

SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

In the Matter of the Application of

CONSOLIDATED EDISON COMPANY
OF NEW YORK, INC.,

Petitioners,

DECISION, ORDER
And JUDGMENT
Index Nos. 904139-16¹
 900837-15
 A00552-14
 A00241-13
RJI No. 01-16-121715
(Hon. Lynch, J.)

-against-

THE NEW YORK STATE DEPARTMENT OF
TAXATION AND FINANCE OFFICE OF
REAL PROPERTY TAX SERVICES,

Respondent.

And

THE CITY OF NEW YORK,

Intervenor-Respondent

INTRODUCTION

This is a special proceeding pursuant to Article 7 of the Real Property Tax Law (“RPTL”). Petitioner is the owner of gas, electric and steam infrastructure as special franchise property located within public rights of way owned by the City of New York. Petitioner challenges the assessed value of this property as determined by Respondent. Petitioner seeks a reduction of the assessed value to 15% of the value established by Respondent.

¹ Consolidated for trial.

The non-jury trial took place on November 9, 2022. The Court reserved decision. Having duly considered all the evidence presented at the trial and the arguments of the parties, I hereby make the following findings of facts based on the credible evidence, and reasoned inferences to be drawn therefrom, and reach the following conclusions of law:

CHALLENGED ASSESSMENTS²

The challenged assessment amounts are as follows, to wit:

May 21, 2013 – For assessment roll to be filed in 2013³

Borough of Bronx, Bronx County	110701-6001	\$1, 954, 483, 011
Borough of Brooklyn, Kings County	110701-6101	\$3, 258, 046, 797
Borough of Manhattan, New York County	110701-6201	\$5, 661, 561, 720
Borough of Queens, Queens County	110701-6301	\$3, 032, 299, 138
Borough of Staten Island, Richmond County	110701-6401	\$592, 429, 424

Grand Total		\$14, 498, 820, 090
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Borough of Bronx, Bronx County	110702-6001	\$712, 820, 936
Borough of Manhattan, New York County	110702-6201	\$908, 166, 783
Borough of Queens, Queens County	110702-6301	\$532, 016, 924

Grand Total		\$2, 153, 004, 643
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Borough of Manhattan, New York County	110703-6201	\$ 694, 777, 743
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May 20, 2014 - For assessment roll to be filed in 2014⁴

Borough of Bronx, Bronx County	110701-6001	\$2, 067, 199, 414
Borough of Brooklyn, Kings County	110701-6101	\$3, 460, 419, 539
Borough of Manhattan, New York County	110701-6201	\$6, 042, 375, 564
Borough of Queens, Queens County	110701-6301	\$3, 150, 642, 008
Borough of Staten Island, Richmond County	110701-6401	\$634, 601, 972

Grand Total		\$15, 355, 238, 497
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Borough of Bronx, Bronx County	110702-6001	\$787, 473, 700
Borough of Manhattan, New York County	110702-6201	\$886, 157, 323

² See Exhibits “B”, “C”, “D”, and “E.”

³ See Exhibit “B.”

⁴ See Exhibit “C.”

Borough of Queens, Queens County	110702-6301	\$587, 675, 427
Grand Total		\$2, 261, 306, 450
Borough of Manhattan, New York County	110703-6201	\$709, 332, 414
<u>May 21, 2015- For assessment roll to be filed in 2015⁵</u>		
Borough of Bronx, Bronx County	110701-6001	\$2, 279, 406, 243
Borough of Brooklyn, Kings County	110701-6101	\$3, 780, 569, 763
Borough of Manhattan, New York County	110701-6201	\$6, 736, 714, 550
Borough of Queens, Queens County	110701-6301	\$3, 447, 143, 515
Borough of Staten Island, Richmond County	110701-6401	\$715, 030, 807
Grand Total		\$16, 958, 864, 878
Borough of Bronx, Bronx County	110702-6001	\$902, 620, 600
Borough of Manhattan, New York County	110702-6201	\$1, 136, 839, 437
Borough of Queens, Queens County	110702-6301	\$628, 136, 648
Grand Total		\$2, 667, 596, 685
Borough of Manhattan, New York County	110703-6201	\$837, 452, 071
<u>June 06, 2016 -For assessment roll to be filed in 2016⁶</u>		
Borough of Bronx, Bronx County	110701-6001	\$2, 417, 526, 147
Borough of Brooklyn, Kings County	110701-6101	\$3, 946, 300, 011
Borough of Manhattan, New York County	110701-6201	\$7, 117, 577, 924
Borough of Queens, Queens County	110701-6301	\$3, 626, 265, 537
Borough of Staten Island, Richmond County	110701-6401	\$764, 749, 557
Grand Total		\$17, 872, 419, 176
Borough of Bronx, Bronx County	110702-6001	\$931, 231, 260
Borough of Manhattan, New York County	110702-6201	\$1, 225, 222, 930
Borough of Queens, Queens County	110702-6301	\$673, 759, 864
Grand Total		\$2, 830, 214, 054
Borough of Manhattan, New York County	110703-6201	\$922, 176, 657

⁵ Exhibit "C".

⁶ Exhibit "D".

FACTS

There were two (2) witnesses. The first witness, Jerome Weinert, testified as an appraiser on behalf of the Petitioner. The second witness, Steve Dean, testified as an appraiser on behalf of the Respondents.

JEROME WEINERT

Jerome Weinert testified that he was a principal of AUS Consultants Depreciation and Valuation Group (hereinafter “AUS”) which ceased doing business in July 2022. At Petitioner’s request, AUS prepared a two-volume appraisal, entitled “Consolidated Edison Company of New York, Inc. Special Franchise Property Located in the City of New York, Market Value Report as of July 1, 2012, July 1, 2013, July 1, 2014, and July 1, 2015, Complete Self-Contained Appraisal Report (hereinafter referred to as “AUS Appraisal”).⁷ The author of the AUS Appraisal, Michael J. Deidrich, left AUS in January 2022, and he did not testify at trial.⁸ Mr. Weinert testified he had participated in the preparation of the AUS appraisal only to the extent of determining reproduction cost new, but he was not involved in the determination of economic obsolescence.⁹ He received his Mechanical Engineering Degree in 1972, became a Professional Engineer in 1976, and has been a member of the American Society of Appraisers in the public utility field since 1978.¹⁰ He did not make any of the calculations in the AUS appraisal, and he did not inspect the property.¹¹

Mr. Weinert testified that AUS prepared the appraisal of the special franchise property in accord with the Reproduction Cost New Less Depreciation (hereinafter “RCNLD”)

⁷ The two-volume Appraisal report was received evidence as Petitioner’s Exhibits “1” and “2”.

⁸ Mr. Diedrich’s Professional Qualifications were included in the Appraisal as Exhibit “I.”

⁹ Mr. Weinert testified he reviewed the appraisals “to the best of my ability.” See NYSCEF Doc. No. 69 – Trial Tr. p. 7, 19.

¹⁰ NYSCEF Doc. No. 69 – Trial Tr. p. 9.

¹¹ NYSCEF Doc. No. 69 – Trial Tr. p. 19.

methodology. AUS adjusted the RCN (i.e., reproduction cost new), including removal of property that does not earn in Con Edison's rate base and removal of the cost of repaving.¹² He also adjusted the Handy-Whitman labor and materials cost index.¹³ He testified that once he determined the cost of replacement, he then factored in physical deterioration,¹⁴ adjusted for net salvage,¹⁵ determined there was no functional obsolescence,¹⁶ and economic obsolescence.¹⁷

Mr. Weinert testified that he primarily reduced the property value due to economic obsolescence, as a form of depreciation from external sources, corresponding to PSC rate regulation.¹⁸ The trial testimony focused on valuation of electric as demonstrative of the overall methodology used for the appraisal, as follows:

Electric RCNLD	\$ 16,051,148,642
Discount Rate	7.40%
Required Return	\$ 1,187,785,000
Total Electric Plant	\$ 21,967,636,788 ¹⁹
Subject Electric Plant	\$ 11,713,617,401 ²⁰
Subject Portion of Total	53.32%
Electric NOI	\$ 1,146,084,749
Subject Portion	\$ 611,117,090

¹² NYSCEF Doc. No. 69 – Trial Tr. p. 12, 78-79.

¹³ NYSCEF Doc. No. 69 – Trial Tr. p. 13.

¹⁴ NYSCEF Doc. No. 69 – Trial Tr. p. 13.

¹⁵ NYSCEF Doc. No. 69 – Trial Tr. p. 14.

¹⁶ NYSCEF Doc. No. 69 – Trial Tr. p. 23.

¹⁷ NYSCEF Doc. No. 69 – Trial Tr. p. 15.

¹⁸ NYSCEF Doc. No. 69 – Trial Tr. p. 17-18. AUS cited external factors attributable to a retail strip mall as its basis to claim the PSC rate regulation constituted an external factor causing economic obsolescence – see NYSCEF Doc. No. 69 – Trial Tr. p. 30-31. The Court finds the retail strip mall comparison to be unpersuasive.

¹⁹ Con Ed reported a \$21,967,636,788 value in a PSC Filing dated 4/28/15 – See Exhibit “2” – Appendix “D” at p. 207.

²⁰ Mr. Weinert’s testimony as to how he made the determination that the special franchise property consisted of \$ 11,713,617,401 or 53.52% of the total property was not clear in the record. It is inherently inconsistent with his testimony that the \$ 16,051,148,642 RCNLD related solely to special franchise property.

Income Shortfall	\$ (576,667,910)
PV Shortfall	\$ (7,792,809,588) ²¹

In describing the information on this exhibit, Mr. Weinert testified that he first established the electric RCNLD as \$ 16,051,148,642. He stated that his goal was to establish value by determining what a willing buyer and seller would agree to in the purchase and sale of the property. He testified that the discount rate, i.e., the required rate of return that a willing purchaser would demand on an investment, was 7.40 %.²² As applied, the 7.4 % discount rate would yield a required investment return of \$1,187,785,000 on a \$16,051,148,642 investment.²³ Through this approach, Mr. Weinert effectively treated the valuation process as a free market or unregulated transaction, where, of course, a willing buyer seeks to achieve the highest investment return.²⁴ To assume that a buyer would require a 7.4% return rate on acquisition of regulated property, however, ignores PSC rate regulation, fails to account for the fact that special franchise property does not have an open market in the first instance, fails to account for the fact that Petitioner also has a monopoly on the electric,²⁵ gas and steam facilities in New York City, and is belied by Con Ed's positive long-range economic forecasts more fully discussed below.

²¹ AUS Appraisal Volume 2, Exhibit "11" p. 5. NYSCEF Doc. No. 69 – Trial Tr. p. 38.

²² As more fully appears in AUS Appraisal Volume 2, Exhibit "11" p. 6-7, he used the same methodology to establish an income shortfall with a gas discount rate of 7.1% and a steam discount rate of 7.56%. The basis for the 7.4% discount rate is stated in the appraisal as follows: "**Knowing an estimated discount rate required by potential purchasers of Con ed Property**, we calculated the income required by those purchasers." The appraisal continues as follows: "**If an income loss exists**, capitalizing that income loss at the discount rate would result in a measurement of external obsolescence." (Emphasis added; See Exhibit "1" – AUS Appraisal Vol 1 of 2, p. 37). There is no data to back up these generalized claims. In AUS Exhibit "11," it is manifest that AUS generated a hypothetical to create the income loss with no real evidence. See also, NYSCEF Doc. No. 69 – Trial Tr. p. 41-42.

²³ NYSCEF Doc. No. 69 – Trial Tr. p. 43 – Weinert admits the \$1,187,785,000 required return is a hypothetical number, not real earnings.

²⁴ NYSCEF Doc. No. 69 – Trial Tr. p. 33-34.

²⁵ NYSCEF Doc. No. 69 – Trial Tr. p.67 – Weinert admits Con Ed has a monopoly on the special franchise property in New York City.

Mr. Weinert determined that the special franchise property consisted of \$ 11,713,617,401 or 53.32% of the total electric plant value of \$ 21,967,636,788. He multiplied the actual NOI in the sum of \$ 1,146,084,749 by 53.52% and arrived at an income in the sum of \$611,117,090.²⁶ He then claimed there was an income shortfall of \$576,667,910 (i.e., hypothetical income of \$ 1,187,785,000 – ratable share of actual NOI of \$611,117,090).²⁷ Based on this fictional income shortfall, Mr. Weinert opined that the property value was reduced by approximately 50%.²⁸ Frankly, the AUS thesis is controverted by his admission that Con Ed has been profitable every year at issue.²⁹

As a direct product of AUS’s wholesale reliance on its flawed economic obsolescence analysis, AUS opined that the special property value was as follows:³⁰

Bronx	Electric	Gas	Steam	Total
July 1, 2012	\$ 1, 125, 000, 000	\$ 477, 000, 000	\$	\$ 1, 602, 000, 000
July 1, 2013	\$ 1, 121, 000, 000	\$548, 000, 000	\$	\$ 1, 669, 000, 000
July 1, 2014	\$ 1, 601, 000, 000	\$799, 000, 000	\$	\$ 2, 400, 000, 000
July 1, 2015	\$ 1, 505, 000, 000	\$609, 000, 000	\$	\$ 2, 114, 000, 000
Brooklyn				
July 1, 2012	\$ 1, 896, 000, 000	\$	\$	\$ 1, 896, 000, 000
July 1, 2013	\$ 2, 031, 000, 000	\$	\$	\$ 2, 031, 000, 000
July 1, 2014	\$ 2, 680, 000, 000	\$	\$	\$ 2, 680, 000, 000
July 1, 2015	\$ 2, 495, 000, 000	\$	\$	\$ 2, 495, 000, 000
Manhattan				
July 1, 2012	\$ 3, 077, 000, 000	\$ 547, 000, 000	\$ 513, 000, 000	\$ 4, 137, 000, 000
July 1, 2013	\$ 3, 290, 000, 000	\$ 568, 000, 000	\$ 489, 000, 000	\$ 4, 347, 000, 000
July 1, 2014	\$ 4, 418, 000, 000	\$ 908, 000, 000	\$ 396, 000, 000	\$ 5, 722, 000, 000
July 1, 2015	\$ 4, 090, 000, 000	\$ 682, 000, 000	\$ 399, 000, 000	\$ 5, 171, 000, 000

²⁶ NYSCEF Doc. No. 69 – Trial Tr. p. 45.

²⁷ NYSCEF Doc. No. 69 – Trial Tr. p. 66.

²⁸ NYSCEF Doc. No. 69 – Trial Tr. p. 27.

²⁹ NYSCEF Doc. No. 69 – Trial Tr. p. 23.

³⁰ See Petitioner’s Exhibit “1” – AUS appraisal p. 40.

Queens

July 1, 2012	\$ 1, 774, 000, 000	\$ 364, 000, 000	\$	\$ 2, 138, 000, 000
July 1, 2013	\$ 1, 879, 000, 000	\$ 408, 000, 000	\$	\$ 2, 287, 000, 000
July 1, 2014	\$ 2, 487, 000, 000	\$ 578, 000, 000	\$	\$ 3, 065, 000, 000
July 1, 2015	\$ 2, 322, 000, 000	\$ 437, 000, 000	\$	\$ 2, 759, 000, 000

Staten Island

July 1, 2012	\$ 385, 000, 000	\$	\$	\$ 385, 000, 000
July 1, 2013	\$ 429, 000, 000	\$	\$	\$ 429, 000, 000
July 1, 2014	\$ 575, 000, 000	\$	\$	\$ 575, 000, 000
July 1, 2015	\$ 555, 000, 000	\$	\$	\$ 555, 000, 000

As a result, AUS opined property values were far less than the assessed value.

By way of example, which is demonstrative of the whole, as of the July 1, 2012, taxable status date for the 2013 assessment in Staten Island, AUS opined that the value was \$385,000,000.00, compared to the challenged assessment of \$592, 429, 424 or approximately 65% of the assessed value. By way of further example, which is demonstrative of the whole, as of the July 1, 2012, taxable status date for the 2013 assessment in Manhattan, AUS opined that the value was \$4, 137, 000, 000, compared to the challenged assessment of \$ 7,263,806,246 or approximately 54% % of the assessed value. Clearly, AUS manipulated a hypothetical of claimed economic obsolescence to dramatically reduce assessed value. The Court rejects AUS's analysis, however, since it was based on a false premise to establish artificial income shortfalls.

Mr. Weinert also admitted that the AUS appraisal failed to identify the intangible value of the special property.³¹ He claimed that he would have placed a 5% intangible on the property if he had done the appraisal but noted that it would not have made any difference in the overall valuation approach. He also opined that the intangible benefit is of no value.³²

³¹ NYSCEF Doc. No. 69 – Trial Tr. p. 79-80.

³² NYSCEF Doc. No. 69 – Trial Tr. p. 86-87.

STEVE DEAN

Steve Dean is a licensed engineer and appraiser, as well as President of DAI Management Consultants, Inc. (hereinafter “DAI”).³³ At Respondent’s request, DAI prepared a four-volume appraisal, entitled “Fair Market Valuation of Consolidated Edison Company of New York’s Special Franchise Property dated March 3, 2020 (for special franchise property located in the City of New York, as of July 1, 2012, July 1, 2013, July 1, 2014, and July 1, 2015) (hereinafter referred to as “DAI Appraisal”).³⁴

Mr. Dean was in the courtroom during Mr. Weinert’s testimony. Mr. Dean agreed that the proper valuation method is the RCNLD. That is where his agreement with Mr. Weinert ended. Mr. Dean testified that Mr. Weinert’s adoption of an income approach to establish an income shortfall as external economic obsolescence was error.³⁵ He opined that PSC rate setting is not an external factor evidencing economic obsolescence.³⁶ He opined that it AUS was not correct to assume that the expected rate of return for an unregulated business is the same for a regulated business, since the unregulated business is subject to competition and investors seek a higher rate of return on their investment.³⁷ He found that AUS assumption of the 7.40 % discount rate was not correct.³⁸ He also testified that various adjustments made by AUS were error, citing the failure to include paving costs to establish RCN, and noting that AUS’s adjustments from the Handy Whitman index were error.³⁹ With respect to AUS, the following colloquy took place, to wit:

³³ His professional qualifications are set forth in the DAI appraisal – Appendix “1”. NYSCEF Doc. No. 69 – Trial Tr. p. 106-107.

³⁴ Respondent’s Exhibits A-1 to A-4.

³⁵ NYSCEF Doc. No. 69 – Trial Tr. p. 143-144.

³⁶ NYSCEF Doc. No. 69 – Trial Tr. p. 146.

³⁷ NYSCEF Doc. No. 69 – Trial Tr. p. 147.

³⁸ NYSCEF Doc. No. 69 – Trial Tr. p. 147-148.

³⁹ NYSCEF Doc. No. 69 – Trial Tr. p. 118-119.

THE COURT: What is the reliability of the methodology adopted by AUS?

THE WITNESS: We work for investors. I have never seen anything like that, that an actual investor would use.⁴⁰

The Court finds that Mr. Dean's analysis is sound.

Mr. Dean explained the RCNLD methodology.⁴¹ The method requires the identification of the original cost of surviving property, with the value escalated to the assessment date to account for inflation. He relied on cost figures provided by Con Ed. And the Handy-Whitman index, without adjustment, to support his cost analysis.⁴²

He considered physical depreciation based on the service life of the equipment but found that the equipment effectively continues in use after the expiration of its service life; accordingly, he applied a 10% RCN minimum value to that property.⁴³ He adjusted for net salvage value of above ground utilities.⁴⁴ Since the technology for electric has remained constant, he determined that the existing equipment continues in use, and that there was no functional obsolescence.⁴⁵ With respect to gas, he determined that there was very little cast iron and steel pipes which would require more maintenance but found there was functional obsolescence.⁴⁶ With respect to steam, there was no functional obsolescence.⁴⁷

⁴⁰ NYSCEF Doc. No. 69 – Trial Tr. p. 149.

⁴¹ NYSCEF Doc. No. 69 – Trial Tr. p. 114.

⁴² NYSCEF Doc. No. 69 – Trial Tr. p. 116.

⁴³ NYSCEF Doc. No. 69 – Trial Tr. p. 124.

⁴⁴ NYSCEF Doc. No. 69 – Trial Tr. p. 127-128.

⁴⁵ NYSCEF Doc. No. 69 – Trial Tr. p. 130.

⁴⁶ NYSCEF Doc. No. 69 – Trial Tr. p. 130.

⁴⁷ NYSCEF Doc. No. 69 – Trial Tr. p. 137.

In stark contrast with AUS, Mr. Dean found there was no economic obsolescence with respect to electric,⁴⁸ gas,⁴⁹ or steam.⁵⁰ He based his findings on Con Ed.’s Long Range Plans, evidencing continuing growth of electric at the rate of 1.2 % to 1.4% per year, over a 20-year plan with 25% growth.⁵¹ He cited Con Ed’s long-range plan indicating that steam will remain flat.⁵² The record also contains Con Ed’s Annual Filings with the SEC for the period 2007 to 2014, evidencing continual growth of business, including gas.⁵³ In context of the business growth, he also determined that PSC rate regulations is not an external factor evidencing economic obsolescence. He found that there was no income shortfall.

Mr. Dean determined the intangible value of the business was 5% of the RCN, since there was insufficient data to analyze Con Ed’s income.⁵⁴ In so doing, he determined that the RCNLD value plus intangible value to be:

Table 1.4.1: 2013 Assessment Roll Special Franchise Property FMV

Borough	Electric	Natural Gas	Steam	Total
Bronx	\$ 2, 2796, 166, 229	\$ 1, 144, 534, 252	\$	\$ 3, 940, 700, 481
Brooklyn	\$ 4, 808, 678, 316	\$	\$	\$ 4, 808, 678, 316
Manhattan	\$ 7, 546, 324, 250	\$ 1, 377, 469, 437	\$ 1, 544, 468, 725	\$ 10, 468, 262, 412
Queens	\$ 4, 417, 134, 102	\$ 866, 637, 544	\$	\$ 5, 283, 771, 646
Staten Island	\$ 899, 947, 535	\$	\$	\$ 899, 947, 535
Total	\$ 20, 468, 250, 432	\$ 3, 388, 641, 233	\$ 1, 544, 468, 725	\$ 25, 401, 360, 390

Table 1.4.2: 2014 Assessment Roll Special Franchise Property FMV

Borough	Electric	Natural Gas	Steam	Total
Bronx	\$ 2, 916, 900, 560	\$ 1, 252, 185, 747	\$	\$ 4, 169, 086, 307
Brooklyn	\$ 5, 036, 529, 026	\$	\$	\$ 5, 036, 529, 026

⁴⁸ NYSCEF Doc. No. 69 – Trial Tr. p. 141.

⁴⁹ NYSCEF Doc. No. 69 – Trial Tr. p. 141.

⁵⁰ NYSCEF Doc. No. 69 – Trial Tr. p. 142. See Exhibit “A-1” – DAI Appraisal Volume 1 of 4, at p. 4-39, § 4.3.3.4. Since AUS claimed a reduced value of up to 50% because of economic obsolescence, and DAI claimed no economic obsolescence exists, it is manifest that the Appraisers were at odds. Since AUS’s analysis was based on a false narrative, and DAI was based on the record, the Court accepts the DAI valuation as credible and reliable.

⁵¹ NYSCEF Doc. No. 69 – Trial Tr. p. 139; see also Respondent’s Exhibit A-4 Appendix 22.

⁵² See Respondent’s Exhibit A-4 Appendix 23.

⁵³ See Respondent’s Exhibit A-4 Appendix 24. For example, in the 2014 SEC filing, Con Ed reported, “The company forecasts average annual growth of the peak gas demand over the next five years at design conditions to be approximately 2.8 percent in the service area.” (See Exhibit A-4, Appendix 24, p. 1192.)

⁵⁴ NYSCEF Doc. No. 69 – Trial Tr. p. 149.

Manhattan	\$ 7,970,531,611	\$ 1,359,136,978	\$ 1,503,332,434	\$ 10,833,001,023
Queens	\$ 4,547,694,893	\$ 959,044,460	\$	\$ 5,506,739,353
Staten Island	\$ 945,213,901	\$	\$	\$ 945,213,901
Total	\$ 21,416,869,991	\$ 3,570,367,186	\$ 1,503,332,434	\$ 26,490,569,610

Table 1.4.3: 2015 Assessment Roll Special Franchise Property FMV

Borough	Electric	Natural Gas	Steam	Total
Bronx	\$ 3,045,675,946	\$ 1,384,645,238	\$	\$ 4,430,321,184
Brooklyn	\$ 5,213,885,241	\$	\$	\$ 5,213,885,241
Manhattan	\$ 8,437,597,207	\$ 1,654,142,413	\$ 1,539,492,684	\$ 11,631,232,304
Queens	\$ 4,716,307,473	\$ 1,007,634,551	\$	\$ 5,723,942,024
Staten Island	\$ 1,004,497,363	\$	\$	\$ 1,004,497,363
Total	\$ 22,417,963,230	\$ 4,046,422,202	\$ 1,539,492,684	\$ 28,003,878,116

Table 1.4.4: 2016 Assessment Roll Special Franchise Property FMV

Borough	Electric	Natural Gas	Steam	Total
Bronx	\$ 3,112,077,191	\$ 1,413,555,098	\$	\$ 4,525,632,289
Brooklyn	\$ 5,276,541,239	\$	\$	\$ 5,276,541,239
Manhattan	\$ 8,625,560,868	\$ 1,740,031,533	\$ 1,498,073,726	\$ 11,863,666,127
Queens	\$ 4,796,250,011	\$ 1,051,497,217	\$	\$ 5,847,747,228
Staten Island	\$ 1,031,357,405	\$	\$	\$ 1,031,357,405
Total	\$ 22,841,786,714	\$ 4,205,083,848	\$ 1,498,073,726	\$ 28,544,944,288

By way of example, for 2013, and demonstrative of the whole, the assessed value for the utilities in Brooklyn was in the sum of \$3,258,046,797. DAI opined the value was \$ 5,036,529,026., i.e., indicating the assessment undervalued the property. By way of further example, for 2013, and demonstrative of the whole, the total assessed value for the utilities was in the sum of \$17.345 billion. DAI opined the total value was \$ 25.401 billion., i.e., indicating the assessment undervalued the property.

CREDIBILITY EVALUATION OF THE EXPERT WITNESSES

The Court recognizes that Mr. Weinert was at an apparent disadvantage in giving his testimony. Clearly, he had not written the appraisal. Moreover, he acknowledged that the AUS appraisal utterly failed to address intangible value. AUS also ceased doing business as of July 2022. It appeared to the Court that Mr. Weinert was trying to make the best of the situation when he rendered opinions corresponding to the AUS report. With that said, the Court evaluated his demeanor while he testified, and found that he was not a credible witness. He stayed the course

on the flawed economic obsolescence analysis, notwithstanding it was a false and fictional narrative. The Court rejects the AUS appraisal in its entirety as wholly unreliable.

In stark contrast, Mr. Dean was the author of the DAI report, with ready knowledge of its contents and methodology. He was clear and concise in his testimony. The crux of the case was the issue of economic obsolescence. His determination that there was no economic obsolescence was fully supported by Con Ed's own long-range plans of economic growth. The Court evaluated his testimony and demeanor and found that Mr. Dean was a wholly credible and reliable witness. The findings of valuation in the DAI appraisal are accepted as both truthful and accurate.

STATEMENT OF LAW

The issue in a tax assessment challenge is to determine the fair value of the property. In, Allied Corp. v. Camillus, 80 N.Y.2d 351, 356 [1992] the Court held,

“Analysis starts with recognition that while property must be assessed at market value, there is no fixed method for determining that value. The ultimate purpose of valuation, whether in eminent domain or **tax certiorari proceedings, is to arrive at a fair and realistic value of the property involved so that all property owners contribute equitably to the public fisc.** Any fair and nondiscriminating method that will achieve that result is acceptable. **The best evidence of value, of course, is a recent sale of the subject property between a seller under no compulsion to sell and a buyer under no compulsion to buy. Absent that evidence, however, the courts have traditionally valued property by one of three methods: comparable sales, capitalization of income or reproduction cost less depreciation.**”
(Internal citations omitted; emphasis added)

A tax assessment is presumed to be valid. Petitioner bears the burden to rebut that presumption with substantial evidence (see Matter of Central Hudson Gas & Elec. Corp. v Assessor of Town of Newburgh, 73 A.D.3d 1046, 1048 [2d Dept. 2010], where the Court held,

“While a locality's **tax assessment is presumptively valid**, it may be overcome by a petitioner's submission of **substantial evidence** demonstrating overvaluation. Substantial evidence will most often consist of a detailed, competent appraisal based on standard, accepted appraisal techniques and prepared by a qualified appraiser. [I]n answering the question whether substantial evidence exists, a court should simply determine whether the documentary and testimonial evidence proffered by petitioner is based on **sound theory and objective data** rather than on mere wishful thinking.” (Internal citations omitted; emphasis added)

If the Petitioners present sufficient evidence to rebut the presumption, they also bear “the burden of demonstrating overvaluation by a preponderance of the evidence.” (Matter of Niagara Mohawk Power Corp. v. Town of Moreau Assessor, 46 A.D.3d 1147, 1148 [3d Dept. 2007]). Valuation remains a question of fact (See Matter of consolidated Edison Co. of N.Y., Inc. v. City of New York, 8 N.Y. 3d 591, 597 [2007]). Here, Petitioner failed to meet its burden of proof on both counts, i.e., failed to present substantial evidence to rebut the presumption that the assessment was valid, and failed to present credible evidence to establish overvaluation of the assessment.

The parties do not dispute that the gas, electric, and steam infrastructure within the City of New York’s public ways constitutes special franchise property. Real Property Tax Law § 102 (17) defines a special franchise, inter alia, as follows:

“Special franchise” means the **franchise, right, authority or permission** to construct, maintain or operate in, under, above, upon or through any public street, highway, water or other public place mains, pipes, tanks, conduits, wires or transformers, with their appurtenances, for conducting water, steam, light, power, electricity, gas or other substance. **For purposes of assessment and taxation a special franchise shall include the value of the tangible property** situated in, under, above, upon or through any public street, highway, water or other public place in connection therewith.” (Emphasis added)

Since Mr. Weinert assumed an open market to establish a 7.40% discount rate in his income analysis, it is essential to identify the elements of special franchise property.

In Brooklyn Union Gas Co. v. State Bd. Of Equalization & Assessment, 65 N.Y. 2d 472, 486 [1985], the Court recognized four essential elements of special franchise property, as follows:

“(a) [the] improvement must be *unique* and must be specially built for the specific purpose for which it is designed; (b) [there] must be a *special use* for which the improvement is designed and the improvement must be so specially used; (c) [there] must ***be no market for the type of property * * * and no sales of property for such use***; and (d) [the] improvement must be an appropriate improvement at the time of the taking and its use must be *economically feasible and reasonably expected to be replaced*.” (Emphasis added)

Clearly, Mr. Weinert’s assumed 7.45% discount rate was premised on a willing seller and buyer in an open market setting. His assumption, however, stands in blatant disregard of the requisite element that there “be no market” for specialty property. Moreover, there was no evidence in the record of a recent sale of the subject or like property between a seller under no compulsion to sell and a buyer under no compulsion to buy.

In Brooklyn Gas, the court also defined the proper valuation method for special franchise property, stating,

We **hold**, therefore, that the special franchise properties of Brooklyn Union, Distribution and Supply are "specialty properties" and that **the proper method of valuing their tangible property is by RCNLD**, to which should be **added**, in order to determine the **full value, the value of the intangible franchise** (the right to use the public streets and thoroughfares for the placement of their tangible property), arrived at by **capitalization-of-income, where there exists excess income, or by adding 5% of the value of the tangible real property where there is no excess income**. (Id at 488) (Emphasis added)

Admittedly, AUS failed to address the value of the intangible franchise, and thus failed to establish full value.

Consideration of economic obsolescence is an appropriate factor under the RCNLD methodology, but not in every case. In Long Island Lighting Co. v. Assessor for Brookhaven, 246 A.D.2d 156 [2d Dept. 1998], the Court upheld the trial court's reduction of the assessed value of the Shoreham Nuclear Power Plant, which never went into operation due to governmental regulations and community opposition and ultimately sold for \$1.00, which the Court considered as evidence of economic obsolescence. The Court defined economic obsolescence as follows:

“Economic obsolescence has been defined as loss of value brought about by conditions that environ a structure, such as declining location or the downgrading of a neighborhood resulting in reduced business volume ... Economic obsolescence reflects a **reduction in the value of property caused by factors extraneous to the property itself**, such as changes in population characteristics and economic trends, excessive taxes and **governmental restrictions** ... determining the existence and extent of economic obsolescence is an integral part of any proper application of the cost approach.” (Internal quotations omitted, emphasis added) (Id. p. 161)

Con Ed., unlike the Shoreham nuclear Plant, is a functional and growing business.

Mr. Weinert assumed that the PSC rate regulation was a governmental restriction causing the loss of value as a form of economic obsolescence. He then took a quantum leap in his analysis to assume a free market for the sale of the property from a willing buyer to a willing seller to establish a 7.40 % discount rate and anticipated income, compared it to anticipated income from a regulated property, and establish a claimed income shortage, reducing the value by approximately 50%. In sharp contrast. Mr. Dean properly recognized there was no free market for this specialty property. Mr. Dean also determined that the PSC rate regulation was not

an external factor evidencing economic obsolescence, since Con Ed's own long-range plan forecasted annual growth over the next 20 years for its ongoing business. Of course, PSC regulates the rates, but the intangible value of having an effective monopoly on the utility market within the public ways of the City of New York, supports Mr. Dean's finding that there is no economic obsolescence here (see also, Tenneco, Inc.-Tennessee Gas Pipeline Div. v. Cazenovia, 104 A.D.2d 511, 514 [3rd Dept. 1984], where the Court held,

“While an allowance for economic obsolescence may be made when the property is not worth the reproduction cost, depending upon the earning capacity after reproduction, it cannot be made in these circumstances where petitioner is profitable and the property would be reproduced.

That petitioner is a regulated utility does not alter this conclusion. Petitioner argues that since its income is based in part on the original cost of the pipeline less depreciation, the pipeline cannot have a fair market value derived by using a reproduction cost which is more than three times the original cost. Petitioner's income, **while regulated, is not fixed**; if for some reason, petitioner were required to replace the pipeline at today's costs, its rate base would increase and its rates would be allowed to increase to generate the necessary income to provide the approved rate of return. Thus, the value of the pipeline should not be limited by petitioner's current income.” (Internal citations omitted; emphasis added)

In fine, there was no real cash shortfall and no reduction in value attributable to PSC regulations.

As a final matter, AUS's failure to address the intangible value of the assets evidenced that the appraisal was incomplete and failed to address full value. Accordingly, the AUS appraisal failed to comport with the requirements of 22 NYCRR 202.59 (g) (2). While the Court did not strike the AUS appraisal, the insufficiencies of the appraisal were fully considered as more fully set forth above. (See Johnson v. Haverstraw, 133 A.D.2d 86, 86-87 [2d Dept. 1987], where the Court held,

“Contrary to the petitioners' present contentions, the record reveals that their appraiser, in valuing the subject property, made numerous adjustments to comparable parcels which were **not accompanied by the requisite facts, figures and calculations in either the appraisal or the expert testimony** (*see, 22 NYCRR 202.59 [g] [2]*). This obvious failure to specify and quantify the aforementioned adjustments **vitiating the probative value of the appraisal**. Hence, the petitioners failed to sustain their initial burden of demonstrating an overassessment.” (Citations Omitted; emphasis added)

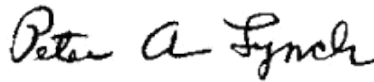
The unreliability of the AUS report is further demonstrated by the failure to include repaving costs in their RCN analysis. Clearly, one cannot repair or replace below ground infrastructure within the public ways without digging up and restoring the paving. It is well settled that the cost of repaving must be considered in determining the replacement cost new. (See People ex rel v. Central Hudson Gas & Elec. Co. v. State Tax Commission, 218 A.D. 44, 53 [3d Dept. 1926], where the Court held, “the referee improperly excluded from the present value of the tangible property money expended in connection with pavements and improperly allowed a return upon all the moneys so expended, rather than the depreciated value of the labor and materials expended in connection with pavements.”)

CONCLUSION

For the reasons more fully stated above, it is the finding of the Court that Petitioner failed to rebut the presumption that the challenged tax assessments were valid, and, in any event, failed to meet its burden of proof to demonstrate overvaluation by a preponderance of the evidence. The Petitions, as consolidated for trial, are dismissed.

This memorandum constitutes the decision, order, and judgment of the Court.⁵⁵

Dated: Albany, New York
November 17, 2022



PETER A. LYNCH, J.S.C.

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⁵⁵ The parties are required to comply with the provisions of CPLR R 2220.