducting their analysis. Eversource's Appd'x at 38-45 – Tr., Day 8, p. 223; Day 9, pp. 198-99; Day 10, p. 108.

Prior to the close of hearings, the BTLA instructed counsel for Eversource and the Municipalities to prepare a joint submission detailing: "docket numbers, case list, total assessed value for each community for each tax year, equalization ratios…[and] the equalized assessments not by parcel but by municipality" as well as "the taxpayer's opinion of market value as well as the municipalities' opinion of market value." Towns' Appd'x Vol. II at 68-69 – Tr., Day 9, pp. 190-91. Eversource's counsel prepared a spreadsheet as directed by the BTLA and shared it with Municipal counsel. Towns' Appd'x Vol. II at 75-86 – Tr., Day 10, pp. 6-17. Municipal counsel reviewed the spreadsheet and flagged several discrepancies in the figures. *Id.* Counsel for Eversource and the Municipalities then continued to work together to prepare an agreed-to filing. Eversource's Appd'x at 50-55 – Tr., Day 12, pp. 84-87. Ultimately, the figures were stipulated to by all parties and were submitted to the BTLA on December 23, 2019. *See,* Towns' Appd'x Vol. II at 20-26 – Objection to Motion (attaching spreadsheet). The final, stipulated-to spreadsheet became Exhibit 43. *See,* Towns' Appd'x Vol. I at 4 – BTLA Decision.

On June 23, 2020, the BTLA issued its Decision. *Id.* Utilizing Exhibit 43 as a source document for its Table 1, "Quantitative Summary" and Table 2, "Findings in Each Appeal," the BTLA concluded that abatements should be granted for 91 of the 138 pending appeals, including the appeals concerning certain T&D assets located in Chester and Hudson based upon the market value estimates of the Municipalities' experts, GES.

Id. at 36-43. For the remainder of the appeals, the BTLA concluded that Eversource did not satisfy its burden of proving disproportionality.[2] *Id.*

On July 23, 2020, the Towns of Durham, Farmington and Sandwich filed a "Motion for Partial Reconsideration of Decision Dated June 23, 2020" (the "Motion"), asserting for the first time that the BTLA should not have applied the stipulated equalization ratios to GES's fair market conclusions regarding Eversource's conventional buildings, fee land, use of the PROW and transmission easements. *See,* Towns' Appd'x Vol. I at 45 – Motion. That same day, 24 other municipalities, including Chester and Hudson, filed a "Notice of Joinder" with the Motion. *See,* Towns' Appd'x Vol. I at 50 – Joinder. Eversource filed a timely Objection. Towns' Appd'x Vol. II at 4.

By Order dated September 18, 2020, the BTLA denied the "Motion for Partial Reconsideration," finding the Motion "without merit." Towns' Appd'x Vol. II at 27 – Order. The BTLA cited to Eversource's Objection in denying the Motion, determining that: the Municipalities failed to demonstrate "good reason" justifying reconsideration; holding that the Municipalities improperly raised arguments for the first time after the Decision was issued that could have been raised early in the proceedings; finding that the BTLA properly applied the stipulated-to equalization ratios to the values of certain taxable parcels which both parties' appraisers treated as reflecting fair market value; and concluding that to the extent the Municipalities' Motion raised an issue justifying reconsideration, such an issue would not have changed the BTLA's decision. *Id.*

[2] While Eversource respectfully disagrees with the BTLA's factual conclusions regarding its experts' appraisal, Eversource elected not to appeal the BTLA's Decision.

Of the 27 municipalities which filed for reconsideration with respect to this issue, only Chester and Hudson filed an appeal with this Court under Rule 10.

SUMMARY OF ARGUMENT

The question in this case is a simple one: should a party be bound by its own experts' conclusions and methodology as well as agreements the party entered into, or can a party turn on a dime when its prior position leads to an outcome it dislikes? As the BTLA properly found, Chester and Hudson should be held to their stipulations and positions taken over four weeks of hearings. Chester and Hudson cannot meet their burden in showing that the BTLA's Decision was "clearly unreasonable or unlawful" based upon the evidence produced and New Hampshire law. *In Re Campaign for Ratepayers' Rights*, 162 N.H. 246, 249 (2011); RSA 541:13. Accordingly, this Court should affirm the BTLA's Decision

On appeal, Chester and Hudson raise four arguments: (1) that the BTLA erred in applying the median equalization ratio to Eversource's fee land, buildings, transmission easements and use of the PROW interests; (2) that the BTLA erred in denying Chester and Hudson's Motion for Partial Reconsideration on timeliness grounds; (3) that the BTLA erred in denying Chester and Hudson's Motion for Partial Reconsideration based on stipulations Chester and Hudson entered into; and (4) that the BTLA erred in denying Chester and Hudson's Motion for Partial Reconsideration on the basis the alleged errors were harmless. Towns' Brief, pp. 6-7.

As a preliminary point, even if the Towns' arguments provided any basis for relief – a point which Eversource strongly rejects – the fact of the

matter remains that the arguments raised on appeal are untimely. Chester and Hudson did not properly raise any of the questions now raised at the earliest possible time, raising them for the first time in a post-Decision pleading. *Infra* at 16-20. As such, the Court should reject Chester and Hudson's arguments and affirm the BTLA's Decision.

Moreover, even if this Court were to consider the questions raised in Chester and Hudson's appeal, none of their arguments provide a valid basis to overturn the BTLA's Decision, which was based on its review of the factual record together with its specialized knowledge in this field. The record reflects that the BTLA properly relied on the figures stipulated-to by counsel for Eversource and counsel for Chester and Hudson as *fair market values*, not *equalized values* in preparing Table 1 and Table 2, which was cross referenced in its Decision. *See,* Towns' Appd'x Vol. I at 36-43 – BTLA Decision. The BTLA properly applied the stipulated-to equalization ratios to the Towns' own expert's fair market conclusions to reach its determination that abatements were warranted in 91 of the 138 appeals. Chester and Hudson had ample opportunity – at the hearings, when equalization ratios were requested by the BTLA, in their post-hearing memorandum and in their reply memorandum – to argue why the equalization ratio should not have been applied, for some reason, to either side's fair market value conclusions. They chose not to do so, improperly raising this issue for the first time in a post-Decision Motion.

Similarly, the BTLA's decision to hold Chester and Hudson to stipulations they entered into does not provide a valid basis for appeal: the position taken by Chester and Hudson in this appeal is at odds with how their own experts treated Eversource's land and buildings values and base

land values for PROW as fair market value. *See,* Towns' Appd'x Vol. II at 4-26 – Objection to Motion. Chester and Hudson can hardly argue that the BTLA's reliance on the fair market value presented by their own expert and the equalization ratios they stipulated-to was improper when arriving at the final assessments.

Finally, the notion that the BTLA erred in denying Chester and Hudson's Motion for Partial Reconsideration on the basis that the Towns' alleged errors were harmless misses the mark. As the trier of fact and based upon its specialized experience, the BTLA was perfectly within its rights to conclude that certain claims were not material in the context of the issues presented by this case. This factual determination does not provide a valid basis by which to appeal the BTLA's decision.

Therefore, this Court should rejected Chester and Hudson's arguments and affirm the BTLA's Decision.

STANDARD OF REVIEW

Appeals from BTLA decisions are governed by RSA 541. "The BTLA's findings of fact are deemed prima facie lawful and reasonable." *Appeal of Town of Charlestown*, 166 N.H. 498, 499 (2014); RSA 541:13. In evaluating evidence, the BTLA is entitled to utilize and rely upon its "experience, technical competence, and specialized knowledge." RSA 541-A:33, VI. Decisions of the BTLA "shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable." RSA 541:13; *see also, Appeal of Liberty Assembly of God*, 163 N.H. 622, 625 (2012). Accordingly, in order to prevail in this appeal, Chester and Hudson

"must show by a preponderance of the evidence that the BTLA's decision was clearly unreasonable or unlawful." *Appeal of Town of Charlestown*, 166 N.H. at 499.

In reviewing the BTLA's decision, this Court's task "is not to determine whether [it] would have found differently" than the BTLA, "or to reweigh the evidence, but to determine whether the findings are supported by competent evidence in the record." *See, Appeal of Phillips*, 165 N.H. 226, 235 (2013). The weight to be given to evidence is within the trier of fact's province. *Appeal of Newcomb*, 141 N.H. 664, 668 (1997). This Court will defer to the trier of fact's judgment on such issues as resolving conflicts in the testimony, measuring the credibility of witnesses, and determining the weight to be given evidence. *Town of Atkinson v. Malborn Realty Trust*, 164 N.H. 62, 66-67 (2012); *Appeal of City of Nashua*, 138 N.H. 261, 264-65 (1994).

ARGUMENT

I. Chester and Hudson Failed to Raise Their Claimed Appellate Issues at the Earliest Possible Time. Accordingly, the BTLA Did Not Err in Denying Chester and Hudson's Motion for Partial Reconsideration on Timeliness Grounds.

This Court should reject Chester and Hudson's argument that the BTLA "unlawfully denied the Towns' Motion on timeliness grounds." Towns' Brief, p. 30. The BTLA properly rejected Chester and Hudson's Motion on the basis, among others, that the arguments raised in their Motion were untimely. Towns' Appd'x Vol. II at 27-29 – Order. This

holding was consistent with the record, the BTLA's Rules and New Hampshire law more generally.

Under the BTLA Rules, motions for rehearing, reconsideration, clarification or other post-hearing relief (collectively referred to as a "rehearing motions") "shall only be granted for good reason, pursuant to RSA 541:3, and a showing shall be required that the board overlooked or misapprehended the facts or the law and such error affected the board's decision. Rehearing motions shall not be granted for harmless errors that, if corrected, would not change the board's decision." N.H. Admin. R. Tax 201.37(e). The BTLA has previously held that the "good reason" standard is not met when a motion "fails to establish the Decision overlooked or misapprehended any relevant points of law or fact or a need for further clarification." Simply restating arguments already presented at the hearing or making new arguments that could have been raised at the hearing does not satisfy this standard." *Kadle v. Town of Peterborough*, BTLA Docket No.: 27963-14PV, 2016 N.H. Tax LEXIS 30, at *1 (April 8, 2016) (emphasis added). "[R]ehearing 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. Admin R. Tax 201.37(g). The BTLA's Rules "make it essential for a party to present all arguments in a timely manner and not for the first time through a 'reconsideration' motion." *Comcast Corporation v. City of Lebanon*, BTLA Docket No.: 23979-08PT, 2012 N.H. Tax LEXIS 126, at *1-2 (July 30, 2012) (emphasis added).

This standard was emphasized in the Board's June 23, 2020 Order, and is consistent with New Hampshire law more generally, precluding

judicial review on issues not raised at the earliest possible opportunity. Towns' Appd'x Vol. I at 34-35 – BTLA Decision; *see, e.g., Sklar Realty v. Town of Merrimack*, 125 N.H. 321, 328 (1984). This Court has long recognized that it is in the interest of fundamental fairness and judicial economy to "*require*" a party to raise all possible arguments and objections at "the earliest possible time." *Mt. Valley Mall Assocs. v. Municipality of Conway,* 144 N.H. 642, 654-55 (2000) (emphasis in original text). Applying this standard to the instant case, it is clear not only that the BTLA properly denied Chester and Hudson's Motion, but that no additional relief is warranted with respect to the same.

Throughout the hearings and its post-trial briefing, Eversource made its position clear that both the Concentric and GES market values had to be equalized to arrive at fair and proportional assessments. *See,* Towns' Appd'x Vol. II at 4-26 – Objection to Motion. Neither in the preparation of Exhibit 43 nor at any other point during the hearings did any of the Municipalities take the position that certain components of the experts' market value conclusions – buildings, fee land, use of the PROW and transmission easements – should remain unequalized as they now claim. Indeed, since at least the time expert disclosures were made, Chester and Hudson knew that both Eversource's expert and their own experts were treating the municipal assessments of Eversource's buildings, fee land, use of the PROW and transmission easements as reflecting the *fair market value* of those assets as of the assessment dates under appeal. Eversource's Appd'x at 73-76 – Concentric's Appraisal Report, pp. 5, 6, 26.

Both Eversource's experts and Chester and Hudson's experts confirmed their opinions repeatedly during their hearing testimony. *Infra* at

22-25. Chester and Hudson made the tactical decision not address the argument they are now making in any of the post-hearing briefing, even after having the opportunity to review Eversource's post-trial memorandum. Chester and Hudson had ample opportunities to lay out the methodology they now claim should have been followed when the BTLA asked for equalization ratios and when discussions about Exhibit 43 took place, but they failed to do so.

The one point in the record that Chester and Hudson point to in support of their argument that they raised the issue now on appeal concerns the notion of "double equalization." Towns' Brief, pp. 28, 30-31. The Towns argue that their counsel "raised concerns" as to the application of the equalization ratio during the hearings, suggesting that "the BTLA's methods could result in" what the Towns characterize as "double equalization." Towns' Brief, p. 30; Towns' Appd'x Vol. II at 68-69, 75-86 – Tr., Day 9, pp. 190-91; Tr., Day 10, pp. 6-17. Not only does the record establish that the notion of "double equalization" has no merit, but the cited discussion concerned an unrelated issue. *Id.*; *see also, infra* at 30. This discussion did not raise the arguments Chester and Hudson are now presenting.

In declining to grant the relief sought by Chester and Hudson's post-Decision Motion on timeliness grounds, the BTLA did not impose a time period stricter than RSA 541:3, as suggested by the Towns. Towns' Brief, p. 30. Rather, in denying the Towns' Motion on timeliness grounds, the BTLA recognized that not once did the Municipalities argue – at the hearings or in their post-hearing briefing – the notion that the BTLA erroneously applied the equalization ratio to Eversource's fee land,

easements, buildings and the base values for the PROW. *Id.* at 20; Towns' Appd'x Vol. II at 27-33 – Order. This decision was well within the BTLA's authority and was grounded in the facts of the case and established law holding that failure to raise claims in a timely manner amounts to waiver. *Mt. Valley Mall Assocs.*, 144 N.H. at 654-55; *see also,* N.H. Admin. R. Tax 201.37(g).

Relatedly, Chester and Hudson's instant appeal fails to adhere to Supreme Court Rule 16(3)(b), which provides in relevant part that "[a]fter each statement of a question presented, counsel shall make specific reference to the volume and page of the transcript where the issue was raised and where an objection was made, or to the pleading which raised the issue. Failure to comply with this requirement shall be cause for the court to disregard or strike the brief in whole or in part, and opposing counsel may so move within ten days of the filing of a brief not in compliance with this rule." Sup. Ct. R. 16(3)(b). While Chester and Hudson do cite to materials in their Appendices, those materials do not show points in the record where the questions presented on appeal were preserved in the record.

Of the four questions presented in Chester and Hudson's Brief, they all cite to the Towns' Appendix, Volume I at 45-54, which is the Municipalities' "Motion for Partial Reconsideration of Decision Dated June 23, 2020" – a pleading filed after entry of the BTLA's Decision. The only other citation in the "questions presented" section of Chester and Hudson's Brief is with respect to the first question, regarding the appropriateness of applying the DRA's median equalization ratios to the fair market values of Eversource's land interests as provided by the Municipalities' own expert,

GES. Town's Brief, pp. 6-7. That citation is to Day 10 of the hearing transcript. Towns' Appd'x, Vol. II at 70-86. As discussed below, the referenced citation speaks to an unrelated issue regarding the assessment data to be provided in the spreadsheet requested by the BTLA. *See, infra* at 30; Towns' Appd'x Vol. II at 68-69, 75-86 – Tr., Day 9, pp. 190-91; Tr., Day 10, pp. 6-17. Put simply, at no point were the arguments now brought before this Court raised at the hearings before the BTLA.

Taken together, even if Chester and Hudson's arguments had any merit, the fact of the matter remains that they are too late in raising these issues. This Court should affirm the BTLA's Decision because the BTLA properly denied Chester and Hudson's belated attempt to argue for a methodology for calculating assessments they now seek to employ.

II. The BTLA Did Not Err in Applying the DRA Median Equalization Ratio to Eversource's Land Interests Located in Chester and Hudson.

At its core, Chester and Hudson's argument on appeal is that taking the figures stipulated-to by the parties and set forth in Exhibit 43, the BTLA improperly equalized certain components of GES's market value conclusions relating to Eversource's buildings, fee land, use of the PROW and transmission easements. *See,* Towns' Brief, p. 17. This argument is unsupported by the record and is inconsistent with New Hampshire law in calculating fair and proportional assessments.

A. *Chester and Hudson's Current Position is Inconsistent with Their Own Expert's Approach to Concluding Fair Market Value.*

Setting aside the fact that Chester and Hudson did not properly raise this alleged issue in a timely manner, Chester and Hudson's appeal ignores the undisputed evidence in the record that their own expert represented that the values of Eversource's assets (set forth in their appraisal) reflected their opinions of fair market value, not already-equalized values. The BTLA's application of stipulated-to equalization ratios to the values of Eversource's taxable parcels was perfectly appropriate, and was a factual determination specifically within the BTLA's purview as the finder of fact and as a technical expert in addressing the issues raised by the Towns. Chester and Hudson's appeal provides no basis to reverse this decision.

The record establishes that both Eversource's expert, Concentric, and Chester and Hudson's expert, GES, treated the values of Eversource's taxable parcels as reflecting fair market value. *Infra* at 23-25. Contrary to Chester and Hudson's position in the instant appeal, the undisputed record establishes that GES's appraisal reflected the fair market value of not only Eversource's utility improvements but also of buildings, fee land, use of the PROW and transmission easements under appeal.

Indeed, the GES appraisers were careful to explain the extent of their investigation to confirm that these values properly represented fair market value. For example, the transmittal letter accompanying GES's expert report states:

> [Eversource] owns parcels of land (some with improvements) in fee simple estate in many of the Municipalities, which have been valued

> at the revaluation by each community's assessor (using the CAMA system) in each of the tax years. We have assumed that these values represent the fair market value of these properties for the purpose of this report.

Eversource's Appd'x at 58 – GES's Appraisal Report, p. 2

Consistent with this representation, the undisputed evidence establishes that the Towns' own expert took the position that the values of these assets reflected their opinions of fair market value; they then relied on the values of certain land parcels (as determined by the individual Municipalities' assessors) to reflect fair market value for the purposes of determining the base value of Eversource's use of the PROW and its transmission easements to which GES then made various adjustments to arrive at a final indications of market value. Eversource's Appd'x at 56-72 – GES's Appraisal Report, pp. 2, 102, 262-73 (Tables 62-65) (showing GES's final reconciliation of values at fair market value); *see also,* Eversource's Appd'x at 25-45 – Tr., Day 7, pp. 42-44, 177-78; Day 8, pp. 219-223; Day 9, pp. 198-99 (Mr. Sansoucy's testimony regarding GES's methodology when valuing Eversource's interests in transmission easements); Day 10, p. 108 (noting that GES provided their analysis of the parcels Eversource's transmission easements cross "to the towns in the revaluation so that any of the assessors in the community can consider the value that we put on the easement. If they take value off the primary parcel, we provide that during revaluations").

Eversource's expert, Concentric, took the same approach with respect to land held in fee by Eversource and the land assessments used to determine the market value of Eversource's use of the PROW and its

transmission easements. Eversource's Appd'x at 73-76 – Concentric's Appraisal Report, pp. 5, 6, 26, Schedule E; *see also,* Eversource's Appd'x at 12-24, 32, 38, 46-49 – Tr., Day 2, pp. 139-40, 196-98, 239-40; Day 3, pp. 57, 60; Day 8, p. 223; Day 11, pp. 134-35.

Aside from the written appraisal reports submitted by the parties' appraisers, during the hearings before the BTLA both parties' experts testified regarding their respective decisions to treat the Municipalities' assessments of Eversource's conventional buildings, fee land, and base land values used to value the use of the PROW and transmission easements as consistent with their fair market value. *See, id.*

The Towns' appraisal expert even testified that GES did not "just assume" that the assessed values of the tax card represented fair market value: "[w]e made that assumption because we had intimate knowledge about what was on the tax cards and therefore, our assumption that those market values were -- I mean, those assessed values had some relationship to market value were valid." *Id.* Mr. Fogg further testified that GES verified the information on the tax cards for all of the municipalities under appeal. *Id.* at 222.

Similarly, Ms. Buckley testified that Concentric accepted the municipal assessors' values of the land and included them in their estimates of the market value of Eversource's property. Eversource's Appd'x at 12-24, 32, 46-49 – Tr., Day 2, pp. 139-40; 196-98 ("I relied on the assessments as the market value of the assessments"); Day 2, pp. 239-40; Day 3, pp. 57, 60 ("I've taken the land values out of regulation and attributed a market value of the land in relying on the assessments, and I've done the same thing with the work centers. And I have separately valued the use of the

right-of-way and the easement based on the market value of the land."); Day 11, pp. 134-35 (noting that GES and Concentric both relied on the assessed value as the fair market value for the assets).

Chester and Hudson's expert explicitly confirmed that GES and Concentric both accepted the assessed values of Eversource's buildings, fee land and the base land values of the PROW and transmission easements as reflective of market value:

> Q. So, in fact, when Ms. Bulkley accepted as a proxy for fair market value assessments, in some cases, she was actually agreeing with you, wasn't she? Maybe the only time in this case, but is that correct?
>
> A. [Mr. Fogg] It might be the second time, but she did, yeah.

Eversource's Appd'x at 38 – Tr., Day 8, pp. 223.

Chester and Hudson's position in the current appeal is at odds with their own experts' approach to arriving at fair market value. Exhibit 43, which was stipulated to by counsel for the Towns, was consistent with this undisputed evidence that GES treated the assessments of buildings, land and the base value of the PROW and transmission easements as reflective of fair market value, to which the equalization ratio would *later* have to be applied by the BTLA in reaching its Decision. Equalization was not already "baked in" to the experts' values as the Towns now suggest.

Given the extensive factual record on this issue, the BTLA, in its role as the finder of fact, properly adjusted GES's aggregate market value conclusions by the applicable equalization ratios to arrive at fair and proportional assessments. *See, Appeal of City of Nashua*, 138 N.H. at 266

(recognizing the need to utilize a "uniform equalization ratio to ensure proportional assessments" in order to "appraise property fairly for taxation purposes"). Chester and Hudson can hardly complain that the BTLA equalized the values set forth in Exhibit 43 when their own experts treated those values as reflecting fair market value as of April 1, 2014, 2015, 2016 and 2017. As such, the Towns' position on appeal provides no basis to reverse the BTLA's factual findings and determinations.

B. *Chester and Hudson Ignore the Fact that Application of the Appropriate Median Equalization Ratio was Necessary to Arrive at Fair and Proportional Assessments.*

Chester and Hudson's appeal ignores the fact that adjustment of GES's aggregate market value conclusions by the applicable equalization ratios was necessary to arrive at fair and proportional assessments. *See, Appeal of City of Nashua*, 138 N.H. at 266.

Under New Hampshire law, the DRA is required to equalize the local assessed values for each municipality on an annual basis. *See,* RSA 21-J:3, XIII. This process is conducted for each municipality, with assessment data, ratio studies and statistical analysis taken into consideration in order to calculate the proportionality of a municipality's assessments compared to fair market value. RSA 21-J:9-a. In the case of real property tax abatement appeals, the established method to determine proportional assessments is to apply the equalization ratios to the estimates of fair market value for the property at issue so as to determine proportionality. *See, e.g., Milford Properties v. Milford*, 119 N.H. 165, 168 (1979). This is what the BTLA did in this case, which was an appropriate

determination for the BTLA to make in its role as the trier of fact, and a necessary step as a matter of law to ensure that the ultimate assessed values were fair and proportional.

Relatedly, as this Court has recognized on numerous occasions, the BTLA's analysis and ultimate determination of fair market value is a technical process which is a matter directly within the BTLA's purview of the trier of fact. "Determination of fair market value is an issue of fact." *Appeal of Pennichuck Water Works*, 160 N.H. 18, 37 (2010). Given the "extraordinary difficulties in placing a fair market value on the property of a regulated utility" the trier of fact is given "considerable deference in this area." *Id.* The BTLA's application of the stipulated-to equalization ratios to Chester and Hudson's aggregate market value conclusions is a matter that falls squarely within the BTLA's purview as the finder of fact, relying on its technical competence and specialized knowledge. RSA 541-A:33, VI; *see, Malborn Realty Trust*, 164 N.H. at 66-67; *Appeal of City of Nashua,* 138 N.H. at 264-65; *Appeal of Public Service Company of N.H.*, 170 N.H. 87, 94 (2017) (holding that in reviewing the BTLA's findings, this Court's "task is not to determine whether [the Court] would have found differently than did the board, or to reweigh the evidence, but rather to determine whether the findings are supported by competent evidence in the record.").

The Towns' lengthy discussions of the *Appeal of City of Lebanon* and *Appeal of Sunapee* misses the mark. While it is true that Eversource did not challenge the assessments of its fee land and conventional buildings located in the Towns, in order to determine disproportionality, it was necessary to consider Eversource's entire taxable estate when determining

whether or not an abatement was due. *See,* 161 N.H. 463 (2011); 126 N.H. 214 (1985). The BTLA elected to accept the results of the GES appraisal which established certain fair market value estimates for the fee land, easements, buildings and the use of the PROW. New Hampshire law requires the application of the relevant equalization rations to achieve a proportional aggregate assessment. The BTLA committed no error in relying upon the fair market values presented by Chester and Hudson's experts and the parties' stipulated-to equalization ratios to arrive at the final assessments. The BTLA's decision should be affirmed.

C. *Chester and Hudson's Reference to a Prior Tax Appeal, Involving a Different Municipality and a Different Record has No Bearing on This Appeal.*

Finally, Chester and Hudson argue that a prior tax appeal involving Eversource and the City of Portsmouth, concerning the application of the equalization ratio to the fair market value determination in that case, should be controlling in this case. Towns' Brief, pp. 26-27. The Court should decline to consider this argument as it was never raised before the BTLA. *See, e.g., Mt. Valley Mall Assocs.,* 144 N.H. at 654-55 ("a party may not be entitled to judicial review of matters not raised at the earliest possible time") (citations omitted).

Even if considered, however, this argument provides no basis for relief, as the *Portsmouth* case was a different matter, involving a municipality not a party to Eversource's appeals before the BTLA, arising out of a different record. The BTLA, as the finder of fact in this case, appropriately applied the stipulated-to equalization ratios to Chester and

Hudson's experts' opinion of a fair market value in order to achieve fair and proportional assessments in this case. In this case, the BTLA could properly rely on the unambiguous evidence of Chester and Hudson's own experts that their appraisals reflected the fair market value of Eversource's fee land, easements, buildings and PROW. The BTLA's determination was well within its power as the trier of fact and was consistent with this Court's prior holdings. *See, e.g., Appeal of Public Service Company of N.H.*, 170 N.H. at 97 (noting that just because the trier of fact accepted a given approach "in a different case, for a different taxpayer, in a different tax year, based upon different appraisals, and supported by different testimony" this fact "has no bearing upon whether the [the trier of fact can] properly reject" the approach in another case).

III. The BTLA Did Not Err in Denying Chester and Hudson's Motion for Partial Reconsideration Based on Stipulations Chester and Hudson Entered Into.

This Court should reject Chester and Hudson's argument that the BTLA's Decision should be reversed on the basis that the BTLA's "denial of the Towns' Motion based on the Towns' submission of stipulations ordered by the BTLA was unjust and unreasonable" "because said stipulation reflects no comment or suggestion as to how the BTLA should apply the equalization ratio." Towns' Brief, p. 34. This argument ignores the record and facts of the case and provides no basis for relief.

First, as outlined above, at no point did Chester or Hudson – represented by experienced municipal counsel – ever advance the position they took for the first time following the issuance of the BTLA's Decision.

A review of the record makes clear that at no point over four weeks of hearings or in the extensive post-hearing briefs, did Chester and Hudson ever argue the position they now take. The suggestion that "the Towns did not agree to the application of the data points submitted through [the] stipulations" is simply not accurate. Towns' Brief, p. 29. To the extent Chester and Hudson failed to raise this issue at an earlier point, it was a tactical choice not to do so.

The spreadsheet submitted with Chester and Hudson's Motion – a version of which was included in their Brief to this Court – could have been presented during the course of the hearings or in the Municipalities' post-hearing submissions had Chester and Hudson wanted to preserve that issue. The BTLA properly concluded that it was simply too late to present such evidence in a post-Decision pleading. That determination was well within the BTLA's discretion and presents no basis by which to reverse the BTLA's Decision.

Chester and Hudson further claim that their counsel "raised concerns" as to the application of the equalization ratio during the proceedings noting that "there may be a 'double equalization' issue if the equalization ratio were to be used to determine whether [Eversource] had been over-assessed given that the assessment for [Eversource's] property were already proportionate" in suggesting that this argument was raised during the consolidated hearings. *See,* Towns' Brief, pp. 30, 35. The record makes clear that this discussion referenced by Chester and Hudson concerned an unrelated issue regarding the assessment data to be provided in the spreadsheet requested by the BTLA.

The BTLA made it clear that the assessment data submitted to them should reflect the total assessed value upon which Eversource had paid taxes. Towns' Appd'x Vol. II at 68-69, 75-86 – Tr., Day 9, pp. 190-91; Tr., Day 10, pp. 6-17 (asking the parties to submit "the starting point of the assessments under appeal…[the] [a]ssessed value, period…[w]hat's on the tax bill [t]hat the taxpayer is appealing"). The current argument being furthered by Chester and Hudson was not raised at the hearings in this matter. If anything, the fact that municipal counsel spoke up on the record demonstrates that Chester and Hudson were represented by experienced counsel who could have raised the current issue well in advance of a post-Decision Motion.

That said, the BTLA, in its role as the trier of fact and with its specialized knowledge and expertise, properly applied the equalization ratios to the market value of Eversource's real property located in Chester and Hudson. *See, Appeal of City of Nashua*, 138 N.H. at 266. As evidenced by the undisputed record, Chester and Hudson's experts took the position in their appraisal and sworn testimony that their appraisal reflected the fair market value not only of the utility improvements but also of as of the buildings, fee land, use of the PROW and transmission easements for the assessment dates under appeal. Eversource's Appd'x at 56-72 – GES's Appraisal Report, pp. 2, 102, 262-73 (Tables 62-65); *see also,* Eversource's Appd'x at 25-45 – Tr., Day 7, pp. 42-44, 177-78; Day 8, pp. 219-223; Day 9, pp. 198-99; Day 10, p. 108. As such, the BTLA properly applied the equalization ratios stipulated-to by both Eversource and Chester and Hudson to the aggregate GES market value conclusions. Chester and Hudson should have known that the established method to determine

proportional assessments is to apply the equalization ratios to the estimates of fair market value. In any event, Chester and Hudson, along with the other municipalities, made a calculated tactical decision not to address their current arguments about the application of the equalization ratios to components of the GES fair market value conclusions in their extensive post-hearing memoranda.

Finally, as a matter of fundamental fairness, Chester and Hudson should be held to the stipulation they entered into. Exhibit 43 reflects the fair market conclusions reached by GES, including its determination of the market value of Eversource's building, fee land and easements and the base land value of the PROW and transmission easements. Towns' Appd'x Vol. II at 20-26 – Objection to Motion (attaching spreadsheet); Towns' Appd'x Vol. I at 4 – BTLA Decision. Chester and Hudson should not be permitted to walk away from this stipulation by arguing that the BTLA acted erroneously in developing the indicated assessments on Table 2 based on Chester and Hudson's own expert's conclusions of fair market value.

The BTLA's decision to hold Chester and Hudson to their stipulations is consistent not only with the approach taken by their expert, but was a determination well within the BTLA's purview. Such an approach is consistent with the BTLA's prior holdings on this issue. *See, e.g., YYY II, LLC v. Town of Pembroke*, BTLA Docket Nos.: 23577-07PT/24337-08PT, 2010 N.H. Tax LEXIS 18 (Feb. 24, 2010) (rejecting the Taxpayer's argument that "notwithstanding the conditional stipulation regarding value, [that] the assessments…should be abated in their entirety" and holding the parties to the assessed value they had previously stipulated to); *Great Lakes Hydro America, LLC v. City of Berlin & Town of Gorham*;

BTLA Docket Nos.: 25531-10PT, et al., 2014 N.H. Tax LEXIS 107 (Oct. 16, 2014) (neither granting nor denying several of the taxpayer's proposed findings on the basis that "the parties filed a Stipulation" to the effect of the proposed findings – thereby indicating that Parties must be held to their stipulations). Likewise, holding Chester and Hudson to their stipulations and to their tactical and strategic choices in this litigation would be consistent with the Court's prior jurisprudence. *See, e.g., Keshishian v. CMC Radiologists*, 142 N.H. 168, 181 (1997) (upholding the trial court's decision finding it manifestly unjust to "force [the defendant] to bear the burden of the plaintiff's failed strategic gamble"); *Kalil v. Town of Dummer Zoning Bd. of Adjustment*, 159 N.H. 725, 732-33 (2010) (noting that this Court "[does] not, generally, revisit cases merely because of perceived unfairness").

Simply put, the BTLA properly accepted the undisputed evidence and took Chester and Hudson's experts at their word that they had determined the market value of Eversource's buildings, fee land, and the PROW and transmission easements. The BTLA, in their role as the finder of fact and utilizing their technical skills and expertise in addressing the issues raised in this appeal, properly adjusted the GES fair market value estimates by the pertinent equalization ratios to arrive at fair and proportional assessments. Chester and Hudson's after-the-fact argument the contrary is not only untimely, but has no support in the record. Accordingly, the BTLA's Decision should be affirmed.

IV. The BTLA Did Not Err in Denying Chester and Hudson's Motion for Partial Reconsideration on the Basis the Alleged Errors were Harmless.

Finally, Chester and Hudson challenge the BTLA's denial of their Motion "on the grounds that any error was 'harmless' or '*de minimis*.'" Towns' Brief, p. 36. Their complaints on this finding should be rejected.

As discussed above, it was not until after the BLTA issued its Decision that Chester and Hudson raised for the first time the argument that the value of Eversource's buildings, fee land, use of the PROW and transmission easements were already proportionate, and thus the equalization ratio should not have been applied to Eversource's land interests, but only to Eversource's T&D assets. *Supra* at 16-20. Setting aside the merits of this argument, the BTLA declined to resolve the considerable disputes between the parties as to the proper valuation of Eversource's PROW and transmission easements on the grounds that they were not material to the overall valuations, stating:

> The board need not address the substantial disagreements between the expert appraisers regarding how to value the Taxpayer's use of the public rights-of-way and its easements that are taxable as part of the Property. While there was much testimony presented regarding the most appropriate methodology for valuing these rights for assessment purposes, this component is relatively minor in relation to the values estimated for the T&D assets, land and improvements and the Taxpayer's entire estate. *See Appeal of Town of Sunapee*, 126 N.H. 214, 217 (1985). Consequently, no further discussion of their differences regarding the valuation of these rights is needed at this time.

Towns' Appd'x Vol. I at 33 – BTLA Decision (emphasis added).

Chester and Hudson assert that it was unjust and unreasonable for the BTLA to deny their Motion on the basis that the alleged error was "harmless" because the purported error increased Chester's and Hudson's liabilities to Eversource. This argument misses the mark. The BTLA understood that the effect of its Decision would be to increase somewhat the refunds due Eversource by Chester and Hudson. However, the amount at issue due to the application of the equalization ratio to Eversource's land interests is only 3.5 percent of the total refund owed by Chester and 4.7 percent of the total refund owed by Hudson. *See, e.g.,* Eversource's Appd'x at 61-72 – GES's Appraisal Report, pp. 262-73 (Tables 62-65); Towns' Appd'x Vol. I at 4 – BTLA Decision.

Accordingly, the BTLA could properly take into account the relatively small impact on the refunds which would occur as a result of Chester and Hudson's belated claims in reaching its determination to deny the relief they requested for the first time following its Decision. This conclusion was consistent with established jurisprudence. *See, e.g., Appeal of Public Service Company of N.H.*, 170 N.H. at 92 (recognizing the Board's application of a materiality standard to overassessments); *see also,* N.H. Admin. R. Tax 201.37(e) ("Rehearing motions shall not be granted for harmless errors that, if corrected, would not change the board's decision").

As this Court has recognized on multiple occasions, "[w]hen faced with conflicting [expert] testimony, a trier of fact is free to accept or reject an expert's testimony, in whole or in part." *LLK Trust v. Town of Wolfeboro*, 159 N.H. 734, 740 (2010); *Appeal of Public Service Company of N.H.*, 170 N.H. at 94; *see also, Appeal of Pennichuck Water Works*, 160 N.H. at 41. The BTLA's appropriate decision to decline to consider an

issue in its role as the finder of fact provides no basis to reverse the Decision.

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

Chester and Hudson have not and cannot establish that the BTLA's Decision was unreasonable and unlawful. Accordingly, and for all the reasons set forth above, this Court should affirm the BTLA's Decision.

Derek D. Lick, Esquire, will conduct oral argument on behalf of Eversource and respectfully requests fifteen (15) minutes for that argument.

Respectfully submitted,

Public Service Company of
New Hampshire d/b/a
Eversource Energy,

By its Attorneys,

SULLOWAY & HOLLIS, P.L.L.C.

Dated: May 5, 2021

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CERTIFICATE OF SERVICE

I hereby certify in accordance with Supreme Court Rule 26(7) that the forgoing Brief and related Appendix were transmitted electronically through the Supreme Court's electronic filing system on this day. In addition, copies of the forgoing Brief and related Appendix were transmitted by First Class Mail, postage prepaid to: the Board of Tax and Land Appeals, Attn: Anne M. Stelmach, Clerk, 107 Pleasant Street Concord, NH 03301.

Dated: May 5, 2021 By: /s/ Margaret H. Nelson
Margaret H. Nelson, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify, in accordance with Supreme Court Rule 16(11), that the forgoing Brief contains approximately 8,244 words, excluding cover page, table of contents, table of authorities, signature page and certifications. Counsel relied upon the word count feature of a word processing program to determine the word count.

Dated: May 5, 2021 By: /s/ Margaret H. Nelson
Margaret H. Nelson, Esq.