

IN THE
UTAH SUPREME COURT

SALT LAKE COUNTY
Petitioner/Appellant,

v.

UTAH STATE TAX COMMISSION,
DELTA AIR LINES, INC.,
Respondents/Appellees.

Brief of Appellant

Judicial review of final agency action of the Utah State Tax Commission,
Appeal No. 17-979 before Judge Jane Phan

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INTRODUCTION

With several other counties,¹ Salt Lake County (the “County”), sued the State of Utah, seeking a declaratory judgment that several Utah tax statutes, including Utah Code § 59-2-201(4), facially violated Article XIII, § 2(1) of the Utah Constitution. *See Salt Lake County v. State of Utah*, 2020 UT 27, ¶ 1, 466 P.3d 158. The district court dismissed the action as nonjusticiable. *Id.* at ¶ 48. Affirming that decision, this Court noted that because the County had pending administrative cases wherein it specifically attacked section 59-2-201(4) as applied, it had thereby failed to exhaust its administrative remedies. *Id.* at ¶ 45.

This appeal involves one of those pending cases; specifically, an appeal valuing Delta Air Lines, Inc.’s (“Delta”) property for property tax purposes for tax year 2017. At its core and when applied to Delta, section 59-2-201(4) violates the uniformity and fair market value mandates of Article XIII, § 2(1) because it prevented the Utah State Tax Commission (the “Commission”) from actually reaching the fair market value of Delta’s property and required the Commission to treat airlines differently than any other state-assessed² property. Any by impinging on the Commission’s otherwise discretionary assessment authority, the statute also violated Article XIII, § 6(3)(b).

¹ The initial challenge included a facial challenge to the statute, which affected multiple counties across the state. The current challenge involves an as-applied challenge involving Delta, which only primarily affects Salt Lake County taxpayers.

² When this brief refers to “state-assessed property,” it refers to property assessed by the Utah State Tax Commission under Utah Code § 59-2-201(1). All other property is assessed by the local county assessor and is referred to as locally assessed property. UTAH CODE § 59-2-301.

STATEMENT OF THE ISSUE

Issue No. 1: Article XIII, § 2(1) of the Utah Constitution requires all taxable property be assessed uniformly in proportion to its fair market value. When Delta was valued for property tax purposes in 2017, section 59-2-201(4) mandated use of a specific valuation methodology and provided a 20% discount for Delta's aircraft that applies to airlines, alone. At the hearing before the Commission, every appraisal expert who valued Delta's property agreed the statutory methodology and statutory discount resulted in a significantly lower assessed value than what any expert would have reached for Delta's property absent the statute. By preventing the Commission from valuing Delta's airline property uniformly in proportion to its fair market value, did the application of section 59-2-201(4) to Delta's property for tax year 2017 violate Article XIII, § 2(1) of the Utah Constitution?

Issue No. 2: The Utah Tax Commission is a constitutionally composed body vested, in part, with original assessment authority to value, among other things, airline property. By dictating to the Commission how airline property in Utah must be valued when applied to Delta's 2017 tax assessment, did section 59-2-201(4) intrude upon the Commission's constitutional authority and thereby violate Article XIII, § 6(3)(b) of the Utah Constitution?

Preservation of Issues: Though the Commission lacks the authority to rule on the constitutionality of a statute, the County raised each challenge in the proceedings below and the issues were thus preserved. (R. 929-33; R. 1277-78).

Standard of Review for Issues: While the Commission could not rule on the constitutionality of section 59-2-201(4) nor refuse to apply it, *see Nebeker v. Tax Comm'n*, 2001 UT 74, ¶ 15, 34 P.3d 180, the County's challenge to the constitutional challenge presents a question of law that is reviewed for correctness. *Amax Magnesium Corp. v. Tax Comm'n*, 796 P.2d 1256, 1258 (Utah 1990); UTAH CODE § 59-1-610.

STATEMENT OF THE CASE

Passed in 2017, Senate Bill 157 amended section 59-2-201(4)³ and was the culmination of years of litigation involving the valuation of airlines for property tax purposes. CHANGES TO PROPERTY TAX, S.B. 157, 62ND LEGISLATURE, CH. 425 (2017). To better understand the contours of the issues on appeal, a brief history of S.B. 157 is set out below.

Recent History of Valuing Airlines

Under Article XIII, § 2(1) of Utah's constitution, taxes paid on property must be uniform and in proportion to the fair market value of the property. As this Court has noted, the requirement is easy to state, but difficult in many instances to attain. *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 188 (Utah 1984). But given there are multiple different types of property, and perhaps as many different factors that may affect value, determining "what constitutes equal 'in proportion to the value of . . . tangible property,' under Article XIII, § [2], cannot be made by application of any single

³ All constitutional and statutory citations are to the versions in effect for the 2017 tax year unless otherwise noted.

formula.” *Id.* But determining the appropriate valuation requires examination of the nature of property to be taxed.

As this Court has aptly noted, some property produces income; some do not. Some sell frequently in an open market and produce comparable values. And still other property may be strongly influenced by market conditions, while others may be influenced by none of the above factors and “may have a value that is peculiar to the [property] owner and to no one else.” *Id.* at 189 (citation omitted). Taking stock of all these variables, regarding state-assessed properties, the Commission uses several, basic valuation methods known as the cost, income, and stock and debt approaches. *Salt Lake City S. R.R. Co. v. Tax Comm’n*, 1999 UT 90, ¶ 14, 987 P.2d 594. Airline property has typically been valued using the income approach. (R. 8713, pgs. 16-17).

Around 2006, many airlines, including Delta, were operating at a loss, which made it difficult to value airlines using an income approach. (Jt. Ex. 53, R. 3699-3700). Delta, in fact, was in bankruptcy. *Id.* Because it was difficult to use an income approach, the Property Tax Division⁴ of the Utah State Tax Commission (the “Division”) would often rely on other methodologies, such as the cost approach. *Id.* The Division also started to use an aircraft publication guide called the Airliner Price Guide (“APG”). *Id.* The APG is

⁴ The Property Tax Division is part of the Utah State Tax Commission and is responsible for assessing state-assessed property on behalf of the Commission, including airline property. *Salt Lake City Corp. v. Tax Comm’n*, 1999 UT 41, ¶ 2, 979 P.2d 346; UTAH ADMIN. CODE R861-1A-16(4)(c) (delegating “full” original assessment authority). A taxpayer or county may object to the Division’s assessment and if they do, an appeal process will be held where the Commissioners will act as adjudicators to determine if the Division’s assessment was correct. UTAH CODE § 59-2-1007. If no party objects, the Division’s assessment becomes the final Commission assessment.

a valuation guide like Bluebook for cars that values⁵ individual aircraft by year, make, and model. (Jt. Ex. 27, R. 2917; R. 8712, pg. 100). Using the APG, the Division would obtain the value of each individual aircraft, sum up the APG value, and then add the value of the non-aircraft property to reach a final value for the airline's property. (R. 8712, pgs. 99-101; Jt. Ex. 13, R. 2583).

When the Division first began using the APG, parties primarily litigated over the proper use of the APG. (Jt. Ex. 28, R. 2952-53). However, in appeal no. 06-0725, an airline contended the APG should not be used at all as an appraisal methodology. (Jt. Ex. 28, R. 2953-54, 2957). During the appeal, the owner of the APG testified the APG was not an appraisal book, should only be used as a data point, and was not a unitary⁶ method for valuing airline property. (Jt. Ex. 28, R. 2953-54; Jt. Ex. 53, R. 3748, 3750-52; R. 8713, pg. 120-124). Rather, the APG was designed to provide a starting point to value individual aircrafts, not to value airline property as an operating unit. (Jt. Ex. 28, R. 2953-54; Jt. Ex. 53, R. 3750-52).

In its decision, the Commission found the APG was not a unitary methodology and concluded it would be “merely coincidental if the values of [] each individual airplane summed . . . plus the book value of the nonmobile assets results in a value near the fair market unitary value of the airline itself.” (Jt. Ex. 28, R. 2956). The Commission

⁵ The APG does not provide a value for each specific aircraft, but rather the value of an “average” aircraft of that type. (Jt. Ex. 27, R. 2917; R.8712, pg. 100).

⁶ A unitary methodology is one that attempts to capture “the fair market value of [a] company's property operating together as a single unit.” *Salt Lake City S. R.R. Co.*, 1999 UT at ¶ 21. It values “the synergistic nature of a business's collective property.” *Id.* An income approach is a common unitary method. *Id.*

also found that “[i]n extreme cases, if it were shown a complete absence of another meaningful approach . . . , the Commission may consider the use of the APG as a proxy. However, for [the airline] there is another meaningful valuation indicator, that being the income indicator.” *Id.* Because the APG was not a generally accepted appraisal method for determining the unitary value of operating airline property, the Commission placed 100% weight on the income indicator. (Jt. Ex. 28, R. 2958, 2963-64).

Following the Commission’s decision, the Utah Legislature passed S.B. 210, which required the Commission to assess the airlines for 2009 and 2010 using the APG and requiring them to deduct 20% from the APG values. AMENDMENTS TO PROPERTY TAX, S.B. 210, 58TH LEGISLATURE, CH. 235 (2009); (R. 8712, pg. 256; Jt. Ex. 17, R. 2694). The understood purpose of the legislation was to provide a two-year window for the Commission to promulgate rules regarding the best methodologies to value airlines. (Jt. Ex. 53, R. 3724; R. 8712, pg. 256).

In response, the Commission established by rule that the preferred methodologies for valuing airline property was the income approach and the cost approach. UTAH ADMIN. CODE R884-24P-62(4)(b) (2011); (Jt. Ex. 53, R.3724-25; R. 8712, pgs. 256-57). The Commission rule also stated that an aircraft pricing guide could be used if the preferred methods did not result in fair market value. UTAH ADMIN. CODE R884-24P-62(6)(c)(ii) (2011)). The Commission also told the Division not to use the APG if they could avoid it. (Jt. Ex. 53, R. 3724-25).

The Commission’s rule regarding the preferred methodologies to value airlines has remained unchanged since that time. Although the rule provided discretion for the

Division to use the APG methodology if that best reflected fair market value, the Division never placed any weight on the APG method again until it was forced to by the current legislation. (Jt. Ex. 19, R. 2723; Jt. Ex. 20, R. 2755; Jt. Ex. 21, R. 2785; Jt. Ex. 22, R. 2813; Jt. Ex. 23, R. 2846; Jt. Ex. 24, R. 2879; R. 8712, pg. 138). For Delta's property for tax years 2011 thru 2015, the Division placed 100% of its weighting on the income approach. *Id.* In 2016, the Division placed 25% weighting on the income approach and 75% weighting on the cost approach. (Jt. Ex. 24, R. 2879).

Enactment of S.B. 157 and the Resulting 2017 Assessment

In 2017, despite the flexibility of the Commission rule to use the APG methodology if warranted, the Utah Legislature enacted S.B. 157 and amended Utah Code § 59-2-201 and removed any flexibility in valuing airlines. CHANGES TO PROPERTY TAX, S.B. 157, 62ND LEGISLATURE, CH. 425 (2017). S.B. 157 amended the statute to require the Commission to use an aircraft pricing guide⁷ to value an airline's aircraft. *Id.* The amended statute also required the Commission to apply a fleet discount as provided in the pricing guide. *Id.* If there is no fleet adjustment method outlined in the pricing guide, the Commission must reduce the pricing guide value by .5% for each aircraft over three aircraft, up to a maximum 20% reduction. *Id.*

⁷ Utah Code § 59-2-201(4) refers both generally to aircraft pricing guides and to the specific guidebook titled the Airliner Price Guide. The statute requires the Commission to specifically use the Airliner Price Guide unless it is no longer published or another price guide better reaches the fair market value of the individual aircraft (after consulting with the airlines). UTAH CODE § 59-2-201(4)(b)(ii). Because the Division and Commission have never used any other publication besides the Airliner Price Guide and used it to value Delta for 2017, this brief uses the acronym "APG" to refer both to the specific guidebook and to the methodology required by Section 201(4).

The sponsor of the bill, Senator Curtis Bramble, explained the impetus for the bill was that once the two-year statute mandating use of the APG methodology for tax years 2009 and 2010 expired, there was a significant escalation of property taxes for the airlines. *S.B. 157 Changes to Property Tax before the Senate Revenue and Taxation Standing Committee Hearing*, 62nd Leg., 2017 Gen. Sess., February 14, 2017, minutes 35:32 – 41:00, available at <https://le.utah.gov/~2017/bills/static/SB0157.html>. Senator Bramble brought a Delta Airline representative to explain why the airlines were unhappy with recent property tax valuations. *Id.* Senator Bramble also indicated that S.B. 157 was intended to minimize litigation in the property tax area. (*Id.* at minutes 43:40 – 45:01).

Following the passage of S.B. 157, the Division implemented it as required in its 2017 assessments. (Jt. Ex. 2, R. 2186). Whereas in previous years, the Division typically placed 100% weight on the income indicator for Delta and had not placed any weight on an APG indicator since being required to by statute in 2010; for 2017, the Division placed 100% weight on the APG statutory methodology. (*Id.* at 2154, 2186; R. 1255). As the Division explained, under normal circumstances, it would have placed significant weight on the income indicator, but to comply with the statute, it placed 100% weight on the APG indicator. (Jt. Ex. 13, R. 2584, 2586). In the Division's revised⁸ assessment, the APG indicator had a system value of \$14.6 billion. (Jt. Ex. 2, R. 2154). The Division's income indicator had a system value of \$40.9 billion. *Id.* Absent the statute, the Division

⁸ The Division issued an original assessment and a revised assessment. (Jt. Ex. 1, R. 2120; Jt. Ex. 2, R. 2154). Delta gave new information to the Division regarding Delta's leased property after the original assessment had been issued, which resulted in the revised assessment. (R. 1232).

would have likely placed no weight on the APG indicator and most, if not all, of the weight on the income indicator. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60).

Appeal of 2017 Assessment

The County appealed the Division’s 2017 assessment, challenging the application of section 201(4) to Delta’s property as unconstitutional.⁹ (R. 1249, 1277). At the hearing, only the Division and the County put forward a valuation for Delta’s property. (Jt. Ex. 13, R. 2561; Jt. Ex. 56, R. 7470). Both the Division and County called expert appraisers to support their valuations. Two witnesses were called for the Division: Lucas Hendrickson, who oversaw the Division’s assessment of Delta, and Devin Hales, who performed the Division’s appraisal of Delta’s property. (R. 8712, pgs. 4, 90, 216). The Division’s appraisal¹⁰ included the following valuation approaches with accompanying system values for Delta’s operating property: (Jt. Ex. 13, R. 2572, 2579, 2582, 2583).

Indicators of Value	Value	Weighting
Income Approach (Yield Capitalization)	\$39,503,315,986 (\$39.5 billion)	0%
Stock and Debt Approach	\$32,438,493,148 (\$32.4 billion)	0%

⁹ Delta also challenged the assessment of a privilege tax against Delta for some of its leased property. (R. 1260). However, none of the parties have appealed the Commission’s decision regarding the assessment of the privilege tax and it is not part of this appeal.

¹⁰ After issuing the revised assessment, the Division discovered it had omitted five operating aircraft from the revised assessment. (R. 1242). The Division included these five aircraft in its appraisal. *Id.* The Division also used a slightly different normalized cash flow and yield capitalization rate in the appraisal. (R. 1244). These changes increased the Division’s system value for Delta’s property from \$14.6 billion in the revised assessment to \$14.8 billion in the appraisal. (Jt. Ex. 2, 2155; Jt. Ex. 13, R. 2586).

Cost Approach	\$21,199,431,034 (\$21.2 billion)	0%
APG-Fleet Discount (59-2-201(4) method-with the 20% discount)	\$14,844,563,893 (\$14.8 billion)	100%

The Division placed 100% weight on the APG-Fleet Discount indicator. (Jt. Ex. 2, R. 2154; Jt. Ex. 13, R. 2565). In doing so, the Division took a “jurisdictional exception,” which is used “when a law or regulation requires methods or procedures that an appraiser would otherwise not use” (Jt. Ex. 13, R. 2565; R. 8714, pgs. 58-61). The Division’s appraisal explained this exception was needed because absent the statute, the Division would have placed weight on other indicators and not used the methodology required by section 201(4). (Jt. Ex. 13, R. 2565, 2584, 2586; R. 8714, pgs. 58-61). Indeed, the Division’s appraisal expert determined “the yield capitalization [income approach] estimate to value is a reasonable indicator of the value of Delta’s operating property. Under normal circumstances, the Division would have likely put significant weight on this indicator. However, for this appraisal, the Division put no weight on this indicator to comply with the methodology outlined in Utah Code Section 59-2-201(4).” (Jt. Ex. 13, R. 2584). The Division’s expert witnesses all testified that absent section 201(4), no weight would have been placed on the APG indicator and significant, if not all, of the weight would have been placed on the income indicator. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60). And if constrained to use the APG guidebook, they would not have taken the 20% deduction required by section 201(4). (R. 8713, pg. 57).

The County put forward a valuation expert, Brent Eyre, who also provided a valuation of Delta’s property. (Jt. Ex. 56, R. 7470). Mr. Eyre included the following valuation approaches and system values: (Jt. Ex. 56, R. 7496, 7525, 7527, 7530).

Indicators of Value	Value	Weighting
Income Approach (Yield Capitalization)	\$38,582,785,946 (\$38.6 billion)	90%
Stock and Debt Approach	\$29,325,615,758 (\$29.3 billion)	5%
Cost Approach	\$21,301,716,879 (\$21.3 billion)	5%

For Mr. Eyre’s appraisal, Mr. Eyre was asked to do an appraisal without being restricted to the methodology in section 201(4), but rather under Commission Rule 62, which was how all other state-assessed property was valued. (Jt. Ex. 56, R. 7473). Mr. Eyre concluded a system value of \$37.3 billion for Delta’s operating property. (Jt. Ex. 56, R. 7531). This value was very close to the Division’s income indicator of \$39.5 billion. (Jt. Ex. 13, R. 2579). Mr. Eyre also prepared a report on the APG criticizing using it as a valuation methodology because it ultimately does not reach fair market value of the property as required by the Utah Constitution. (Jt. Ex. 57, R. 7562).

Delta did not provide any appraiser or expert who valued Delta’s property. (R. 8714, pgs. 184, 242). Rather, Delta’s expert witness, Robert Reilly, prepared reports reviewing the County’s and the Division’s appraisals and pointing out alleged errors in those appraisals. (Jt. Ex. 61, R. 7694; Jt. Ex. 62, R. 7735). However, Mr. Reilly was explicit that the reports’ purposes were “not to conclude an opinion of value with respect to” the operating property of Delta. (Jt. Ex. 61, R. 7698; Jt. Ex. 62, 7759).

After the hearing and briefing from the parties, the Commission issued its decision. (R. 1231). The Commission first noted that prior to 2017, the Division assessed airlines using a unitary approach and used several different valuation methods to determine the fair market value of airline properties. (R. 1255). The Division would then use their expertise to weight and reconcile the various approaches based on the quality of the evidence and other factors of appraisal judgment. (R. 1255). However, in 2017, the legislature enacted S.B. 157, which substantially changed how the Division assessed airline properties. (R. 1255).

The Commission found the Division had appropriately applied the requirements of section 201(4) to value Delta's property. (R. 1259). The Commission also found the APG did not provide for a fleet adjustment and therefore section 201(4)(c)(iii) required a 20% reduction be given to Delta's aircraft. (R. 1257). The County, based on the expert testimony at the hearing, argued that clear and convincing evidence had been provided pursuant to section 201(4)(d) and therefore the Commission should use an alternative method to value the property. (R. 1258).

Although the Commission recognized the unitary indicators prepared by the Division were significantly higher than the required statutory methodology and that absent the statute, "the Division would have placed a substantial percentage of its weight on the income approach," the statute was clear that unitary methodologies could not be used to meet the clear and convincing requirement of the statute. (R. 1258; 1281-82). The Commission explained that the plain language of the statute focused on the values of the individual aircraft; therefore, evidence submitted to meet the clear and convincing

requirement must be at the individual aircraft level, not the unit level. (R. 1282).

Accordingly, because the Division complied with the requirements of section 201(4), the Commission upheld the Division's revised assessment¹¹ that placed a 100% weight on the statutory APG methodology value. This appeal followed.

SUMMARY OF THE ARGUMENT

Article XIII, § 2(1) requires all taxable property be assessed uniformly in proportion to its fair market value to ensure all taxpayers bear their proportionate share of funding governmental services. The application of section 59-2-201(4) to Delta's property in 2017 violated that constitutional provision by requiring a methodology that undervalued Delta's property and was non-uniform compared to how other state-assessed taxpayers were assessed. Additionally, section 201(4) took away the Commission's discretion to choose the methodologies that would reach fair market value for Delta's property violating Article XIII § 6(3)(b). Specifically, the statute prohibited the Commission from considering and relying on an income approach, which every expert appraiser who valued Delta's property testified was the most reliable indicator to reach fair market value. They also testified they would have placed significant, if not all, their weight on their income indicator absent the statute.

Had the Commission been able to consider and place weight on the income indicator, the value of Delta's property would have been 2 ½ times higher than the value under the statutory methodology. The Division's income indicator showed a value for

¹¹ The Commission adjusted the revised assessment to correct for the five missing aircraft the Division had discovered had been omitted. (R. 1242, 1283).

Delta's property of \$39.5 billion compared to the statutory methodology value of \$14.8 billion. In contrast to valuing Delta, the Commission had discretion to choose the methodologies that would best reach fair market value for all other state-assessed properties besides airline property.

The statute also violated the uniformity provision by providing a 20% discount to Delta for having multiple aircraft that no other state-assessed property received and by imposing a clear and convincing standard whereas all other state-assessed properties were valued using a preponderance of the evidence standard. Finally, the statute also violated Article XIII, § 6(3)(b) by unconstitutionally infringing on the Commission's constitutional assessment authority to value airlines.

ARGUMENT

I. Background on the Property Tax System and the Constitutional Mandate to Assess All Property Uniformly at Fair Market Value.

The nature of the property tax system in Utah and the constitutional mandate to assess all property at fair market value in a uniform manner are critical to understanding this appeal. This appeal has been brought to ensure that Utah taxpayers are not disproportionately shouldering the burden of government services in violation of the Utah Constitution. Utah's property tax system is designed to ensure that each property owner shoulders their proportionate share of funding essential local government services such as education, law enforcement, fire protection, emergency response services, libraries, and parks. *Kennecott Copper Corp. v. Salt Lake County*, 799 P.2d 1156, 1160 (Utah 1990);

Harmer v. Tax Comm'n, 452 P.2d 876, 880 (Utah 1969); *State v. Thomas*, 50 P. 615, 617 (Utah 1897).

Article XIII, § 2(1) of the Utah Constitution accomplishes this by requiring all taxable property be assessed uniformly in proportion to its fair market value. It states:

(1) So that each person and corporation pays a tax in proportion to the fair market value of his, her, or its tangible property, all tangible property in the State that is not exempt under the laws of the United States or under this Constitution shall be:

(a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and

(b) taxed at a uniform and equal rate.¹²

This provision has two interconnected constitutional mandates: (1) that all taxable property be assessed uniformly, and (2), in accordance with the property's fair market value. *See Alta Pac. Assoc., Ltd. v. Tax Comm'n*, 931 P.2d 103, 115 (Utah 1997) (“[] Utah law demands that all entities pay taxes in proportion to their property's full market value.”); *Amax Magnesium Corp. v. Tax Comm'n*, 796 P.2d 1256, 1260 (Utah 1990) (“Two principles govern the law of taxation: (1) that property be assessed at its just value, and (2) that owners of property bear an equal portion of the tax burden in proportion to the amount of property they own.”); *Harmer*, 452 P.2d at 879 (“While absolute equality and uniformity in the assessment is not practicable, a requirement of reasonable uniformity and equality is essential.”).

¹² The language of Article XIII, § 2 has had minor changes over time since it was first enacted in 1895. However, the same central requirements of market value and uniformity have not changed. *See Thomas*, 50 P. at 615-616 (noting all taxable property must be valued at market value.).

The uniformity and market value provisions are interconnected because if all property is valued at fair market value, then uniformity has been achieved. However, if the fair market value standard is departed from, then uniformity is violated unless all other properties receive the same benefit. *See Bd. of Equal. of Salt Lake County v. Tax Comm'n ex rel. Benchmark*, 864 P.2d 882, 887 (Utah 1993) (“if assessors have not appraised at full value . . . then such treatment must be uniform and equal on all real estate and tangible property.”); *Kennecott Copper Corp.*, 799 P.2d at 1160 (Utah 1990) (“Where it is impossible to achieve perfectly both the standard of true value and the standard of uniformity and equality, the latter standard should prevail.”).

The uniformity and valuation mandates are critical to protecting all Utah taxpayers because for taxpayers, it is a zero-sum system. If some property is valued at less than market value, all else being equal, other taxpayers must pay more in taxes to make up the difference. UTAH CODE § 59-2-924(4)(b). This is because, absent certain exceptions,¹³ all taxing entities receive the same amount of revenue regardless of fluctuating property values. *Id.* Because the amount of revenue stays constant, the tax rate fluctuates based on the assessed values within that taxing entity’s tax area.¹⁴ *Id.* Therefore, a decrease in

¹³ For example, taxing entities can receive increased revenue through proposing a tax increase and going through a public hearing process. UTAH CODE § 59-2-919. They may also receive additional revenue for eligible new growth in their taxing area. UTAH CODE § 59-2-924(4)(b)(iv).

¹⁴ The formula to determine a taxing entity’s certified tax rate at its highest and most simple level is: prior year budgeted revenue for that entity ÷ aggregate property values within that entity’s area = certified tax rate. UTAH CODE § 59-2-924(4)(b). For example, if an entity’s budgeted revenue is \$1 million dollars and the property values are \$100 million dollars, the tax rate will be 1% for that entity. If next year, the property values increase to \$125 million dollars, the tax rate will decrease to .08% to maintain the \$1

some taxpayers' property values increases the tax rate for all other taxpayers. If some taxpayers are paying taxes based on a below market value property, those tax burdens are shifted to other taxpayers. *See Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 187, 193 (Utah 1984) (discussing that state-assessed properties had been undervalued, which caused a discriminatory shift in property taxes to locally-assessed properties). Ultimately, the uniformity and valuation mandates ensure that some property owners do not shift their tax burdens to other taxpayers. *Alta Pac. Assoc.*, 931 P.2d at 115.

Although the constitutional mandates to assess property uniformly and at fair market value are straight-forward, the constitution and this Court recognize that arriving at fair market value for any given property is an intensely factual and often complex exercise. *Rio Algom Corp.*, 681 P.2d at 188-189. Accordingly, the legislature has some authority to pass laws to further the goal of achieving uniformity in the property tax system. *See Id.* at 193 (upholding statute aimed at equalizing differences in methodologies between state-assessed and locally-assessed properties from a facial challenge). The legislature can also establish the ratio to fair market value for all properties. For example, the legislature has established that all taxable property in the state shall be valued at a 100% of fair market value. UTAH CODE §§ 59-2-103(2); 59-2-201(1)(a). The legislature has also provided a statutory definition of fair market value that is uniformly used in valuing all property in the state. UTAH CODE § 59-2-102(13).

million dollars in revenue. Conversely, if the legislature exempts a large amount of property and the values fall to \$85 million, the tax rate will increase to 1.2%. Under this simple formula, undervaluing properties results in a tax shift to other taxpayers.

However, the legislature is still beholden to the uniformity and valuation mandates and where the legislature or assessing authority has departed too far from those constitutional mandates, this Court has held those laws or offending assessments unconstitutional. *ex rel. Benchmark*, 864 P.2d at 886-87 (holding discounts given to owners of multiple residential lots unconstitutional); *Amax Magnesium Corp.*, 796 P.2d at 1260 (holding 20 percent discount statute was unconstitutional as applied to similarly situated taxpayer who did not receive the discount); *Rio Algom Corp*, 681 P.2d at 195 (striking down statute that froze values of locally assessed property as of a given year); *Kennecott Copper Corp.*, 799 P.2d at 1161-62 (holding there was an issue of fact as to whether statutory methodology was applied unconstitutionally in relation to fair market value); *Harmer*, 22 Utah 2d at 328-30 (holding assessments valuing property as agricultural land and reappraising only parts of the county violated the fair market value and uniformity mandates); *Moon Lake Electric Ass’n, Inc. v Tax Comm’n*, 9 Utah 2d 384 (1959) (striking down statutes valuing nonprofit electric and telephone corporations as unconstitutional); *Stillman v. Lynch*, 56 Utah 540, 192 P. 272 (1920) (holding statute providing valuation formula for bank stocks was unconstitutional).

Accordingly, while the Legislature has some authority to try and achieve uniformity within the system, it still must comply with the fair market value and uniformity provisions. *Kennecott Copper Corp.*, 799 P.2d at 1162. In that vein, this Court has warned about “the difficulty in establishing any dogmatic formula or method of determining values for all purposes, however simple and fair such method or formula may appear on its face.” *Pub. Service Comm’n v. Southern Pac. Co.*, 95 Utah 84, 79 P.2d

25, 35 (Utah 1938). This is because what may result in fair market value in one case may not achieve fair market value in all cases. *Cf. Rio Algom Corp.*, 681 P.2d at 194 (upholding valuation statute against facial challenge) *with Kennecott Copper Corp*, 799 P.2d at 1161-62 (striking down same statute in as-applied challenge). For that reason, “equity and uniformity . . . cannot, in every case, be achieved by resort to a single guideline.” *Alta Pac. Assoc.*, 931 P.2d at 109.

Salt Lake County contends this is the precise constitutional difficulty inherent in section 201(4). The dogmatic formula enacted by the Legislature has resulted in a valuation of Delta’s property that is both non-uniform and fails to reach fair market value, which has resulted in the impermissible shifting of Delta’s proportional share of governmental expenses to other taxpayers.

II. The Assessment of Delta’s Property Pursuant to Utah Code § 59-2-201(4) Violated Both the Fair Market Value and Uniformity Mandates of Article XIII, §2(1) of the Utah Constitution.

When challenging the constitutionality of a statute, the statute is presumed to be constitutional, and this presumption applies with particular force to tax statutes. *Rio Algom Corp.*, 681 P.2d at 190-191. The party challenging the constitutionality of a statute bears the burden of establishing the statute is either unconstitutional on its face or as applied to the facts of the case. *Utah Pub. Employees Ass’n v State*, 2006 UT 9, ¶ 19, 131 P.3d 208. Salt Lake County contends this burden has been met.

Section 59-2-201(4), as applied to Delta’s property for tax year 2017, violated Article XIII, §(2)(1) in three ways. First, section 201(4)(b)(i) violated the fair market

value requirement by mandating the Commission use a methodology that did not result in the fair market value of Delta's property. It also violated uniformity because the Commission had discretion to choose appropriate methodologies that would reach fair market value for all other state-assessed properties. Second, section 201(4)(c) required the Commission to apply a 20% discount for aircraft resulting in a below market value and violating uniformity since other taxpayers with multiple items of similar property did not receive the same discount. Finally, section 201(4)(d) violated uniformity and the valuation mandates by requiring the Commission to apply a clear and convincing standard when all other taxpayer assessments were subject to a preponderance of the evidence standard. Each violation will be discussed in turn.

A. Utah Code § 59-2-201(4)(b)(i) Violated the Constitutional Fair Market Value Mandate by Prohibiting the Commission from Using Methodologies That Would Reach Fair Market Value and Violated the Uniformity Mandate Because the Commission had Discretion to Choose Appropriate Methodologies for All Other State-Assessed Taxpayers.

Section 59-2-201(4)(b)(i) unconstitutionally resulted in the under valuation of Delta's property by requiring the Commission to use a methodology that under-valued Delta's property. Section 201(4)(b)(i) also violated the constitutional uniformity clause because the Commission had discretion to choose methodologies that would reach fair market value for all other state-assessed taxpayers.

1. Utah Code § 59-2-201(4) Violated the Fair Market Value Mandate by Prohibiting the Commission from Using Methodologies that Would Value Delta's Property at its Highest and Best Use.

To understand why section 201(4) undervalued Delta’s property, it is critical to understand the nature of valuation methodologies used to reach fair market value for state-assessed properties. This Court has recognized there are numerous methods and formulae used to determine market value of property. *Rio Algom Corp.*, 681 P.2d at 192. What type of methodology is used is contingent on the nature of properties to be taxed. *Id.* at 188-89. The three primary approaches that are used to value property are the cost, income, and market approaches. *Salt Lake City S. R.R. Co.*, 1999 UT at ¶ 14. What approach is used and how much weight to put on the various approaches is dependent on the type of property being valued and the availability and reliability of information available. (R. 1239-40; Jt. Ex. 13, R. 2570; Jt. Ex. 53, R. 3724, 3737; Jt. Ex. 56, R. 7529; R. 8712, pgs. 219-20).

Where property is made up of components that are more valuable as a unit working together rather than through the sum of its parts, and thereby often sold together, a unitary approach¹⁵ is typically used. (R. 8712, pgs. 95-96, 126-27, 220-21; Jt. Ex. 56, R. 7479-80; R. 8713, pg. 68-69). As this Court has explained, certain property “cannot be regarded as merely land, buildings, and other assets. Rather, its value depends on the interrelation and operation of the entire utility as a unit. . . .” *Salt Lake City S. R.R. Co.*, 1999 UT at ¶ 21 (cleaned up); (Jt. Ex. 13, R. 2567). A unitary method captures the

¹⁵ The 2009 Western States Association of Tax Administrators Committee on Centrally Assessed Properties Appraisal Handbook defines the unitary appraisal process as: “Unit appraisal means valuing an integrated group of assets functioning as an economic unit as ‘one thing,’ without reference to the independent value of the component parts. The logic of the concept is, that informed buyers and sellers will most likely buy or sell a viable operating unit as ‘one thing.’” (Jt. Ex 13, R. 2567).

synergistic nature of various components of a property operating together as a unit. *Id.* at 21; (R. 8712, pgs. 95-96, 126-27; Ex. 56, R. 7479-80; R. 8713, pg. 69). The value created from synergistic property is considered “enhanced value” and the Court has held this enhanced value is part of the taxable property. *Beaver County v. WilTel, Inc.*, 2000 UT 29, ¶¶ 35-36, 995 P.2d 602 (*superseded by statute on other grounds, see T-Mobile, Inc. v. Tax Comm’n*, 2011 Utah 28, 254 P.3d 752).

This Court has recognized that airlines, along with other properties assessed by the Commission, are typically valued using unitary methods. *Salt Lake City Corp.*, 1999 UT at ¶ 2; UTAH ADMIN. CODE R884-24P-62(4); (Jt. Ex. 13, R. 2567, 2570; Jt. Ex. 56, 7476; R. 8712, pgs. 48-49, 188-90, 263-64). While not required to be used,¹⁶ this Court has looked favorably on unitary methods for valuing state-assessed property as “the most rational way to determine the value of an enterprise whose function relies upon cross-boundary connections.” *WilTel, Inc.*, 2000 UT at ¶ 21.

The income approach is the primary example of a unitary method because it values the property by computing the present value of anticipated income generated by all the property operating together, which a willing seller and buyer will use to establish a price. *Salt Lake City S. R.R. Co.*, 1999 UT at ¶ 14; (Jt. Ex. 13, R. 2584; Jt. Ex. 56, R. 7501, 7530). The income approach is a preferred methodology for assessing unitary

¹⁶ While looking favorably upon unitary methodologies, this Court has also made clear they are not mandatory in every case. *T-Mobile v. Tax Comm’n*, 2011 UT 28, ¶ 51. This is because the Court recognizes that requiring a specific methodology “ignores the reality that certain methodologies are not always accurate in every circumstance.” *Id.* Of course, section 201(4)’s mandating of a methodology for all circumstances ignores that same reality recognized by the Court.

property under Commission rule for these same reasons. UTAH ADMIN. CODE R884-24P-62(4)(b); (Jt. Ex. 13, R. 2584; Jt. Ex. 56, R. 7501, 7530; R. 8712, pg. 112, 223, 225-26).

Because choosing the appropriate methodologies are heavily contingent on the type of property being assessed and specific circumstances present, the Court has recognized that it is critical for the assessing experts to have discretion in appropriately valuing the specific property at issue. “The work of an appraiser . . . reflects . . . the experience, the integrity, and in sum, the personalized judgment of the individualized appraiser. It is his prerogative to select and analogize the various factors which seem important to him in arriving at his estimate as to value. Therefore no one should be able to put him in a straightjacket as to method.” *Alta Pac. Assoc.*, 931 P. 2d at 109.

The constitutional difficulty with section 201(4) is that it did what this Court warned against and placed the Commission in a straightjacket as to method. It did so by mandating that airline property be valued by using a methodology that values the individual aircraft, rather than allowing unitary methodologies that would capture the value of Delta’s property operating together as a unit.

Under the plain language¹⁷ of the statute, the Commission was required to assess Delta’s property by valuing each aircraft individually through use of an aircraft price

¹⁷ In interpreting a statute, the goal is to evince the intent and purpose of the legislature, which is best done by examining the plain language of the statute. *Zilleruelo v. Commodity Transporters, Inc.*, 2022 UT 1, ¶ 18. Statutes must be interpreted as a whole rather than in piecemeal fashion and it is presumed that words and phrases were chosen carefully and advisedly. *Amax Magnesium Corp.*, 796 P.2d at 1258. In addition, if there are multiple reasonable readings of a statute, the statute should be interpreted in a way that avoids doubts as to constitutionality. *In Re Gestational Agreement N.T.B.*, 2019 UT

guide and then summing up the values. Section 201(4) states that “[e]xcept as provided in Subsection (4)(d), the commission shall use an aircraft pricing guide¹⁸ . . . to determine the fair market value of aircraft. . .” The statute defines an aircraft pricing guide as a “nationally recognized publication that assigns value estimates for *individual* commercial aircraft . . .” UTAH CODE § 59-2-201(4)(a) (emphasis added). If the Commission has clear and convincing evidence that the aircraft pricing guide does not reasonably reflect the fair market values of the aircraft and cannot identify an alternative aircraft pricing guide with which to determine the aircraft values, section 201(4)(d) provides the Commission “may use an alternative method *for valuing aircraft* of an airline. . .” (emphasis added). In other words, the statute only allows the Commission to value the individual aircraft rather than valuing all Delta’s property, including the aircraft, as an operating unit working together.

This requirement to value the individual aircraft rather than the property operating together as a unit resulted in unconstitutionally undervaluing Delta’s property in two related ways. First, the statute prevented the Commission from valuing Delta’s property at its highest and best use. Determining the highest and best use of property is integral to determining the fair market value of the property. (Jt. Ex. 13, R. 2569; R. 8712, pg. 95; R.

40, ¶ 33. However, the statute’s text must ultimately be adhered to, and the court is not at liberty to rewrite the statute to save it from constitutional concerns. *Id.*

¹⁸ The statute also mandates that a specific publication be used, the Airliner Price Guide. UTAH CODE §59-2-201(4)(b)(ii). However, if the Airliner Price Guide is no longer published or the Commission determines that another price guide better reflects the value of the aircraft, the Commission “after consulting with the airlines,” can choose an alternative aircraft pricing guide. UTAH CODE § 59-2-201(4)(b)(ii)(A).

8713, pg. 71). The statutory definition of fair market value is “the amount at which property would change hands between a willing buyer and a willing seller,” UTAH CODE § 59-2-102(13). *See ex rel. Benchmark*, 864 P.2d at 885 (constitution requires that property be valued at what it would sell for in the open market).

Because a seller would not willingly sell property for a price that does not reflect the highest and best use of that property, an appraiser must make a highest and best use determination when valuing property for property tax purposes. *See Bd. of Equal. Salt Lake County v. Tax Comm’n ex rel Judd*, 846 P.2d 1292, 1295 (Utah 1993) (“Generally, land is assessed for property tax purposes according to its ‘highest and best’ use.”); *Kennecott Copper Corp. v. Salt Lake County*, 122 Utah 431, 436 (1952) (“It would be obviously unfair to plaintiff to condemn and take this property without paying its value for its present use, and it would be equally unfair to respondents to assess it at a lower valuation”); (Jt. Ex. 13, R. 2569; R. 8712, pg. 95; R. 8713, pg. 71; R. 8714, pg. 304-305). A property valued at something other than the highest and best use will not result in the fair market value of the property. (R. 8713, pg. 72). Delta’s witness agreed that property must be valued at its highest and best use and that the highest and best use is “the use of the property that gives you the highest value.” (R. 8714, pg. 227).

All the expert appraisers who valued Delta’s property testified the highest and best use of Delta’s property, including its aircraft, was as an operating unit functioning as a going concern.¹⁹ (Jt. Ex. 13, R. 2569; R. 8712, pg. 127, 244; R. 8713, pg. 71; Jt. Ex. 53,

¹⁹ Delta’s witness testified that the highest and best use of the aircraft was for moving freight and moving people. (R. 8714, pg. 231). However, because he did not perform a

R. 3619-20; Jt. Ex. 56, R. 7478). As one of the Division’s experts explained, if the APG methodology reached fair market value for Delta’s property, it would be “coincidental” because the appropriate way to value airline property is as a unit, not by summing up the individual pieces. (R. 8712, pgs. 237-38). In his words, “they’re just two different premises of value, ...” (R. 8712, pg. 238). Accordingly, section 201(4) prevented Delta’s property from being valued at its highest and best use as an operating unit.²⁰

The second way that section 201(4) undervalued Delta’s property is that it unconstitutionally removed the Commission’s discretion to choose the most appropriate methodologies, including unitary methodologies, to reach the fair market value of Delta’s property. Every expert appraiser who valued Delta’s property testified that absent the statute, they would have placed all or significant weight on their income approaches to value Delta’s property. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60).

The Division stated in its appraisal that “[u]nder normal circumstances, the Division would have likely put significant weight on [its income] indicator. However, . . . the Division put no weight on this indicator to comply with the methodology outlined in Utah Code Section 59-2-201(4).” (Jt. Ex. 13, R. 2584). The Division’s appraisers uniformly stated they would have put significant weight on the income indicator absent

valuation of Delta’s property, it is not clear how his highest and best use would have affected his valuation.

²⁰ Despite the importance of determining the highest and best use when valuing property, the Commission did not even make a highest and best use determination, presumably because the statute already dictated that conclusion with no discretion to the Commission. (R. 1258-59, 1281-83).

the statute. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60). The Division's appraiser testified that he believed that absent the statute, the Division "would have put the majority, if not all of our weight on" the income indicator. (R. 8712, pgs. 115-16). Indeed, the Division's appraisal specifically stated that because section 201(4) "restrict[s] an appraiser from using other methods to estimate the fair market value of Delta," the Division had to take a jurisdictional exception to allow placing 100% weight on the statutorily required method. (Jt. Ex. 13, R. 2565).

The County's expert appraisal witness, Mr. Eyre, who besides the Division's experts was the only other expert to do an appraisal of Delta's property, also concurred that the income approach was the best indicator to use and was the method "most widely used by potential purchasers of an income-producing property." (Jt. Ex. 56, R. 7530). Mr. Eyre performed a cost indicator, income indicator, and market indicator, but unlike the Division, did not follow the mandate²¹ of the statute to use the APG methodology and placed 90% weighting on his income indicator. (Jt. Ex. 56, R. 7529-30).

It is not surprising the appraisers would want to rely on the income approach to value Delta's property. First, they all agreed the income approach was the best methodology for valuing Delta's property as an operating unit. (R. 1244; Jt. Ex. 13, R.

²¹ Mr. Eyre alleged that his income indicator provided clear and convincing evidence that the section 201(4) methodology did not reasonably reflect fair market value of Delta's property. (Jt. Ex. 56, R. 7473). However, the Commission rejected Mr. Eyre's income indicator because section 201(4) did not allow for an approach that valued the property as a unit to be used to meet the clear and convincing standard. (R. 1282).

2584; Jt. Ex. 53, R. 3737-38; Jt. Ex. 56, R. 7501, 7530; R 8712, pgs. 115-16, 257-59; R. 8714, pg. 88). This is partially because the income approach captures the enhancement value of the operating property working together. *WilTel, Inc.*, 2000 UT 29, ¶¶ 35-37; (R. 8712, pg. 110, 112, 225-26; R. 8714, pg. 62-63). But most importantly, an income approach reflects how a willing buyer and seller²² would value the operating property of an airline, which is at the core of the fair market value definition. (R. 8712, pgs. 116, 258-59); UTAH CODE § 59-2-102(13). Finally, in this specific case, the experts who appraised Delta's property found the income indicator to be a very reliable indicator for Delta's property. (R. 1244; Jt. Ex. 13, R. 2584; Jt. Ex. 53, R. 3737-38; Jt. Ex. 56, R. 7501, 7530; R 8712, pgs. 103, 115-16, 154, 257-59; R. 8714, pgs. 74, 88).

Yet, despite this consensus, section 201(4) prevented the appraisers from using any approach, including the income approach, that would value the property as an operating unit and instead required the aircraft to be valued individually. (R. 1238-40, 1244, 1258-59; Jt. Ex. 13, R. 2565, 2584, 2586; Jt. Ex. 56, R. 7478; R. 8712, pg. 154, 237-38; R. 8713, pg. 72; R. 8714, pgs. 60, 74). Every expert appraiser who valued Delta's property said they would not likely have put any weight on the APG methodology absent the statute. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60). In the Division appraiser's words: "as an appraiser absent Utah law, I probably would not have put any of my weight on that

²² Certainly, Delta would not be a willing seller under a methodology that did not value Delta's property at its highest and best use as part of an operating airline. (Jt. Ex. 53, R. 3743; R. 8714, pgs. 304-05).

indicator. But with Utah law, I put 100 percent.” (R. 8712, pgs. 103, 120, 125, 139, 151-52). The Division was clear that the only reason they put 100 percent on the APG indicator was because they were forced to by the statute. (R. 1238-40, 1244, 1258-59; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pg. 262).

Because the statute mandated use of the APG methodology and prohibited the Division and Commission from using other methodologies, it violated the fair market clause by reaching a below market value for Delta’s property. Given that every expert appraiser who valued Delta’s property said they would have put most, if not all, of the weight on the income approach, one need only look at the various income approaches to know Delta’s property was significantly undervalued.

In the Division’s appraisal, the required APG statutory methodology resulted in a system value of \$14.8 billion. (Jt. Ex. 13, R. 2586). Conversely, the Division’s income approach resulted in a system value of \$39.5 billion, more than 2 ½ times higher than the statutory methodology. (Jt. Ex. 13, R. 2579). The County appraisal’s income approach reached a value very close to the Division’s income value at \$38.6 billion. (Jt. Ex. 56, R. 7529). The County’s expert, the only expert who valued Delta’s property without the constraints of section 201(4), ultimately valued Delta’s property at \$37.3 billion. (Jt. Ex. 56, R. 7531). This unconstitutional undervaluation of Delta’s property resulted in a significant windfall to Delta and a tax shift to all other taxpayers. For illustration purposes, Delta paid approximately \$2.79 million dollars in taxes based on the revised assessment. However, had the Commission placed 100% weight on the Division’s income indicator in its appraisal, which also included the five missing aircraft, Delta’s

taxes would have been approximately \$6.95 million dollars, a difference of approximately \$4 million dollars in Delta's tax burden that was shifted to other taxpayers.²³

It should be noted that while the County provided a value for Delta's property absent the statute and the Division gave repeated statements on how it likely would have valued Delta absent the statute, the Commission itself did not state how it would have valued Delta if it had not been constrained by the statute. Of course, it is precisely that lack of discretion to the Commission that is the reason for the County's challenge.²⁴ However, while the Commission declined to state what it would have done absent the statute, the Commission has previously made clear how it views using an APG methodology to value airlines. For the 2006 tax year, when the Commission was faced with the question of the appropriateness of using an APG methodology, the Commission found it would be "merely coincidental if the values of [] each individual airplane summed . . . plus the book value of the nonmobile assets results in a value near the fair market unitary value of the airline itself." (Jt. Ex. 28, R. 2956). The Commission also stated that only in extreme cases where there was a "complete absence of another meaningful approach to valuing an airline" would the Commission consider using an APG methodology as a proxy for value. (Jt. Ex. 28, R. 2956).

²³ This does not include the privilege tax adjustment the Commission made in its decision. (R. 1294).

²⁴ The County requested the Commission to determine the fair market value of Delta's property absent the statute so this Court could see what value the Commission would have found absent the statute, but given the mandatory nature of the statute, the Commission understandably chose not to do so. (R. 8712, pgs. 31-32).

These were not idle words from the Commission. In every year since its decision, except for when the Legislature forced the Commission's hand, the Commission placed no weight on an APG indicator for Delta's property. (Jt. Ex. 19, R. 2723; Jt. Ex. 20, R. 2755; Jt. Ex. 21, R. 2785; Jt. Ex. 22, R. 2813; Jt. Ex. 23, R. 2846; Jt. Ex. 24, R. 2879; R. 8712, Pg. 138). In fact, in every year the Division and Commission had discretion, the Division placed 100% weight on the income indicator except in 2016, when it weighted the income indicator at 25% and the cost indicator at 75%.²⁵ (Jt. Ex. 24, R. 2879). But in no year did it place any weight on an APG indicator unless the Legislature left it no choice.

In addition, after the Legislature required the Commission to use an APG methodology in 2009 and 2010 to give time to the Commission to come up with preferred approaches through rule making, the Commission adopted the income and cost approach as the preferred methodologies, not the APG methodology.²⁶ UTAH ADMIN. CODE R884-24P-62(4)(b). Indeed, a Division appraiser stated that after the Commission promulgated the rule, the Commission conveyed to the Division that it did not want the Division to use

²⁵ When asked why the Division placed less weight on the income approach in 2016, a Division witness explained that it was an attempt to be conservative and not have the value fluctuate so significantly from year 2015. (Jt. Ex. 53, R. 3722-23).

²⁶ Perhaps, understanding the Legislature's fondness for APG methodologies, the Commission did require the Division to calculate a value using an APG methodology and stated that such a value could be used if the preferred methodologies did not result in a reasonable estimate of fair market value. UTAH ADMIN. CODE R884-24P-62(6)(c). However, neither the Division nor the Commission ever placed any weight on the APG methodology except when required by statute. (Jt. Ex. 19, R. 2723; Jt. Ex. 20, R. 2755; Jt. Ex. 21, R. 2785; Jt. Ex. 22, R. 2813; Jt. Ex. 23, R. 2846; Jt. Ex. 24, R. 2879; R. 8712, Pg. 138).

the APG if they could avoid it and that they strongly preferred the income and cost indicator. (Jt. Ex. 53, R. 3724-25).

The Commission has consistently and repeatedly rejected use of an APG methodology to value Delta's property. With this history, it is no surprise that the Commission noted in its current decision that "the Division's testimony made it clear that absent Utah Code Subsection 59-2-201(4) . . . the Division would have placed a substantial percentage of its weight on the income approach." (R. 1258). The Commission also noted that the Division had prepared both income and cost indicators, both of which were preferred indicators under Rule 62, but placed no weight of them despite the fact the APG indicator was "less than half the value derived from the Division's income indicator and significantly lower" than the cost approach indicator. (R. 1238). There should be little doubt that absent the statute, the Commission would have placed no weight on the APG indicator and instead placed weight on other indicators, primarily one of the income indicators presented by the parties. But the statute prevented the Commission from even considering other indicators of value.

This case represents the culmination of what the Court warned against in *Kennecott Copper Corp.*, 799 P.2d 1156 (Utah 1990). In *Kennecott*, the Legislature had passed a statute that required mines to be valued at two times the average of net annual proceeds in the three calendar years immediately preceding that tax year. *Id.* at 1158. Unlike in this case, there had been a previous constitutional provision that explicitly contemplated valuing mines using a net proceeds formula as well as a provision that stated "all . . . mines . . . shall be assessed as the Legislature shall provide." *Id.* at 1159 fn.

3, 1161. However, the Court held the net proceeds statute nevertheless had to comply with the fair market valuation requirements of Article XIII. *Id.* at 1162. As the Court explained, although the constitution permits the legislature some leeway to achieve a degree of uniformity, it must still be “within the general confines of the term ‘market value.’” *Id.* at 1160. When the Constitution grants authority to the Legislature to enact legislation, “the Legislature may enact only those laws which are consistent with and effectuate the purpose of the authorization. . .” *Id.* at 1159.

In the case of Article XIII, the Court noted the purpose of the authorization was uniformity and fair market value and therefore any formulas must be reasonably designed to achieve that result. *Id.* at 1160. The Court also explained that while a general methodology may be a constitutional method of valuation overall, a particular formula still may violate the constitution in a specific case if it does not yield a result that complies with the fair market value requirement. *Id.* at 1161. Accordingly, the Court held the County was entitled to show the specific statutory formula produced a result that violated the fair market value clause. *Id.* at 1161-62. The County has met that burden in this case. While there may be some time and some place where the statutory APG methodology reaches fair market value for an airline’s property, it did not do so here.

Knowing about the fair market value mandate, the Legislature is typically careful to provide an opt-out if a statutory methodology does not reach fair market value in a specific case and another methodology needs to be used. For example, following the challenge to the statute in *Kennecott*, the Legislature amended the statute to provide an opt out that if the net proceeds formula did not reach fair market value, other valuation

methods could be used. UTAH CODE § 59-2-201(3)(a). The Legislature has carefully provided similar opt outs in other valuation statutes that provide valuation guidance. *See* UTAH CODE § 59-2-301.1; UTAH CODE § 59-2-301.2; UTAH CODE § 59-2-301.3; UTAH CODE § 59-2-301.4; UTAH CODE § 59-2-301.5; UTAH CODE § 59-2-301.6; and UTAH CODE § 59-2-301.7 (statutes that require the assessor to consider different factors when valuing certain types of property, but only as they affect the fair market value of the property). These statutes are great examples of how the Legislature can encourage the assessing authorities to consider various valuation principles without running afoul of the fair market value provision.

If the Legislature had followed the same pattern and allowed the Commission discretion to use other methodologies in cases where the APG methodology did not reasonably reflect fair market value, the County would not have challenged the statute. However, the Legislature chose not to provide that discretion and instead did what this Court has warned against, which is to provide a dogmatic formula to determine value for all cases. *ex rel. Pub. Service Comm'n*, 95 Utah 84, 79 P.2d at 35. In passing section 201(4), the Legislature has ignored “the reality that certain methodologies are not always accurate in every circumstance.” *T-Mobile, Inc.*, 2011 UT at ¶ 51. Ignoring that reality and applying section 201(4)’s dogmatic methodology has resulted in a value that does not reflect fair market value for Delta’s property. The Division’s appraiser could not have been any plainer when he testified that in his expert opinion, the statutory APG methodology fell outside the range of fair market value. (R. 8712, pg. 188). As such, the application of that statute violated the fair market value provision of the constitution and

should be held unconstitutional. *See Harmer*, 22 Utah 2d at 326 (holding that valuing agricultural land as a class below fair market value violated the constitution).

2. Utah Code § 59-2-201(4) Violated the Uniformity Provision Because the Commission has Discretion to Choose Appropriate Methodologies to Reach Fair Market Value for All Other State Assessed Taxpayers Other Than Airlines.

In addition to violating the fair market value provision, the application of the statute violated uniformity as well. In valuing all other state-assessed property, the Commission and parties were not mandated to use one methodology. While Commission rule R884-24P-62(4)(b) makes the preferred methods for valuing state-assessed methodologies²⁷ the income and cost approach, the rule also provides that “[o]ther generally accepted appraisal methods may also be used when it can be demonstrated that such methods are necessary to more accurately estimate fair market value.” UTAH ADMIN. CODE R884-24P-62 (4)(b)(i). The preferred methodologies under Commission Rule 62 are simply rebuttable presumptions for mass appraisal purposes, but any party can demonstrate by a preponderance of the evidence that an alternative methodology more accurately reaches fair market value. *Id.* at R884-24P-62(4)(b)(iii).

Section 201(4) unfortunately does not treat the APG methodology as a rebuttable presumption or provide an opt-out if the APG methodology does not reach fair market

²⁷ Utah Administrative Code R884-24P-62 is used to value most state-assessed properties, but R884-24P-7 and R884-24P-10 is used to value mining and oil and gas property rights, respectively. Both these rules also provide the preferred methodology to be an income approach, but also provide that other methodologies can be used if needed to reach fair market value. R884-24P-7(B)(1) and (B)(7); Utah Admin. Code R884-24P-10(3)(b) and (3)(c).

value. This means that other transportation property assessed by the Commission, such as pipelines that move oil and railroads that move people and goods, can be valued at their highest and best use as an operating unit while airlines, which also moves people and goods, cannot. This discrepancy in treatment means Delta is valued at less than market value while the Commission can use methodologies that best reach fair market value for all other state-assessed property. The uniformity provision of Article XIII does not allow for this disparate treatment and section 201(4) should therefore be held unconstitutional.

B. The 20% Discount Resulted in Below Market Value and Violated the Uniformity Provision Because Other Taxpayers with Multiple Items of Property Did Not Receive a Fleet Discount.

In addition to violating the constitution by prohibiting the Commission from using the appropriate methodologies that would reach fair market value, the statute also violated the constitution by providing a 20% discount to Delta's aircraft. In *Stillman v. Lynch*, this Court hypothesized "[s]uppose the Legislature had enacted a law putting farmers in a separate class for purposes of taxation, and had given them a flat 20 percent reduction in the assessment of their property. Would any one question the invalidity of such a law? It would be rank and indefensible class legislation that could not possibly be harmonized with the Constitution." 56 Utah 540, 192 P. at 279. If one exchanges farmers for the airline industry, that is essentially the current case before the Court.

In *Stillman* the Court struck down a statute that provided for a property tax discount when assessing bank stockholder's stocks.²⁸ *Id.* at 278-279. The Court held the

²⁸ During this period, the Utah Constitution expressly included stocks as being subject to property tax. *See Stillman*, 56 Utah 540, 192 P. at 278 (quoting the constitution that "the word

Constitution required all property be assessed at its full cash value and that a discount could not be provided to one class of property when no other property received the same discount. *Id.* at 279. The Court held that “where there is a deduction or exemption from taxation without express authorization by the Constitution, . . .” it cannot stand and struck down the statute providing the deduction. *Id.* at 280-81.

The Court affirmed these principles again in *ex rel. Benchmark, Inc.*, 864 P.2d 882 (Utah 1993). In *Benchmark*, the owner was a land developer who owned multiple property lots. *Id.* at 883. The developer contended that for property tax purposes, a discount should be provided when valuing the lots because it would take an extended period of time to sell the lots. *Id.* The justification for this discount was that listing all the lots for sale would glut the market and there would not be sufficient willing buyers to buy all the lots at once. *Id.* at 888. Accordingly, a discount was needed to reflect the absorption period. *Id.* The Commission agreed, holding that “for property which contains a number of parcels too numerous to be sold at fair market value within one year, an absorption adjustment must be made to allow for the time value of the investment in the property.” *Id.* at 884.

The Court disagreed and struck down the discount as unconstitutional. *Id.* at 888. The Court noted that to ensure the burden of taxation is shared in proportion to the property’s value, discounts must be applied uniformly and equally to similar property so that all property is assessed in the same proportion to its value. *Id.* at 886. In the

property . . . is hereby declared to include monies, credits, bonds, stocks, franchises . . .”). That language regarding stocks has since been removed.

developer's case, only the developer was being provided a discount on its lots and owners who owned only one lot did not receive any discount. *Id.* at 887. The Court concluded that "such a scheme is not uniform and equal and does not distribute the burden of taxation in proportion to the value of the property owned." *Id.* Accordingly, the discount violated the uniformity provision of the constitution. *Id.* at 888.

This Court reached the same conclusion in *Amax Magnesium Corp.* where the Court struck down a statutory 20% discount that was given to locally assessed property, but was not given to Amax's property, which was state-assessed. 796 P.2d at 1260. The Court had previously upheld a facial challenge to the statute because the methodologies used to value locally assessed properties were very sensitive to inflation, while state-assessed methodologies were not. *Id.* However, *Amax* was brought as an as-applied challenge, not a facial one. *Id.* In addition, *Amax* was valued using the same methodologies that were sensitive to inflation that were used for locally assessed properties. *Id.* While the 20% discount was facially valid as an attempt to bring uniformity to state and locally assessed properties because of the differences in methodologies, it conversely violated uniformity when applied to a property that used the same inflation sensitive methodologies as locally assessed properties. *Id.* Therefore, the Court held the 20% discount was unconstitutional where it was not being applied to Amax, who was similarly situated to those properties that received the discount. *Id.*

Just as in *Amax*, *Benchmark*, and *Stillman*, the 20% discount given to Delta pursuant to section 201(4)(c) violated the fair market value and uniformity provisions of the constitution. First, no expert who performed an opinion of value could justify the 20%

discount with any market evidence. (R. 8712, pgs. 134-135, 240-41; R. 8713, pgs. 125, 148; R. 8714, pgs. 54-56). Indeed, the statute required the discount to be applied regardless of any market evidence to the contrary. Even if it was appropriate to value each individual aircraft and provide a discount, the 20% is arbitrary because the market changes and the discount would not be the same for every year and every aircraft. (R. 8713, pgs. 125-27, 145-46).

The APG itself states a discount should not be provided when doing a fleet appraisal. (Jt. Ex. 27, R. 2932). While the APG provides for a wholesale value calculation method for three or more aircraft in a “bulk” purchase, it explicitly states the method “is not to be used for multiple aircraft appraisals or fleet appraisals.” (Jt. Ex. 27, R. 2932). Essentially, the 20% under the wholesale method assumes the aircraft are being liquidated in a bulk sale rather than as part of the entire operating unit. (R. 8713, pg. 143). As the Division’s expert explained, the premise of value for a bulk sale is different than the premise of value for valuing the aircraft as part of an ongoing operating unit. (R. 8712, pgs. 250-52). An entire fleet of aircraft would typically be sold as part of the entire operating unit, not liquidated separately in a bulk sale. *Id.* A liquidation value is different from fair market value and a discount would not be given if the fleet were sold as part of an operating unit. (R. 8712, pgs. 240-41, 252).

For these reasons, the Division’s expert testified the Division would not have provided a discount absent the statute. (R. 8712, pgs. 152-153.) As he explained, when asked what the basis for the 20% adjustment was, “the basis for why we make the adjustment is the statute requires it.” (R. 8712, pg. 241).

The only witness who tried to defend the potential use of a discount was Delta's witness, who did not perform an appraisal or given an opinion of value. (R. 8714, pgs. 184-185). Delta's witness stated "[t]he larger the - - the bundle of assets, the lower the price per unit that you would expect. So if you're valuing a large enough fleet, you have to make an adjustment for the fact that the fleet is a large bundle of assets. And as volume increases, price decreases." (R. 8714, pgs. 236-237). He then gave an example that if you sold one Ford F-150 pick up truck, it might sell for \$60,000 dollars, but if you had 823 of the same pickup trucks, you would have to provide a discount to reflect that multiple pickups are being sold at once. (R. 8714, pgs. 238-239).

Delta's witness's reasoning to defend the 20% discount is the precise reasoning that was rejected by this Court in *Benchmark*. Moreover, just as in *Benchmark*, the discount given to airlines have not been given to other owners that have multiple items of the same property. The Division's witness testified that he has not seen any other discounts given to other property owners based on the number of similar items owned. (R. 8712, pgs. 132-33). None of the witnesses who testified could identify any other property owners who received a discount based on the number of similar items owned. (Jt. Ex. 47, R. 3527; Jt. Ex. 53, R. 3758-59; R. 8712, pgs. 132-33, 206-08, 239-40, 248; R. 8713, pg. 50; R. 8714, pgs. 117, 134-35, 174). Whether state-assessed or locally assessed, no other taxpayers besides airlines receive a discount for having multiple items of property. *Id.*

Indeed, an employee for the Commission in the Motor Vehicle Division stated that no discounts are provided for owners who own multiple trucks. (R. 8714, pg. 117).

Trucks were precisely the comparison used by Delta's witness to justify giving the discount to Delta because of the number of aircraft. And yet, none of those other property owners, including truck dealerships, got a 20% discount that Delta received under section 201(4).

The application of the discount to Delta's property not only violated the fair market value provision because there was no market justification for it, but it also violated the uniformity provision because it was not provided to any other class of taxpayers beyond airlines. Just as the Court recognized in *Stillman* that the legislature could not select a class such as farmers to receive a discount that no one else receives, the legislature cannot provide a discount only to airlines as a class that other similar property owners do not receive. Because Delta received a discount that other similarly situated taxpayers did not receive that resulted in an undervaluation of Delta's property, the discount should be struck down as unconstitutional.

C. The Clear and Convincing Standard Violated the Fair Market Value Standard and Uniformity Provisions of the Utah Constitution as Applied to Delta's Property.

Finally, section 201(4) violated the constitution by applying a different valuation standard for airlines than used for any other property owners. Section 201(4)(d) provides the Commission may use "an alternative method for valuing aircraft of an airline" if the Commission "has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft" and the Commission cannot identify an alternative aircraft pricing guide to determine aircraft value. This provision of the statute violates Article XIII, § 2(1) in two ways. First, it

suffers from the same deficiency that has been identified for the statutory provision requiring the Commission to value the aircraft individually rather than at their highest and best use as part of an operating unit.

The County provided a unitary appraisal showing the statutory methodology undervalued Delta's property. (Jt. Ex. 56, R. 7470). Yet the Commission was unable to consider that appraisal or the Division's income indicator because the statute only allowed alternative evidence for values of individual aircraft, not evidence of Delta's property working together as unit. (R. 1282). The Commission had no discretion under the statute to consider other unitary approaches such as the income approach and therefore an income approach could not be used to meet the clear and convincing standards. In other words, the clear and convincing provision mandated the Commission only consider evidence that valued Delta's property at something other than its highest and best use. As already discussed, mandating a methodology that failed to reach fair market value and prohibiting other methodologies that would reach it in this case violated the constitution.

In addition, the clear and convincing standard violates uniformity because no other property was valued under a clear and convincing standard. Although neither the Division or County knew how to apply a clear and convincing standard²⁹ in an appraisal

²⁹ Even if the Division knew how to apply such a standard in an appraisal context, they cannot get the data to so. They would need to see the data behind the various aircraft guidebooks or value each aircraft individually, which is simply not possible in any practical sense. (R. 8712, pgs. 120-22; R. 8713, pgs. 69-71, 98). The data for the APG is proprietary and is not publicly available. (Jt. Ex. 57, R. 7569). The Division essentially

context, everyone understood that it was something more than was required under a preponderance of evidence standard. (R. 1246, 1282; Jt. Ex. 47, R. 3528; Jt. Ex. 53, R. 3764-68; R. 8712, pgs. 104-05, 142, 277; R. 8713, pgs. 157-58). All other taxpayers are valued under a preponderance of the evidence standard. UTAH ADMIN. CODE R884-24P-7 (B)(7); R884-24P-10(3)(c); R884-24P-62(4)(b)(iii); UTAH CODE § 59-1-604 (establishing preponderance of the evidence standard in district proceedings for tax appeals).

By using two different evidentiary standards, the statute essentially creates two different valuation standards, one for airlines and one for all other taxpayers. This Court has recognized the danger of using two different valuation standards. In *Public Service Commission v. Southern Pac. Co.*, the Legislature enacted statutes providing that the Public Service Commission would value public utilities and the Commission would be required to use that valuation for property tax purposes. 95 Utah 84, 79 P.2d at 26, 29-30. However, the Court explained that valuing property for a rate base under a fair value standard was not necessarily the same standard as the fair market value standard for property tax purposes. *Id.* at 34. Accordingly, the Court noted that it seemed “the Legislature has attempted to compel the State Tax Commission to use a valuation basis for assessment of utilities which is, or may under some circumstances be, different from the value of such property in money, contrary to the requirement of the Constitution.” *Id.* at 35.³⁰

must accept the APG’s values because they do not have the data to question it. (R. 8712, pg. 124, 143-44).

³⁰ Ultimately, the Court did not strike down the statute on this basis because the statute did not actually specify or mandate how the property had to be valued. *Public Service*

Requiring a clear and convincing standard for airlines while applying a preponderance of the evidence standard for all others similarly risks reaching a different standard of value for airlines than for other taxpayers. It is easily conceivable that the Commission would reach a different value under the clear and convincing standard than they would have reached under the preponderance standard. This is in fact exactly what happened in this case. As discussed above, absent the statute, the Division would have reached a different value for the assessment. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60).

Moreover, the effect of the clear and convincing standard has the same effect as the concern identified by this Court regarding the statute in *Moon Lake Elec. Ass'n, Inc.*, 9 Utah 2d 384 (1959). In *Moon Lake*, the Court struck down a statute that placed a cap on how high nonprofit electric and telephone corporations could be valued. 9 Utah 2d at 385. The Court struck it down as violating the fair market value provision because “[t]he effect of these sections is nothing, unless it prevents the accurate assessment of property in a given case to its full value.” *Id.* at 387. Similarly, the clear and convincing standard’s only effect is to arrive at a different value than what would be arrived at under a preponderance standard. If the clear and convincing standard arrives at the same value as the preponderance standard would have, then the statute had no effect at all in that

Commission v. Southern Pac. Co., 95 Utah 84, 79 P.2d 25, 35 (Utah 1938). Therefore, in theory, the Public Service Commission could use a methodology that would reach the fair market value of the property. *Id.* However, the Court still struck down the statute because it gave assessing authority to the Public Service Commission rather than the Utah State Tax Commission as required by Article XIII, § 11 of the Utah Constitution. *Id.* at 39-40.

circumstance. Its only effect is when it reaches a different value than the preponderance standard would have arrived at. Again, this is precisely what happened in the current case.

If the statute had allowed for unitary methodologies to be submitted as evidence under the preponderance of the evidence standard, the Division would not have used the APG methodology and would have placed weight on other indicators, primarily the income approach. (R. 1240, 1244; Jt. Ex. 13, R. 2565, 2584, 2586; R. 8712, pgs. 103, 115-116, 151-52, 154, 257-58, 262; R. 8713, pgs. 58-60). Every expert with an opinion of value testified the income approach should have been considered and weighted when valuing Delta's property. (R. 1244, 1258). The Commission itself stated its preference for the income approach in both its rules and its caselaw. UTAH ADMIN. CODE R884-24P-7(B)(1); R884-24P-10(3)(b); R884-24P-62(4)(b); (Jt. Ex. 28, R. 2958). Given that every party who valued Delta's property provided appraisals that favored placing weight on the income approach, the Commission would have certainly followed its past practice and done the same.

Accordingly, in conjunction with the statutory requirement to only value individual aircraft, the clear and convincing standard resulted in a different valuation for Delta's property than would otherwise have been reached. Using a standard that results in a below market value that was not uniform with the standard applied to other taxpayers violates the constitution and should be struck down.

III. Utah Code § 59-2-201(4) Violated Article XIII, §6(3)(b) of the Utah Constitution by Infringing on the Commission's Constitutional Power of Assessment.

Article XIII, § 6(3)(b) of the Utah Constitution provides the Commission “shall assess mines and public utilities and *have such other powers of original assessment as the Legislature may provide by statute.*” (emphasis added). The Legislature, through section 59-2-201(1)(a)(iii), has provided that the Commission shall assess all operating property of airlines. However, despite this assignment of assessment jurisdiction, by enacting section 201(4), the Legislature effectively removed the Commission’s assessment power over airlines, in violation of Article XIII, § 6(3)(b). While the Legislature was not obligated to provide original assessment authority to the Commission to value airlines, once it had, it could not impinge on that authority during the period it had been granted.

In *Public Service Commission v. Southern Pac. Co.*, this Court struck down some statutes that similarly attempted to impinge on the Commission’s assessment authority. 95 Utah 84, 79 P.2d at 39-40. In that case, the Legislature passed statutes providing the Public Service Commission would value public utilities, which the Tax Commission would then be obligated to use as the property tax value. *Id.* at 35-36. Noting that the heart of assessment is the making of valuations and that the statutes essentially left the Commission to perform only clerical duties, the Court struck down the statutes for unconstitutionally impinging on the Commission’s assessment authority. *Id.* at 38, 40. *See also Evans & Sutherland Computer Corp. v. Tax Comm’n*, 327 Utah Adv. Rep. 38,

953 P.2d 435, 443 (striking down statute³¹ providing for district court de novo review of tax commission decisions because it infringed on Commission's constitutional assessment authority).

Just as the Legislature did in the *Public Service Commission* case, section 201(4) essentially removed assessment authority over airlines from the Commission and left the Commission with only clerical duties. The section 201(4) methodology is simply adding up the values of the individual aircraft as listed in a guidebook and then deducting 20%. (Jt. Ex. 13, R. 2583; R. 1238-39; R. 8713, pg. 262-65). There is no appraiser judgment or valuation involved in copying numbers from a guidebook. (R. 8713, pg. 264). This can be seen from the Commission's decision where, rather than evaluating the valuation evidence presented by the parties, the Commission was reduced to determining whether the Division had complied with the statute. (R. 1283). Because section 201(4) effectively removed any ability of the Commission to value airline property, it violated Article XIII, § 6(3)(b) of the Utah Constitution and should be struck down.

CONCLUSION

Utah Code § 59-2-201(4) prevented the Commission from reaching fair market value for Delta's property for tax year 2017 and treated Delta differently than any other non-airline state-assessed property, therefore, this Court should hold section 59-2-201(4) unconstitutional as applied to Delta's property for tax year 2017. It should also hold the

³¹ The constitution was later amended to allow the Legislature to authorize Article VIII courts to redetermine any matter decided by the Tax Commission. UTAH CONSTITUTION Article XIII, § 6(4).

statute unconstitutionally infringes on the Commission's assessment authority under Article XIII, § 6(3)(b). The Court should remand the matter to the Commission to have it determine Delta property's value absent the constraints of section 59-2-201(4).

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CERTIFICATE OF COMPLIANCE

I certify that in compliance with rule 24(g), Utah Rules of Appellate Procedure, this brief contains **less than 14,000** words, excluding the table of contents, table of authorities, addenda, and certificates. I also certify that in compliance with rule 21(g), Utah Rules of Appellate Procedure, this brief, including the addenda:

does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (nonpublic information).

contains non-public information and is marked accordingly, and that a public copy of the brief has been filed with all non-public information removed.

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CERTIFICATE OF SERVICE

I certify that on November 16, 2022, an electronic copy of the Brief of Appellant in searchable portable document format (pdf):

was filed with the Court by email and served on appellees by e-mail, and the appropriate number of hard copies will be mailed or hand-delivered upon the Court and counsel within 7 days.

was filed with the Court on a CD or by email and served on appellees.

will be filed with the Court on a CD or by email and served on appellees within 14 days.

SIM GILL
District Attorney for Salt Lake County

/s/ Bradley C. Johnson
Deputy District Attorney
Counsel for Appellee

ADDENDA

Addendum 1

Copy of Article XIII, § 2 of Utah Constitution (2017 Version)

West's Utah Code Annotated
Constitution of Utah
Article XIII. Revenue and Taxation

U.C.A. 1953, Const. Art. 13, § 2

Sec. 2. [Property tax]

Currentness

(1) So that each person and corporation pays a tax in proportion to the fair market value of his, her, or its tangible property, all tangible property in the State that is not exempt under the laws of the United States or under this Constitution shall be:

(a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and

(b) taxed at a uniform and equal rate.

(2) Each corporation and person in the State or doing business in the State is subject to taxation on the tangible property owned or used by the corporation or person within the boundaries of the State or local authority levying the tax.

(3) The Legislature may provide by statute that land used for agricultural purposes be assessed based on its value for agricultural use.

(4) The Legislature may by statute determine the manner and extent of taxing livestock.

(5) The Legislature may by statute determine the manner and extent of taxing or exempting intangible property, except that any property tax on intangible property may not exceed .005 of its fair market value. If any intangible property is taxed under the property tax, the income from that property may not also be taxed.

(6) Tangible personal property required by law to be registered with the State before it is used on a public highway or waterway, on public land, or in the air may be exempted from property tax by statute. If the Legislature exempts tangible personal property from property tax under this Subsection (6), it shall provide for the payment of uniform statewide fees or uniform statewide rates of assessment or taxation on that property in lieu of the property tax. The fair market value of any property exempted under this Subsection (6) shall be considered part of the State tax base for determining the debt limitation under Article XIV.

Credits

Laws 2002, S.J.R. 10, § 2, adopted at election Nov. 5, 2002, eff. Jan. 1, 2003.

Notes of Decisions (206)

U.C.A. 1953, Const. Art. 13, § 2, UT CONST Art. 13, § 2

Current with laws through the 2022 Third Special Session. Some statutes sections may be more current, see credits for details.

End of Document

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Addendum 2

Copy of Utah Code § 59-2-201(4) (2017 Version)

Effective 5/9/2017

Superseded 1/1/2023

59-2-201 Assessment by commission -- Determination of value of mining property -- Determination of value of aircraft -- Notification of assessment -- Local assessment of property assessed by the unitary method -- Commission may consult with county.

- (1)
- (a) By May 1 of each year, the following property, unless otherwise exempt under the Utah Constitution or under Part 11, Exemptions, Deferrals, and Abatements, shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter:
 - (i) except as provided in Subsection (2), all property that operates as a unit across county lines, if the values must be apportioned among more than one county or state;
 - (ii) all property of public utilities;
 - (iii) all operating property of an airline, air charter service, and air contract service;
 - (iv) all geothermal fluids and geothermal resources;
 - (v) all mines and mining claims except in cases, as determined by the commission, where the mining claims are used for other than mining purposes, in which case the value of mining claims used for other than mining purposes shall be assessed by the assessor of the county in which the mining claims are located; and
 - (vi) all machinery used in mining, all property or surface improvements upon or appurtenant to mines or mining claims. For the purposes of assessment and taxation, all processing plants, mills, reduction works, and smelters that are primarily used by the owner of a mine or mining claim for processing, reducing, or smelting minerals taken from a mine or mining claim shall be considered appurtenant to that mine or mining claim, regardless of actual location.
 - (b)
 - (i) For purposes of Subsection (1)(a)(iii), operating property of an air charter service does not include an aircraft that is:
 - (A) used by the air charter service for air charter; and
 - (B) owned by a person other than the air charter service.
 - (ii) For purposes of this Subsection (1)(b):
 - (A) "person" means a natural person, individual, corporation, organization, or other legal entity; and
 - (B) a person does not qualify as a person other than the air charter service as described in Subsection (1)(b)(i)(B) if the person is:
 - (I) a principal, owner, or member of the air charter service; or
 - (II) a legal entity that has a principal, owner, or member of the air charter service as a principal, owner, or member of the legal entity.
- (2) The commission shall assess and collect property tax on state-assessed commercial vehicles at the time of original registration or annual renewal.
- (a) The commission shall assess and collect property tax annually on state-assessed commercial vehicles that are registered pursuant to Section 41-1a-222 or 41-1a-228.
 - (b) State-assessed commercial vehicles brought into the state that are required to be registered in Utah shall, as a condition of registration, be subject to ad valorem tax unless all property taxes or fees imposed by the state of origin have been paid for the current calendar year.
 - (c) Real property, improvements, equipment, fixtures, or other personal property in this state owned by the company shall be assessed separately by the local county assessor.

- (d) The commission shall adjust the value of state-assessed commercial vehicles as necessary to comply with 49 U.S.C. Sec. 14502, and the commission shall direct the county assessor to apply the same adjustment to any personal property, real property, or improvements owned by the company and used directly and exclusively in their commercial vehicle activities.
- (3)
- (a) The method for determining the fair market value of productive mining property is the capitalized net revenue method or any other valuation method the commission believes, or the taxpayer demonstrates to the commission's satisfaction, to be reasonably determinative of the fair market value of the mining property.
 - (b) The commission shall determine the rate of capitalization applicable to mines, consistent with a fair rate of return expected by an investor in light of that industry's current market, financial, and economic conditions.
 - (c) In no event may the fair market value of the mining property be less than the fair market value of the land, improvements, and tangible personal property upon or appurtenant to the mining property.
- (4)
- (a) As used in this Subsection (4), "aircraft pricing guide" means a nationally recognized publication that assigns value estimates for individual commercial aircraft that are:
 - (i) identified by year, make, and model; and
 - (ii) in average condition typical for the aircraft's type and vintage.
 - (b)
 - (i) Except as provided in Subsection (4)(d), the commission shall use an aircraft pricing guide, adjusted as provided in Subsection (4)(c), to determine the fair market value of aircraft assessed under this part.
 - (ii) The commission shall use the Airliner Price Guide as the aircraft pricing guide, except that:
 - (A) if the Airliner Price Guide is no longer published or the commission determines that another aircraft pricing guide more reasonably reflects the fair market value of aircraft, the commission, after consulting with the airlines operating in the state, shall select an alternative aircraft pricing guide;
 - (B) if an aircraft is not listed in the Airliner Price Guide, the commission shall use the Aircraft Bluebook Price Digest as the aircraft pricing guide; and
 - (C) if the Aircraft Bluebook Price Digest is no longer published or the commission determines that another aircraft pricing guide more reasonably reflects the fair market value of aircraft, the commission, after consulting with the airlines operating in the state, shall select an alternative aircraft pricing guide.
 - (c)
 - (i) To reflect the value of an aircraft fleet that is used as part of the operating property of an airline, air charter service, or air contract service, the fair market value of the aircraft shall include a fleet adjustment as provided in this Subsection (4)(c).
 - (ii) If the aircraft pricing guide provides a method for making a fleet adjustment, the commission shall use the method described in the aircraft pricing guide.
 - (iii) If the aircraft pricing guide does not provide a method for making a fleet adjustment, the commission shall make a fleet adjustment by reducing the aircraft pricing guide value of each aircraft in the fleet by .5% for each aircraft over three aircraft up to a maximum 20% reduction.
 - (d) The commission may use an alternative method for valuing aircraft of an airline, air charter service, or air contract service if the commission:

- (i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; and
 - (ii) cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value.
- (5) Immediately following the assessment, the commission shall send, by certified mail, notice of the assessment to the owner or operator of the assessed property and the assessor of the county in which the property is located.
- (6) The commission may consult with a county in valuing property in accordance with this part.
- (7) The local county assessor shall separately assess property that is assessed by the unitary method if the commission determines that the property:
- (a) is not necessary to the conduct of the business; and
 - (b) does not contribute to the income of the business.

Amended by Chapter 425, 2017 General Session

Addendum 3

3-Commission Decision (R. 1231-1295)

BEFORE THE UTAH STATE TAX COMMISSION	
<p>DELTA AIRLINES, INC,</p> <p style="text-align: center;">Petitioner,</p> <p>SALT LAKE COUNTY,</p> <p style="text-align: center;">Cross Petitioner,</p> <p>v.</p> <p>PROPERTY TAX DIVISION OF THE UTAH STATE TAX COMMISSION,</p> <p style="text-align: center;">Respondent.</p>	<p>FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL DECISION</p> <p>Appeal No. 17-979</p> <p>Tax Type: Centrally Assessed Property Tax / Privilege Tax</p> <p>Tax Year: 2017</p> <p>Judge: Phan</p>

This Order may contain confidential "commercial information" within the meaning of Utah Code Sec. 59-1-404, and is subject to disclosure restrictions as set out in that section and regulation pursuant to Utah Admin. Rule R861-1A-37. Subsection 6 of that rule, pursuant to Sec. 59-1-404(4)(b)(iii)(B), prohibits the parties from disclosing commercial information obtained from the opposing party to unopponents, outside of the hearing process. Pursuant to Utah Admin. Rule R861-1A-37(7), the Tax Commission may publish this decision, in its entirety, unless the property taxpayer responds in writing to the Commission, within 30 days of this notice, specifying the commercial information that the taxpayer wants protected. The taxpayer must send the response via email to taxredact@utah.gov, or via mail to Utah State Tax Commission, Appeals Division, 210 North 1950 West, Salt Lake City, Utah 84134.

Presiding:

John L. Valentine, Commission Chair
Michael J. Cragun, Commissioner
Rebecca L. Rockwell, Commissioner
Lawrence C. Walters, Commissioner¹
Jane Phan, Administrative Law Judge

Appearances:

For Petitioner: Gary Thorup, Attorney at Law
Cole Crowther, Attorney at Law
James Gilson, Attorney at Law

For Cross Petitioner: Jacque Ramos, Deputy Salt Lake County District Attorney
Tim Bodily, Deputy Salt Lake County District Attorney

For Respondent: Laron Lind, Assistant Attorney General
Michelle Lombardi, Assistant Attorney General

¹ Commissioner Walters attended the Formal Hearing, but retired prior to the issuance of this decision.

STATEMENT OF THE CASE

This matter came before the Utah State Tax Commission for a Formal Hearing on December 7 through 11, 2020, in accordance with Utah Code Ann. §59-2-1007 and §63G-4-201 et seq. The hearing was conducted by video conference. The parties submitted Post-Hearing Briefs, with the final Post-Hearing Reply Briefs being submitted to the Commission on March 19, 2021. Based upon the evidence and testimony presented at the hearing and considering the argument of the parties presented at the hearing and in the Post-Hearing Briefs, the Tax Commission hereby makes its:

FINDINGS OF FACT

1. The lien date at issue in this appeal is January 1, 2017.
2. The property that is the subject of this appeal is all of the operating property of Delta Airlines, which is then allocated to Utah to determine the Utah assessed value.
3. This matter contains two distinct issues, Petitioner’s (“Delta’s”) privilege tax appeal and Cross Petitioner Salt Lake County (“County’s”) valuation appeal.
4. In its original property tax assessment, Respondent (“Division”) valued Delta’s system wide property as a unit and then allocated a portion of that value to Utah. The Division issued its original assessment on or around May 1, 2017 valuing Delta’s taxable Utah property at \$221,035,530.² Included in this value was \$53,190,265 for government-owned space at the airport, which is not assessed a property tax, but is instead assessed under Utah’s privilege tax statute, Utah Code § 59-4-101 et seq. Delta gave the Division new information relating to the leased property and the Division amended its privilege tax assessment to \$26,926,410. This resulted in a revised Utah assessed value (“Revised Assessment”) of \$196,163,650. The Utah Revised Assessment consists of the following:

Utah Apportioned Flight Equipment	\$165,943,465	Less 5.3% TEFRA	\$157,148,461
Utah Apportioned Terminal Equipment Assessed Value			
Utah Terminal Property	\$14,272,316		
Gov. Leased Property (privilege tax)	<u>\$26,926,410</u>		
	\$41,198,726	Less 5.3% TEFRA	<u>\$ 39,015,194</u>
			\$196,163,650

² All exhibits referred to in this decision are from the Parties’ Joint Stipulated Exhibits. The Division’s original assessment is Exhibit 1 and Revised Assessment is Exhibit 2. Both assessments are dated May 1, 2017.

5. The Utah taxable value was apportioned entirely to Salt Lake County since Delta did not fly in or out of an airport in any other county in Utah during 2017.

6. Cross Petitioner Salt Lake County appealed this assessment and is requesting a higher value. In regards to the assessed value of the property, Delta did not contest the Division's 2017 conclusion of value relating to the property tax in the Revised Assessment. Delta, however, filed an appeal to contest a portion of the \$26,926,410 privilege tax assessment, arguing that portions of the airport property owned by Salt Lake City and leased by Delta, which were the subject of the privilege tax assessment, were impermissibly assessed privilege tax. Delta argues the portion of privilege tax related to these areas should be abated. At the hearing the Division offered a new appraisal value, ("Hearing Appraisal") which concluded a higher Utah assessed value for tax year 2017 of \$199,451,840 due to the fact that the appraiser had included five airplanes which had been missed in the Original Assessment and Revised Assessment. The Division asked that the Utah taxable assessed value be raised to \$199,451,840.

I. FINDINGS OF FACT ON VALUATION ISSUE

7. To determine the assessed value, the Division, in its original and Revised Assessment, placed 100% weight on the Airliner Price Guide methodology that used current market values minus a 20% fleet adjustment ("APG-Fleet Discount"), which the Division concluded was required by Utah Code Subsection 59-2-201(4).

8. Utah Code Subsection 59-2-201(4) was enacted by the Utah Legislature in its 2017 General Session and made retrospective to the January 1, 2017 lien date at issue in this appeal.

A. Division's Revised Assessment

9. The Division's 2017 Revised Assessment³ had been prepared by the Property Tax Division and had been approved by Lucas Hendrickson, Assistant Director of the Property Tax Division,⁴ who attended the hearing and testified in regards to the assessment and valuation methods. For the Revised Assessment, the Division had prepared a number of different approaches to value, but gave 100% of the weight to only one of the approaches, the APG-Fleet Discount indicator. The APG Fleet Discount was the approach that indicated the lowest value for the subject property. The approaches the Division considered in the 2017 Revised Assessment, the value conclusions from each and the weight given to the conclusions are the following:

³ Exhibit 2.

⁴ Mr. Hendrickson is currently the Assistant Director of the Property Tax Division. At the time he had approved the Revised Assessment, he was a Valuation Manager in the Property Tax Division.

Approach	Value	Weight	Weighted Value
Cost Approach	\$21,305,288,946	0%	0
Income Approach	\$40,898,159,170	0%	0
APG Retail ⁵	\$17,120,643,805	0%	0
APG Wholesale	\$16,212,963,805	0%	0
APG-Fleet Discount	\$14,611,909,805	100%	\$14,611,909,805

10. After concluding that the Delta system value, rounded, was \$14,600,000,000, the Division determined what portion of the value should be allocated to Utah. This was done by looking separately at the flight equipment and terminal property apportioned to Utah and applying the TEFRA adjustment as follows:

Type	Method	Market value	Less TEFRA ⁶	Allocated Market Value
Flight Equipment	Ground Hrs	165,943,465	(8,795,004)	157,148,461
Terminal property	At Market VI	41,198,726	(2,183,532)	39,015,194
Total Utah Assessed Value Rounded				196,163,650

11. For its income approach in its Revised Assessment, the Division had prepared an income approach consistent with the preferred income indicator set out in Utah Admin. Rule R884-24P-62, although the Division placed no weight on its income approach. The Division's income approach was based on the capitalization method preferred by Rule 62(5)(b), which is the formula $CF/k-g$, where "CF" is a single year's normalized cash flow, "k" is the nominal, risk adjusted discount or yield rate, and "g" is the expected growth rate of the cash flow. From the income approach, the Division had concluded a system wide value of \$40,898,159,170. The Division's income approach in its Revised Assessment consisted of the following elements:⁷

⁵ The Airliner Price Guide appears to use "retail" values and "current market values" as synonymous terms. See Exhibit 27 of the Parties' Joint Stipulated Exhibits. The Division has retained the label "retail" in its assessment templates and when discussing the Airliner Price Guide used "retail" and "current market value" interchangeably.

⁶ This is a 5.30% reduction in value pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Title V (TEFRA), The Airport and Airway Improvement Act of 1982 {49 U.S.C.A. §40016(d)(2)(A)}.

⁷ Exhibit 2.

- a. To determine the “CF” or normalized cash flow, the Division estimated net operating income to be \$4,000,000,000 after considering operating revenue and net operating income for each year from 2011 to 2016. Then, looking at various calculations including a 3 year average, 5 year average, 3 year weighted average and 5 year weighted average, as well as some other income estimates and investment analysts’ earnings projections, the Division made the following adjustments to the net operating income to get its normalized cash flow:

Income & Expense Items	Normalized
Normalized Net Operating Income.	4,000,000,000
Add: Depreciation Expense	1,900,000,000
Add: Operating Amortization Expense	16,000,000
Add: Deferred Income Taxes	100,000,000
Add: Other Non-Cash Expense	0
Less: Replacement Capital Expenditures	(1,916,000,000)
Less: Increase in Working Capital	(80,000,000)
	<hr/> <hr/>
Total Normalized Cash Flow	4,020,000,000

- b. The Division calculated a capitalization rate for the subject property of 8.39% using the weighted average cost of capital (“WACC”) method. The Division had prepared a 2017 Capitalization Rate Study for each category of airlines, including Legacy Air Carriers, which was the category of airline that applied to the subject. There are three components of the WACC capitalization rate: 1) the equity rate; 2) the debt rate; and 3) the capital structure. The Division’s capitalization rate conclusion was the following:

	Industry Structure	Industry Rate	Weighted Rate
Debt	45%	4.83%	2.17%
Equity	55%	11.30%	<u>6.22%</u>
			8.39%

- 1) To determine the equity rate, the Division did prepare a Rule 62 compliant CAPM model, and gave that model 50% weight. The Division also looked at

other equity models and the Division's conclusions from those models are the following:⁸

CAPM: Rule 62 Compliant	11.47%
CAPM: Supply Side	10.25%
CAPM: Implied ERP	9.82%
Division's Risk Premium	10.01%
DGM: Earnings & Dividends	20.90%
DGM: Plowback Ratio	<u>32.69%</u>
Reconciled Equity Rate	11.30%

- 2) The Division concluded a debt rate for the subject property of 4.83%. This was based on the debt rating for a Baa3 rated company.
- 3) The Division concluded the appropriate capital structure to be 45% debt and 55% equity by considering the capital structure of Delta and two other legacy carriers as guideline companies. The percent of debt and equity financing from the guideline companies was the following:

	Debt %	Equity %
American Airlines	52.47%	47.53%
Delta Air Lines	33.48%	66.52%
United Continental Holdings	51.36%	48.64%

- c. In the Rule 62 capitalization formula, $CF/(k-g)$, "g" is the expected growth rate. Rule 62(5)(b)(i)(C) sets out how the growth rate is to be derived and provides, "If insufficient information is available to the Division either from public sources or from the taxpayer, to determine a rate, "g" will be the expected inflationary rate in the Gross Domestic Product Price Deflator obtained in Value Line." The Division had used the inflation rate from Value Line of 2.4%.
- d. Included in Delta's operating property was property that Delta leased and a value for this property had to be determined and then added to the income indicator. In its Revised Assessment, the Division had concluded the system wide value for the operating leased property was \$1,669,449,082.
- e. Because the income approach does indicate a value of both the tangible and intangible property and some of the property is exempt intangibles, the Division made a deduction

⁸ Exhibit 8.

in its Revised Assessment in its income approach for exempt intangibles. The Division concluded that the ratio of tangible property to all property was 59.46%. The Division calculated this ratio as follows:

Net Book Value of Tangible Property	21,470,580,054
Add: NBV of Exempt Intangible Property	14,638,000,000
Net Book Value Including Exempt Intangibles	36,108,580,054
Ratio of Tangible Property to All Property	59.46%

12. Based on the above components, the income approach to determine the system wide value of Delta's taxable property for tax year 2017 was as follows in the Division's Revised Assessment:

Total Normalized Cash Flow	4,020,000,000
Capitalization Rate	8.39%
Less: Forecast Long-Term Inflation or Growth Rate	2.40%
Yield Capitalization Rate (k-g)	5.99%
CF I (k-g)	67,111,853,088
Add: Operating Leased Property	1,669,449,082
Income Indicator Including Exempt Intangibles	<u>68,781,302,170</u>
Intangible Ratio	59.46%
Less: Estimated Value of Exempt Intangibles	(27,883,143,000)
INCOME INDICATOR OF SYSTEM WIDE VALUE:	<u>40,898,159,170</u>

13. In addition to its income approach to value, the Division had prepared a historic cost less depreciation ("HCLD") cost approach based on the net book value of the property. The Division's cost approach in its Revised Assessment is the following:

	System Cost	Depreciation/Amortization
Flight Equipment	21,053,303,076	6,868,837,344
Rotables & Spare Engines	1,802,782,333	688,419,553
Capital Leased Flight Equipment	661,298,569	405,823,857
CWIP- Flight Equipment	815,291,847	
Operating Leased Aircraft	<u>2,612,877,901</u>	<u>375,506,523</u>
Total Flight Equipment	26,945,553,726	8,338,587,277
Ground Property	3,473,131,952	1,787,444,068
Materials & Supplies	435,945,484	93,191,244

Capital Leased Ground Property	92,620,827	41,617,508
CWIP- Ground Property	644,321,785	
Land	139,846,377	0
Gates	<u>0</u>	<u>0</u>
Total Ground Property	4,785,866,425	1,922,252,820
Total Flight & Ground	31,731,420,151	<u>(10,260,840,097)</u>
Total Net Book Value of Tangible Property		21,470,580,054
Less: Cost of Flight and Ground CWIP		(1,459,613,632)
Add: PV of Flight and Ground CWIP		<u>1,294,322,524</u>
COST INDICATOR OF VALUE		21,305,288,946

14. Although the Division had prepared an income indicator and a cost indicator in its Revised Assessment, both of which are listed as preferred indicators in Rule 62, the Division placed no weight on these indicators for tax year 2017. The Division placed 100% weight on an approach that the Division had called “Airliner Price Guide-Fleet Discount” (“APG-Fleet Discount”). The Division’s conclusion from this indicator was a system wide value of \$14,600,000,000, which was less than half of the value derived from the Division’s income indicator and significantly lower than the value derived from the cost approach indicator.

15. The Division had prepared three different Airliner Price Guide (“APG”) indicators. An APG-Wholesale, an APG-Retail and an APG-Fleet Discount. These were based on simply obtaining the wholesale or retail value for each of Delta’s operating aircraft based on aircraft type and year of manufacture from the APG. To prepare the valuation based on these APG approaches, the Division listed each individual aircraft used by Delta, noting its aircraft type and year of manufacture. Then the Division looked to the APG for the wholesale and retail value of that aircraft based on type and year of manufacture. There were no adjustments for condition or miles because the APG assumes an average condition typical for the aircraft’s type and vintage. The values for each aircraft were then totaled to obtain the wholesale and retail value for all of the aircraft. The Division’s APG-Wholesale and APG-Retail values are the summation of the values for each aircraft.

16. Additionally, for the APG-Fleet Discount indicator, the Division applied a 20% fleet discount to the total obtained from the APG-Retail value to get the discounted value of all of

the aircraft, which the Division calculated to be \$10,034,936,000. To that, the Division added ground and other property at its net book value and land at its market value. The Division's Airliner Price Guide values were summarized in the Revised Assessment as follows:⁹

Description	APG Retail	APG Wholesale	APGFleetDiscount
Owned Aircraft	9,993,200,000	9,066,150,000	9,993,200,000
Capital Leased Aircraft	285,000,000	256,370,000	285,000,000
Operating Leased Aircraft	<u>2,265,470,000</u>	<u>2,313,470,000</u>	<u>2,265,470,000</u>
Market Value of All Aircraft	12,543,670,000	11,635,990,000	12,543,670,000
Less: Fleet Discount (20%)			<u>(2,508,734,000)</u>
Total Value of All Aircraft			10,034,936,000
CWIP @ PV	1,294,322,524	1,294,322,524	1,294,322,524
Rotables & Spr Engns @ NBV	1,114,362,780	1,114,362,780	1,114,362,780
Ground Property@ NBV	1,685,687,884	1,685,687,884	1,685,687,884
Land	139,846,377	139,846,377	139,846,377
Materials & Supplies @ NBV	342,754,240	342,754,240	342,754,240
Gates@ NBV	0	0	0
Other Property@ NBV	_____	_____	_____
APG Market Value	17,120,643,805	16,212,963,805	14,611,909,805

17. The Division had placed 100% weighting on its APG-Fleet Discount indicator. Although the Division had prepared an income indicator and a cost indicator the Division placed no weight on these indicators in its original assessment or Revised Assessment for tax year 2017. At the hearing, Mr. Hendrickson provided testimony and the Division submitted as exhibits prior year assessments¹⁰ that showed that in years prior to tax year 2017, the Division had relied on the income and cost indicators in those past years' assessments and had placed more or less weight on one or the other of the indicators in issuing its assessment. The Division had also prepared and placed some weight on various APG indicators in some years. Mr. Hendrickson pointed out, for example, that for 2016 the Division gave no weight to its APG indicator of value and all the airlines were assessed based on income and cost indicators. Mr. Hendrickson testified that in 2016, the Division had put different weighting on the different indicators and these were not uniform for each airline.

⁹ Exhibit 2, pg. PTD 293.

¹⁰ Exhibits 14-25.

Mr. Hendrickson explained in regards to the weighting for 2016, "We will typically look at each company on its own, look at the information that's been reported to us, the quantity and quality of the information, and . . . what we believe best represents market . . . value . . . for those companies as of the lien date." He then testified, "I think our intent was to value them at fair market value. And so we believed by using those weights that we were coming up with our best estimates for fair market value." Mr. Hendrickson provided his opinion as an appraiser that it was important for an appraiser to utilize more than one indicator of value because each indicator or sub-indicator had its own strengths and weaknesses. He testified that, "it's usually beneficial to look at multiple indicators of value and try to balance out and analyze the strengths and weaknesses of each."¹¹

18. Mr. Hendrickson testified at the hearing that for tax year 2017, the Division placed 100% of the weight in its assessments for all airlines on the APG-Fleet Discount approach.¹² He testified the reason why the Division had made this departure from how these properties had been valued in prior years was because it was required by Utah Code Subsection 59-2-201(4) which became effective in 2017. Mr. Hendrickson stated, "Absent any statutory requirement . . . that would require me to place weight on an APG indicator . . . I would likely place most of my weight on . . . [a] properly crafted income approach."¹³ He explained that he would look at an income approach when valuing an airline because it was the primary driver of how these properties are bought and sold and how they are valued. With respect to how the Division was required to value the subject property pursuant to Utah Code Subsection 59-2-201(4) he did not "think that's how a willing buyer or willing seller would do the analysis" to figure out what they would buy or sell the property of an operating airline for.¹⁴

19. Mr. Hendrickson testified that the subject property is assessed as a unitary property, which was as a group of operating assets working together as one unit operating at their highest and best use. He provided the opinion that the enhanced or assemblage value of a unitary property is taxable in Utah, explaining, "If the value of that unit . . . is greater than the sum of the individual pieces and parts, then yes, I believe that value [is] taxable in the State of Utah."¹⁵

20. Mr. Hendrickson stated that Subsection 59-2-201(4) required the Division to assess the property based on the valuations for each individual aircraft as stated in the Airliner Price Guide. The APG provides two values, a wholesale value and a current market value or retail value

¹¹ Transcript Day 1, pg. 220. See also Transcript Day 1, pgs. 229-30.

¹² Transcript Day 1, pg. 227, Exhibit 26.

¹³ Transcript Day 1, pg. 257.

¹⁴ Transcript pgs. 258-259.

¹⁵ Transcript Day 1, pg. 221.

for aircraft. The Division used the terms current market value or retail value interchangeably. The Division concluded the statute required that the assessment be based on the current market value or retail value.

21. In addition, Subsection 201(4)(c) required that the Division make a fleet adjustment to the APG value. Subsection (4)(c)(i) states, "To reflect the value of an aircraft fleet that is used as part of the operating property of an airline . . . the fair market value of the aircraft shall include a fleet adjustment as provided in this Subsection (4)(c)." Subsection (4)(c)(ii) states if the aircraft pricing guide provides a method for making a fleet adjustment, the Division was to use that method, and if not Subsection (4)(c)(iii) states that the Division "shall make a fleet adjustment by reducing the aircraft pricing guide value of each aircraft in the fleet by .5% for each aircraft over three aircraft up to a maximum 20% reduction." Mr. Hendrickson testified that the Division struggled with how to apply the fleet adjustment and ultimately decided to apply the 20% reduction to every airplane in order to be able to administer the statute and be equitable to all airlines. He explained in his testimony, "I remember having a discussion with . . . my management and Mr. Art Brownell, who was a -- former senior appraiser at the Tax Commission, and discussed how we were going to implement this change. And as a result of those conversations, it was determined . . . we would give the 20 percent discount . . . to every plane in order to be able to administer effectively the requirements of the statute. And then also to be equitable to all of the airlines." He also explained, "but . . . also I think a small part of it was just being able to administer that uniformly and without error. To be able to do that mid assessment, I think that played a small part into it as well. But primarily it was the equal and uniform treatment issues that led us to decide we were just going to do 20 percent discount for . . . everybody."¹⁶

22. Another issue that the Division addressed in applying the discount was what was meant by the term "fleet." Mr. Hendrickson testified in that regard, "It's not -- it's not completely clear, even under this explanation of complete wholesale, how you would identify what constitutes a -- a fleet. Is it just the same aircraft type? Does it have to be in the same aircraft type in the same year of manufacture? So . . . there's still some questions that . . . I have about . . . about how to apply that . . . in theory, if you considered each aircraft type, a Boeing 737, an Embraer 195AR, an Airbus A320, if you all consider those their own fleets, . . . and they had a couple of each one of those types of aircraft, . . . you may not apply a discount to any of them depending on how you interpret the requirements of these instructions."¹⁷

¹⁶ Hearing Transcript pgs. 246-248.

¹⁷ Hearing Transcript pg. 253.

B. Division Hearing Appraisal

23. At the hearing, the Division also submitted an Appraisal Report, which had been prepared by Division employee Devin Hales, Manager, Property Tax Division/Utilities and Licensed Appraiser with Ad Valorem Centrally Assessed Valuation Designation, ("Hearing Appraisal").¹⁸ It was Mr. Hales' conclusion that the Utah value for the subject property was \$199,451,840 as of the lien date January 1 2017, which was a small increase over the Revised Assessment. The Division asked that the assessment be increased to Mr. Hales' appraisal amount. In his appraisal, Mr. Hales did prepare a cost approach, a yield capitalization income approach, a stock and debt approach as well as the APG-Fleet Discount approach and other APG indicators. Although there were some different conclusions in the income and cost approaches, because Mr. Hales placed 100% of the weight on the APG-Fleet Discount indicator, ultimately it was the difference in this indicator that resulted in the higher value.

24. Mr. Hales testified that the primary difference between his Hearing Appraisal and the Division's Revised Assessment was that five of Delta's operating aircraft had not been included in the Revised Assessment.¹⁹ The fact that Delta did own or lease these five additional aircraft, or the fact that they had mistakenly been left out of the Revised Assessment was not refuted by any of the other parties.

25. Mr. Hales' conclusions in the Hearing Appraisal from each approach were as follows:²⁰

Cost Approach:	\$21,199,431,034
Yield Capitalization:	\$38,790,514,317
APG - Retail:	\$17,437,925,893
APG - Wholesale:	\$16,246,805,893
APG - Fleet Discount:	\$14,844,563,893
Stock and Debt:	\$40,463,742,220
Reconciled System Value:	\$14,800,000,000
Utah Mobile Flight Allocation Percentage:	1.34%
Utah Terminal Allocation Percentage:	0.65%
Final Opinion of Utah Value:	\$199,451,840

¹⁸ Exhibit 13.

¹⁹ Hearing Transcript Day 3 pg. 20.

²⁰ Exhibit 13.

26. In the Hearing Appraisal, Mr. Hales had taken an appraisal “jurisdictional exception” to place 100% of the weight on the APG Fleet Discount indicator. He testified at the hearing that as an appraiser, his first duty was to follow the law and Utah Law required that 100% weight be placed on that indicator and absent Utah law, he would not have put any weight on that indicator.²¹ In his appraisal he explained the jurisdictional exception as follows:²²

The jurisdictional exception rule under USPAP provides a saving or severability clause intended to preserve the balance of USPAP if compliance with one or more of its parts is precluded by the law or regulation of a jurisdiction. Appraisers may claim a jurisdictional exception under USPAP when a law or regulation requires methods or procedures that an appraiser would otherwise not use or be restricted to under an appraisal assignment. In this appraisal, the Property Tax Division of the Utah State Tax Commission (Division) developed and placed 100% weight on an Airliner Price Guide indicator that complies with methodologies outlined in Utah Code Section 59-2-[201](4). This statute directs the Tax Commission to value mobile flight equipment by using an aircraft pricing guide at current market value (retail) adjusted for a fleet discount unless the Commission "has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft." The effective date of this law was January 1, 2017. Because these methods restrict an appraiser from using other methods to estimate the fair market value of Delta, the Division claimed a jurisdictional exception when placing 100% weight on the APG – Fleet Discount approach to value.

In my opinion, the valuation contained in this report resulted in a reasonable estimate of the fair market value of Delta’s operating property for ad valorem property tax purposes pursuant to the methodologies outlined in Utah Code Section 59-2-[201](4) and under the jurisdictional exception rule of USPAP. Absent this jurisdictional exception, the Division would have likely considered and relied upon other indicators of value.

27. Mr. Hales did testify that the Division routinely takes jurisdictional exceptions to valuation restrictions imposed by Utah law, including administrative rules and guidance from prior decisions.²³

28. Although in the Hearing Appraisal Mr. Hales did place 100% of the weight on his APG-Fleet Discount indicator, he had prepared an income approach using the same Rule 62 yield capitalization formula as the Division had used in its original and Revised Assessments. There were some differences between Mr. Hales’ and the Division’s Revised Assessment in the income

²¹ Hearing Transcript pgs. 102-104.

²² Exhibit 13, pg. 4.

²³ Hearing Transcript Day 3, pgs. 42-44, 58-61.

approaches, including Mr. Hales using a different normalized cash flow and yield capitalization rate. Ultimately, because no weight was placed on this approach in either the Division's Revised Assessment or the Hearing Appraisal, the differences had no effect on the reconciled value. A comparison of the income approach in the Division's Revised Assessment and from Mr. Hales' Hearing Appraisal is as follows:

	Revised Assessment	Hearing Appraisal
CF	\$4,020,000,000	\$4,020,600,000
k	8.39%	8.64%
g	2.40%	2.40%
Value	\$67,111,853,088	\$64,432,692,308
Operating Leased Property	<u>+\$1,669,449,082</u>	<u>+\$2,000,000,000</u>
Income Indicator Including	\$68,781,302,170	\$66,432,692,308
Intangible Ratio	59.46%	40.54%
Less: Exempt Intangibles	(\$27,883,143,000)	(\$26,929,376,322)
	<hr/>	<hr/>
INCOME INDICATOR OF SYSTEM WIDE VALUE:	\$40,898,159,170	\$39,503,315,986

29. Mr. Hales testified regarding his income indicator, "I believe that absent . . . Utah law, we would have put the majority . . . if not all of our weight on this indicator."²⁴ He explained the reason for this was that when buyers and sellers of properties like the subject airline go to buy these properties "they primarily are looking at income approaches to value." In addition, he explained that there was "good reliable data" for an income approach for Delta.²⁵

30. For the cost indicator in the Hearing Appraisal, Mr. Hales used the historical cost less depreciation ("HCLD") method noting that it is the preferred cost method in Rule 62. This was the same method used by the Division in its Revised Assessment. Regarding his cost indicator, Mr. Hales had testified, "[T]he main strength . . . of any HCLD cost approach, especially for publicly traded companies such as Delta Air Lines, Inc. is that the data that you're receiving is reliable data. It's been audited by third-party auditing firms. It's available to the public under strict criminal punishment if it's incorrect."²⁶ While the Division's conclusion from the cost approach had been \$21,305,288,946, Mr. Hales had reached a slightly lower conclusion at \$21,199,431,034. However,

²⁴ Hearing Transcript Day 1, pgs. 115-116.

²⁵ Hearing Transcript Day 1 pg. 116.

²⁶ Hearing Transcript Day 1 pgs. 108-109.

again because no weight was placed on this indicator the difference is not reflected in the reconciled value.

31. In his appraisal, like the Division had in the Revised Assessment, Mr. Hales also prepared three different APG approaches to value. Regarding his APG approaches, Mr. Hales provided the opinion that they were not unitary approaches, but instead summation approaches.²⁷ Mr. Hales provided the opinion that the purpose of the unitary valuation was to capture “the value of the group of assets working together.” He stated, “[T]here is no chance for an enhanced or an assemblage value to be placed within the APG methodologies.”²⁸

32. The Commission notes that although Utah Code Subsection 59-2-201(4) requires the assessment be based on the APG and requires a discount from the APG, it does not specify whether the Division is to apply the discount to the APG “wholesale” or the APG “current” or “retail value”. Mr. Hales addressed this issue. He explained that in older versions of the Airliner Price Guide, “the current market value was referred to as retail value . . . [s]o when you hear retail or current market value . . . as it applies to the APG, they’re synonymous.”²⁹ The Division’s Revised Assessment and the Hearing Appraisal APG-Fleet Discount indicator were based on the “current market value” minus 20%. Mr. Hales testified that in the older versions of the Airliner Price Guide the method used to discount multiple aircraft being held for sale was referred to as a fleet discount “whereas in more modern versions of the APG, that formula has been redefined as a complete wholesale method.”³⁰ However, Mr. Hales pointed out that the APG states the “wholesale calculation method is not to be used for multiple aircraft appraisals or fleet appraisals” (citing Airliner Price Guide: Future Market Values, (2016) 5/77, 12-22). Mr. Hales testified that the wording and application of the APG were confusing.³¹ Mr. Hales did make the 20% deduction because it was required by Utah Code Subsection 59-2-201(4).³²

33. Mr. Hales explained that when applying the APG he assumed the numbers in the APG were correct for the purpose of the appraisal. He pointed out in regards to Delta’s SEC 10-K filing, which he relied on in preparing his cost and income approaches, that “I probably feel better about the numbers in the 10-K just because I know where they come from, and I know the auditing process, and I know the . . . penalties that are applied to the companies if they don’t comply with

²⁷ Hearing Transcript Day 1 pg. 126.

²⁸ Hearing Transcript Day 1 pg. 127.

²⁹ Hearing Transcript Day 3 pg. 15.

³⁰ Hearing Transcript Day 3 pg. 16.

³¹ Hearing Transcript Day 1, pg. 133.

³² Exhibit 13, pg. PTD 382.

those strict guidelines laid out by the SEC.” Mr. Hales contrasted that with the APG noting, “[T]he APG, again, is . . . a private company who supplies you with data . . . But there is nobody that, you know, regulates them or audits them like the process of the SEC.”³³ He also stated he was not aware of a way to check the reliability of the underlying data that produced the aircraft values.³⁴

34. He explained that in the APG, the assumption is that the price reflects the “average” aircraft of that year, and aircraft type and does not represent any particular individual aircraft. Mr. Hales explained in his appraisal, “Inherent in the Division’s use of the APG is the assumption that all of the aircraft owned or operated by Delta are in average condition.”³⁵

35. Mr. Hales’ values from the three APG approaches were a little higher than the values indicated in the Division’s Revised Assessment because the Division’s Revised Assessment had not included five airplanes. Mr. Hales had concluded the following APG values:

APG - Retail	17,437,925,893
APG - Wholesale	16,246,805,893
APG - Fleet Discount	14,844,563,893

36. Mr. Hales explained that he recognized that Utah Code Subsection 59-2-201(4)(d) did provide that the Commission could use a method other than the APG, but explained the “clear and convincing evidence” requirement was not a standard that he fully understood. He also noted the Subsection (4)(d) provision “only allows for deviation . . . if an appraiser or the division can prove that . . . the aircraft value, not the . . . unit value of the airline . . . is something different . . . than is found in the APG.” Mr. Hales stated he applied the APG values and had not independently tried to value any of the aircraft.³⁶

37. Once Mr. Hales determined the system wide value for the subject property to be \$14,800,000,000 based on his APG-Fleet Discount, he then determined an allocation factor to allocate the portion of the value taxable to Utah. Mr. Hales used the same methods for calculating the allocation percentage and had concluded the exact same allocation percentages, as had the Division in the Revised Assessment. In the Revised Assessment and Hearing Appraisal, the appraisals indicated that for airline companies, there are two categories which each have different allocation formulas. The first category is mobile flight equipment and the second category is terminal equipment or ground equipment. To determine how much of the system value is attributable to each category, the Division and Mr. Hales determined a ratio by comparing the gross

³³ Hearing Transcript Day 1 pgs. 125-126.

³⁴ Hearing Transcript Day 1 pg. 145.

³⁵ Exhibit 13, pg. PTD 379.

³⁶ Hearing Transcript Day 1, pg. 141.

costs on Delta's books of the flight equipment and the gross costs of the terminal equipment. Based on this, they had concluded that 84.92% of the property was the mobile flight equipment and 15.08% was the terminal equipment. These are the same percentages used in the Revised Assessment and the Hearing Appraisal.³⁷

38. In the Hearing Appraisal, Mr. Hales next applied separate allocation formulas to determine how much of the mobile flight equipment and how much of the terminal equipment were allocable to Utah. The formula applied to the terminal equipment was not contested or disputed at this hearing. The gross costs of all terminal equipment in Utah was compared with system costs for terminal equipment. This calculation resulted in a Utah allocation percentage for the terminal equipment of 0.65%.³⁸ This was the same percentage used in the Revised Assessment as well as the appraisal submitted by the County.

39. To calculate the allocation percentage for the mobile flight equipment, the Division used a weighted ground hours calculation and a revenue ton miles calculation, to which the Division gave equal weight. Mr. Hales made the same calculation as follows:³⁹

Allocation Factor	System	Utah	Utah Allocation
Weighted Ground Hours	5,144,546	93,133	1.81%
Revenue Ton Miles	22,870,055,752	198,232,769	0.87%
		Utah Mobile Flight Equipment Allocation	1.34%

40. At the hearing, there was no issue raised regarding the weighted ground hour calculation, which resulted in a 1.81% allocation factor. Regarding revenue ton miles, Utah Code Section 59-2-804 requires half of the weight be placed on the revenue ton miles calculation. The County raised the issue that the revenue ton miles did not capture all of the property used in Utah. When questioned on this point, Mr. Hales testified that he did not do a study to see if that allocation would have captured 100% of the value in all states and did not offer an opinion on this. He did, however, explain how the revenue ton miles could lead to some omissions as follows:⁴⁰

So the way I understand it is Delta or any airline would report to us the revenue ton miles that were accumulated by their aircraft for any flight that landed within the State of Utah or took off from the State of Utah. But the system number for revenue ton miles is an accumulation of all the revenue ton miles that are accumulated throughout the entire, you know, international operation of Delta. . . . And so what could potentially be happening is you have a . . . a flight from . . . Denver to L.A. As that plane takes off in Denver and lands in L.A., we would not receive any

³⁷ Exhibit 13 pg. PTD 384.

³⁸ Exhibit 13, pg. PTD 384.

³⁹ Exhibit 13, pg. PTD 384.

⁴⁰ Transcript Day One, pg. 158-159.

revenue ton miles in Utah as part of our allocation despite the fact that the plane could have potentially flown over, you know, all of Utah . . . on its flight path from Denver to L.A. And so what happens is . . . Colorado would receive a portion of those revenue ton miles for the amount of revenue ton miles generated within their flight from Denver to the Utah border. And California would receive revenue ton miles in their allocation for the . . . revenue ton miles accumulated from the time it passed the Nevada border until the time it landed in L.A. But neither Utah nor Nevada would receive any revenue ton miles in their allocation. And so any of the revenue ton miles generated, you know, in those types of flights would just be missing from . . . any of the state's allocations, other than the ones where it took off and landed.

Mr. Hales further explained:⁴¹

And when you have an allocation formula [that] potentially doesn't, you know, add up to 100 percent if used across the board, you have a situation where some . . . of the system value . . . would remain unallocated to any taxing jurisdiction.

41. Mr. Hales' conclusion was that 0.65% of the terminal equipment should be allocated to Utah and 1.34% of the mobile flight equipment allocated to Utah which resulted in Utah values as follows:⁴²

Description	Mobile Flight	Terminal	Property Allocated To Utah
System Value	12,567,801,671	2,232,198,329	
Allocation Percentage	1.34%	0.65%	
Total Utah Value	168,226,538	+ 14,467,827	= \$182,694,365

42. There was an additional adjustment added to the Utah taxable property value for the value attributable to leased property owned by Salt Lake City, but leased to Delta. This is property that is assessed under the privilege tax statute at Utah Code Sec. 59-4-101 et seq. The value Mr. Hales had calculated for this property was \$27,920,556. Adding the \$182,694,365 to the \$27,920,556 resulted in a total value of \$210,614,921. Mr. Hales had used some different assumptions to determine the privilege tax value, which was a little higher than the privilege tax value of \$26,926,410 determined in the Revised Assessment. Mr. Hales' change was relatively minor and not sufficiently supported during the hearing.

43. Mr. Hales also made a TEFRA Act reduction to the \$210,614,921 total Utah value, which was an adjustment required by federal law. This adjustment required a subtraction of

⁴¹ Transcript Day One, pg. 160-161.

⁴² Exhibit 13, pg. PTD 384.

5.30%. After subtracting the \$11,163,081 TEFRA Act adjustment, Mr. Hales concluded an indicated Utah assessment value of \$199,451,840.⁴³

C. County's Appraisal-Brent Eyre

44. The County argued at the hearing that the Division's Revised Assessment was not assessing the subject property at fair market value for the lien date at issue. To support this position the County submitted an appraisal that had been prepared by Mr. Brent Eyre, ASA. It was Mr. Eyre's conclusion that the system wide market value of the operating property of Delta Airlines on January 1, 2017, pursuant to Administrative Rule 62 was \$37,300,000,000. It was his conclusion, based on the "statutorial allocation percentages" that the taxable Utah value was \$473,259,044.

45. In his appraisal, Mr. Eyre prepared a cost approach, a "Rule 62 Preferred Income Approach" and a stock and debt based market approach to value. He did not prepare an APG valuation. In reconciling the values from his three approaches, he placed 90% of the weight on the income approach and 5% weight on each of the cost and stock and debt approaches.

46. Mr. Eyre's conclusion from each approach was the following:⁴⁴

Value Indicator	\$Millions
Cost Approach	\$21,301.7
Rule 62 Preferred Income Approach	\$38,582.8
Market Approach-Stock & Debt	<u>\$29,325.6</u>
System Value Conclusion	\$37,300.0

47. For his cost approach, Mr. Eyre used a historical cost less depreciation ("HCLD") method. He noted in his appraisal that this is the preferred cost approach to value unitary properties such as Delta pursuant to Rule 62. He stated he obtained the information from the Annual Report filed by Delta and from Delta's Form 10-K for the year ending 12/31/2016. Mr. Eyre's cost approach conclusion of Delta's system value of \$21,301,716,879 was just a little lower than the cost approach indicated in the Division's Revised Assessment, which had been \$21,305,288,946.

48. In his appraisal, Mr. Eyre placed the most weight on his income approach following the preferred income capitalization formula outlined by Rule 62. This was the same formula that the Division had followed in its income approaches where $\text{value} = \text{CF}/(k-g)$.

49. In determining the "CF," which is the normalized cash flow, Mr. Eyre pointed out that Rule 62(B)(3)(a)(1)(a) defines "cash flow" to be "the projected cash flow for the year immediately following the lien date, and may be estimated by reviewing the historic cash flows,

⁴³ Exhibit 13, pg. PTD 386.

⁴⁴ Exhibit 56, pg. 57.

forecasting future cash flows, or a combination of both” and that cash flow is “restricted to the operating property in existence on the lien date, together with any replacements intended to maintain, and not expand or modify, the existing capacity or function thereof.” In his appraisal, Mr. Eyre provided the formula for calculating cash flow as outlined by Rule 62 as follows:⁴⁵

$$\text{Cash Flow} = \text{Net Operating Income (NOI)} + \text{Noncash Expenses (e.g., Depreciation \& Deferred Income Taxes)} - \text{Capital Expenditures} - \text{Changes in Net Working Capital Necessary to Achieve the Expected Growth}$$

50. Mr. Eyre also considered the historical operating revenue and operating expense data from Delta’s Forms 10-K as filed with the Securities and Exchange Commission for the years 2013 through 2016. He explained in his appraisal, “my estimate of normalized 2017 NOI level was to calculate a four-year weighted average of historical NOIs and increase this result by a 2.40% inflationary growth rate.”⁴⁶ It was Mr. Eyre’s conclusion that based on the preferred methods set out in Rule 62, the normalized net cash flow was \$3,971,000,000. This was lower than the Division’s and Mr. Hales’ appraisal cash flows, which had been \$4,020,000,000.

51. In his appraisal, Mr. Eyre explained that the discount rate outlined in Rule 62 and the appropriate rate to use in a yield capitalization model is the weighted average cost of capital or (“WACC”), which was the same method the Division had used in its assessments and Mr. Hales had used in his appraisal. Mr. Eyre had concluded a capitalization rate using this method of 8.78%,⁴⁷ which was higher than the rate that had been used by the Division in its Revised Assessment of 8.39% and Mr. Hales’, which had been 8.64% in his Hearing Appraisal.

52. In Mr. Eyre’s appraisal, for the growth rate or “g” in the formula, he had also used 2.4% as his estimate of sustainable growth in cash flows. Mr. Eyre explained in his appraisal:⁴⁸

[T]he sustainable growth rate, pursuant to Rule 62, is the expected future growth of the cash flow attributable to assets in place on the lien date, and any future replacement assets. This is not the growth rate measured by financial analysts and reported by the various investment services. Thus, it is very difficult for any appraiser, to estimate this level of growth. Because of this, Rule 62 provides for a “default” growth rate if one cannot be determined. This growth rate is the expected inflationary rate measured by the Gross Domestic Product (“GDP”) Price Deflator obtained in Value Line. The expected GDP Price Deflator as reported by Value Line on 1/1/17 was 2.40%. This is the growth rate I will use in my Rule 62 income approach to value.

⁴⁵ Exhibit 56, pg. 31.

⁴⁶ Exhibit 56, pg. 34.

⁴⁷ Exhibit 56.

⁴⁸ Exhibit 56, pg. 48.

53. As both Mr. Eyre's cash flows were lower and his capitalization rate higher than the Division's had been for the Revised Assessment and Mr. Hales' had been for the Hearing Appraisal, Mr. Eyre's yield capitalization indicator was a little lower than that concluded by the Division or Mr. Hales. Mr. Eyre concluded a system wide value, including intangibles, from this income indicator of \$62,241,379,310. In its Revised Assessment, the Division's system wide value had been \$67,111,853,088 and for the Hearing Appraisal it had been \$64,432,692,308.

54. Mr. Eyre then adjusted his system wide income indicator, including intangibles, to remove the intangibles and to add the operating leases as follows:⁴⁹

Rule 62 Income Indicator Before Intangible Adjustment	\$62,241,379,310
Multiply by Taxable Property Ratio	59.46%
Rule 62 Income Indicator Before Operating Leases	\$37,008,724,138
Add: Value of Operating Leased Aircraft	\$1,574,041,808
Rule 62 Income Indicator of Value	\$38,582,765,946

55. Mr. Eyre also prepared a market approach to value based on the stock and debt method. He had placed 5% weight on this approach. He explained in his appraisal, "The stock and debt indicator is based on the accounting premise that the value of the assets equals the value of liabilities plus equity."⁵⁰ He pointed out that Delta has publicly traded debt and equity securities. Mr. Eyre acknowledged in his appraisal that Rule 62 discourages the use of the stock & debt approach. However, he explains in his appraisal:

Rule 62 states that the stock & debt approach "may tend to capture the value of intangible property, as defined in this rule, at higher levels than other methods." However, since Delta is a publicly traded unit of assets and there are accepted methods of eliminating the contributory value of exempt intangible property, it is my opinion that the stock & debt approach does have some relevancy for the subject property.⁵¹

It was his conclusion from this approach that the system wide taxable property of Delta was \$29,325,615,758.

56. As noted previously, Mr. Eyre placed 90% of the weight on his income approach and 5% weight each on his cost approach and stock and debt approach. His total system wide reconciled value of the taxable property of Delta was \$37,300,000,000.

57. Mr. Eyre's allocation factors for the terminal equipment and the mobile flight equipment were exactly the same percentages used by both the Division and Mr. Hales, which were

⁴⁹ Exhibit 56, pg. 49.

⁵⁰ Exhibit 56, pg. 54.

⁵¹ Exhibit 56, pg. 54.

0.65% and 1.34% respectively. For the mobile flight equipment, Mr. Eyre testified that he followed Utah Code Sec. 59-2-804 in regards to using revenue ton miles as an allocation factor. Mr. Eyre testified, "The use of this factor prevents Delta from ever having 100% of its value allocated to assessment jurisdictions."⁵² After applying the allocation percentages, Mr. Eyre concluded that the Utah taxable value of Delta was \$473,259,044.

58. Mr. Eyre did not prepare an APG with discount indicator. In his appraisal,⁵³ Mr. Eyre explained:

I have not adhered to the provisions of Utah Code Annotated ("UCA") 59-2-201(4) which requires the value of centrally assessed aircraft in Utah to be valued through the use of the Airliner Price Guide. I have adhered to the provisions of UCA 59-2-201(4)(d) which state that alternative valuation methods for valuing centrally assessed aircraft may be used if one has: "...clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft..."(UCA 59-2-201(4)(i)) I have prepared indicators of value for the subject property pursuant to the provisions of Rule 62. The results of these indicators of value that I have prepared pursuant to the provisions of Rule 62 have, in my opinion, provided clear and convincing evidence that the use of the Airliner Price Guide "do not reasonably reflect the fair market value of the aircraft" of the subject company.

59. Mr. Eyre did not prepare his own APG with fleet discount, but in arguing that the Utah Code Subsection 59-2-201(4) APG value did not reflect the fair market value of the aircraft, he compared his appraisal value to the Division's APG-Fleet Discount value. He explained in his testimony at the hearing:⁵⁴

Well, in my opinion, there is no analysis that goes into . . . preparing an indicator value under the Airliner Price Guide. I reviewed the Division's value that they determined under the Airliner Price Guide, and then compared that to my opinion of value using the preferred methodologies of Rule 62. And in my opinion, that was clear and convincing evidence that the Airliner Price Guide did not get to fair market value of the -- of the subject property of Delta Air Lines functioning as a going concern.

Mr. Eyre also testified:

I believe even my performance of this appraisal would be an indication of clear and convincing evidence that the Airliner Price Guide does not arrive at the market value of this -- of the operating property of Delta Air Lines.⁵⁵

⁵² Hearing transcript Day 2, pg. 104.

⁵³ Exhibit 56, pg. 1.

⁵⁴ Hearing Transcript Day 2, pgs. 249-250.

⁵⁵ Hearing Transcript Day 2, pg. 110.

He also testified that his income approach alone “would be an indication that a summation of the individual aircraft probably is not getting to a value of the property operating at its highest and best use.”⁵⁶ In addition, he testified that Utah Code Subsection 59-2-201(4), which requires the Tax Commission to value the property of an airline through the use of the APG, “would prevent an appraiser from obtaining a value that would be reflective of the highest and best use of that property . . .”⁵⁷

60. In addition to the use of the APG value, Mr. Eyre testified that the deduction of 20 percent from the APG value, “in my opinion makes the number almost meaningless.”⁵⁸ Mr. Eyre testified that the APG itself indicates that you “don’t make this adjustment if you’re appraising the full fleet of aircraft.”⁵⁹ Mr. Eyre also questioned the Division’s determination to take 20% off all aircraft in the fleet. He testified that the statute was not clear on how that was to be applied and stated, “a reasonable person could conclude that that decision should be made for each category of aircraft.” Mr. Eyre pointed out the statute “says for one aircraft is .5 percent up to a maximum of -- of 20 percent.” He concluded, “the rule or the statute, [is] not clear as to how the Division should apply that . . . 20 percent. Should it be applied to each category of air[craft] . . . which, in my opinion, would be a reasonable . . . conclusion to make.”⁶⁰

A. Delta’s Rebuttal Reports-Robert Reilly

61. Delta submitted an Appraisal Review of the report prepared by Brent Eyre. The review appraisal had been prepared by Willamette Management Associates (“Review Appraisal”) and Robert F. Reilly, CPA, appeared at the hearing to testify and answer questions about this Review Appraisal. It was the Review Appraisal conclusion that “[b]ased on our review, and in our opinion, the analyses, opinions, and conclusions of the Eyre report are not credible. . . . In other words, the completeness, accuracy, adequacy, relevance, and reasonableness (as those terms are used in USPAP Standards Rule 3-3) of the Eyre report’s analyses are not sufficient to provide credible appraisal results.” The Review Appraisal and Mr. Reilly in his testimony set out a list of errors identified in the Eyre Appraisal.

62. One primary error noted in the Review Appraisal was that the Eyre Appraisal did not consider the application of an aircraft pricing guide. The Review Appraisal pointed out that this is required by Utah Code Subsection 59-2-201(4). The Review Appraisal also stated that

⁵⁶ Hearing Transcript Day 2, pg. 124.

⁵⁷ Hearing Transcript Day 2, pg. 72.

⁵⁸ Hearing Transcript Day 2, pg. 148.

⁵⁹ Hearing Transcript Day 2, pg. 142.

⁶⁰ Hearing Transcript Day 2, pgs. 251-252.

considering the application of an aircraft pricing guide is required by Rule 62. In his appraisal, Mr. Eyre had asserted that he was using an alternative valuation method pursuant to Utah Code Subsection 59-2-201(4)(d). The Review Appraisal concluded that Mr. Eyre did not adhere to the requirements of Subsection 59-2-201(4)(d) for an alternative method because Mr. Eyre had not provided an alternative value for the aircraft and had not addressed the requirement of Subsection 59-2-201(4)(d)(ii). The Review Appraisal pointed out that the alternative method was for the valuation of the aircraft, as opposed to the entire unit of Delta's operating property. Additionally, the report noted that Subsection (4)(d) provides that the Commission may use an alternative method if the Commission "(i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; and (ii) cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value." The Review Appraisal noted, correctly, that Mr. Eyre had not provided any discussion or analysis regarding the Subsection (4)(d)(ii) requirement. The Review Appraisal also made other arguments in regards to Mr. Eyre's failure to value Delta based on the Airliner Price Guide pursuant to Utah Code Subsection 59-2-201(4).⁶¹

63. At the hearing, Mr. Reilly testified that there were other airline price guides. He acknowledged the Airliner Price Guide, in his opinion, was the most commonly referenced, but there was also the AVITAS price guide, the Aircraft Blue Book and the VREF Aircraft Value Guide.⁶²

64. The Review Appraisal also criticized the Eyre Appraisal for not deducting functional or economic obsolescence from the HCLD cost approach. It further provided criticism of Mr. Eyre's method for determining the ratio to remove the intangible property and for failing to remove the value of intangible investment attributes and investor expectations of growth related to future assets in the stock and debt approach. The Review Appraisal argued that Mr. Eyre's appraisal was a business valuation rather than a unit principle valuation. The Review Appraisal noted the wide differences in value conclusions from the income approaches, other approaches, and the way Mr. Eyre had weighted his conclusions from these approaches. The Review Appraisal also argued that Mr. Eyre had not complied with Rule 62, including arguing that under Rule 62 more weight should have been placed on the cost indicator.⁶³

⁶¹ Exhibit 61, pgs. 9-10.

⁶² Transcript Day 3, pgs. 261-262.

⁶³ Exhibit 61.

65. Delta also submitted an appraisal review of the appraisal report prepared by Devin Hales.⁶⁴ This Review Appraisal had also been prepared by Willamette Management Associates (“Review Appraisal of Hales”). The Review Appraisal of Hales did point to some issues that Willamette Management Associates had with Mr. Hales’ cost, income and stock and debt approaches and argued that there were fundamental errors in these approaches. In addition, the report asserted that Mr. Hales had not removed all intangible property from these approaches. However, Mr. Hales had placed 100% of his weight on the APG-Fleet Discount indicator. Regarding that indicator, the Review Appraisal of Hales concluded:⁶⁵

Furthermore, in our opinion, the Division’s assessment applied appropriate valuation methodologies to produce credible appraisal results with regard to the fair market value of Delta’s tangible operating property—in accordance with UCA 59-2-201(4).

B. Commission’s Valuation Conclusions

66. Utah Constitution, Article XIII, Sec. 2 provides, “So that each person and corporation pays a tax in proportion to the fair market value of his, her or its tangible property, all tangible property in the state that is not exempt under the laws of the United States or under this Constitution shall be: (a) assessed at a uniform and equal rate in proportion to its fair market value . . .” Utah Code Section 59-2-201 provides that certain types of properties, including airlines, are centrally assessed by the Tax Commission, rather than by the individual counties. Prior to tax year 2017, the Division assessed airline properties under a unitary approach and used several different appraisal valuation methods to determine the fair market value of these properties. The appraisers for the Division would then reconcile their various approaches to value by weighting them based on the quality of the evidence and other factors of appraisal judgment. As previously noted in the Findings of Fact, the weighting given by the Division to these approaches changed depending on the factors the Division considered in its reconciliation.

67. However, effective for tax year 2017, the Utah Legislature adopted Utah Code Subsection 59-2-201(4), which substantially changed how the Property Tax Division was required to assess the property of airline companies. These changes were adopted during the Division’s 2017 assessment season and Mr. Hendrickson testified the Division was required to to change how they assessed airline properties to comply with this new legislation. Utah Code Subsection

⁶⁴ Exhibit 62.

⁶⁵ Exhibit 62, pg. 24.

59-2-201(4)(b) generally requires aircraft to be valued using the Airliner Price Guide, subject to certain exceptions.

68. To comply with the requirements of Utah Code Subsection 59-2-201(4) in its original assessment, Revised Assessment and Hearing Appraisal, the Division used the Airliner Price Guide to determine the value of Delta's operating aircraft and placed 100% of its weight on a APG-Fleet Discount approach. The Airliner Price Guide provides a current or retail value and a wholesale value for each aircraft listed by aircraft type and year of manufacture. Utah Code Subsection 59-2-201(4)(b) does not specify whether the Division is required to assess aircraft based on APG retail or APG wholesale values. The Division, which had considered the APG in its assessments for prior years, and had placed a varying amount of weight on the APG in those prior years, made the determination that Utah Code Subsection 59-2-201(4) required 100% of the weight to be placed on the retail or current value column minus a fleet adjustment provided in Subsection (4)(c).

69. In accordance with this determination, the Division listed every aircraft by aircraft type and year of manufacture, then determined the APG retail or current value for each aircraft based on the aircraft type and year of manufacture. The APG makes no adjustment for the condition of the aircraft or number of miles flown as the values are stated for an average aircraft of that age and aircraft type. The Division then calculated the sum of the individual APG retail values for each aircraft. In the Revised Assessment, the Division concluded the sum of the retail value based on the APG of all the aircraft in Delta's fleet was \$12,543,670,000. The Division then reduced this amount by the 20% fleet adjustment required by Utah Code Subsection 59-2-201(4)(c). The Division determined the 20% fleet adjustment should be applied to all aircraft in the fleet. This resulted in a total value for all of the aircraft system wide of \$10,034,936,000.

70. Although most of the tangible taxable property value of Delta is from the aircraft, there is some non-aircraft property such as Delta's ground property, land, rotables, spare engines and construction work in progress. After adding the value of the non-aircraft property, for its Revised Assessment, the Division concluded a value for Delta's system wide tangible taxable property of \$14,611,909,805.

71. In the Hearing Appraisal, Mr. Hales followed the exact same method of determining his APG Fleet Discount Indicator as had been used in the Revised Assessment. However, Mr. Hales' indicator was higher than the Division's as he had discovered there were five airplanes not included in the Division's Revised Assessment. After adding the value of the non-aircraft property, it was Mr. Hales' conclusion that the system wide tangible taxable value of

the Delta property based on the APG Fleet Discount Indicator was \$14,844,563,893, which he rounded to \$14,800,000,000.

72. The fact that there had been five aircraft that were not included in the Division's Revised Assessment was unchallenged and not disputed or disproven by any party. Neither the County nor Delta had submitted their own APG-Fleet value or concluded some other APG-Fleet value. After reviewing the evidence presented, the Commission finds Mr. Hales' APG Fleet value to be the correct APG Fleet value to use to determine the system wide taxable value of Delta because it included the corrected number of aircraft.

73. It was the testimony of Mr. Hendrickson that the Division had to make a judgment decision on how to apply the Subsection 59-2-201(4)(c) fleet adjustment, due to the absence of guidance in statute or rule as to how the adjustment should be applied. Both the Division and Mr. Hales' conclusion was to apply a 20% reduction of the APG retail price to all of the aircraft in Delta's fleet. Utah Code Subsection (4)(c) states, "[t]o reflect the value of an aircraft fleet that is used as part of the operating property of an airline . . . the fair market value of the aircraft shall include a fleet adjustment . . ." Subsection (4)(c)(ii) provides, "[i]f the aircraft pricing guide provides a method for making a fleet adjustment, the commission shall use the method described in the aircraft pricing guide." Mr. Hales had stated in his testimony that prior versions of the APG referenced a fleet adjustment, while the current version referenced only "the complete wholesale method." The Winter 2016 APG states, "[t]he above wholesale calculation method is not to be used for multiple aircraft appraisals or fleet appraisals." Considering the language in the APG and the parties' testimony, the Commission finds that the APG does not provide a method for making the fleet adjustment required by Utah Code Subsection 59-2-201(4)(c).

74. Utah Code Subsection (4)(c)(iii) states, "If the aircraft pricing guide does not provide a method for making a fleet adjustment, the commission shall make a fleet adjustment by reducing the aircraft pricing guide value of each aircraft in the fleet by .5% for each aircraft over three aircraft up to a maximum 20% reduction." Mathematically, the full 20% reduction would be reached if the fleet had 43 aircraft. Delta had more than 800 aircraft in its operating fleet⁶⁶ so the full 20% reduction was appropriate. The Division's conclusion is reasonable that the calculation of the amount of the fleet adjustment should be based on all of the aircraft in Delta's fleet and should not be calculated on individual groupings of aircraft based on aircraft type and year built. As Utah Code Subsection 59-2-201(4)(c)(iii) refers specifically to "each aircraft in the fleet," it was also a reasonable interpretation for the Division to apply the full 20% discount in this matter to all of the

⁶⁶ Exhibit 2.

aircraft in Delta's operating fleet, including the first three aircraft. The Commission thus concludes that the method both the Division and Mr. Hales used to make their fleet adjustments comply with the statute.

75. The County argued that the Commission should use an alternative method to the APG for valuing Delta's taxable property because the APG-Fleet Discount method results in a value lower than the fair market value of Delta's property. Mr. Eyre's appraisal concluded the fair market value of Delta's property on a unitary basis based on its highest and best use was \$37,300,000,000, substantially higher than the \$14,800,000,000 APG-Fleet Discount value. Appraisers for the Division, Mr. Hendrickson and Mr. Hales, also had prepared other approaches to value and testified at the hearing that but for Utah Code Subsection 59-2-201(4) they would have placed most of their weight on their income approaches, which indicated a value for Delta's system wide taxable property of \$40,898,159,170 and \$38,790,514,317 respectively. The APG-Fleet Discount value was also substantially lower than the Division's and Mr. Hales' cost approach values, which had been \$21,305,288,946 and \$21,199,431,034 respectively. Further, the Division's testimony at the hearing made it clear that absent Utah Code Subsection 59-2-201(4), the Division's assessment would have been higher than it was for 2017, because the Division would have placed a substantial percentage of its weight on the income approach.

76. Utah Code Subsection 59-2-201(4)(d) does allow for an alternative method of valuing the aircraft, but its scope is very limited. Subsection (4)(d) provides, "The commission may use an alternative method for valuing aircraft of an airline . . . if the commission: (i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; and (ii) cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value." The Division did not assess the subject property with an alternative method. It was the County that argued for an alternative method of valuing Delta's operating property. The County argued that the appraisal prepared by Mr. Eyre was "clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft...." Mr. Eyre contends that he prepared indicators of value for the subject property pursuant to the provisions of Rule 62 and the results of these indicators "have, in my opinion, provided clear and convincing evidence that the use of the Airliner Price Guide do[es] not reasonably reflect the fair market value of the aircraft of the subject company."⁶⁷

⁶⁷ See Findings of Fact, ¶58 and Exhibit 56.

77. As discussed in more detail in the Conclusions of Law, the Commission finds that the County has not presented clear and convincing evidence as required by Utah Code Subsection 59-2-201(4)(d) to support an alternative method of valuing Delta's aircraft. Therefore, the Commission finds that \$14,800,000,000 is the correct system wide value for the 2017 property tax assessment based on Utah Code Subsection 59-2-201(4).

78. As the \$14,800,000,000 value is Delta's system value, additional steps are needed to determine how much of that value is apportionable and taxable to Utah. As noted above, this requires determining an allocation for the terminal equipment and an allocation for the mobile flight equipment. The Division in its assessments and both appraisers Mr. Hales and Mr. Eyre had come to the same conclusion that the allocation percentage for the terminal equipment was 0.65% and the allocation for the mobile flight equipment was 1.34%. They had all used the same methods and formulas for calculating these allocation percentages. The allocation for the terminal equipment was based on the gross cost of all terminal equipment property in Utah compared with the system cost for terminal property and was not an issue in this proceeding. The formula for calculating the allocation percentage for the mobile flight equipment is specifically set out at Utah Code Sec. 59-2-804, which requires that the Division use a weighted ground hours calculation and a revenue ton miles calculation, and then gives each equal weight. In calculating this percentage, the Division, Mr. Hales and Mr. Eyre specifically followed Utah Code Sec. 59-2-804 and that was not disputed. Using this calculation, the Utah allocation percentage for the mobile flight equipment was 1.34%. As noted above, and as argued by the County in this proceeding, the revenue ton miles formula set out in Utah Code Sec. 59-2-804 may not capture all of an airline's flight miles and may under allocate the Utah miles. Regardless, the Division has followed the statute and the Commission finds the Division's Utah allocation percentages to be appropriate based on Utah Code Sec. 59-2-804.

79. Based on the Division's calculation of the Utah allocation percentages for the terminal equipment and the mobile flight equipment, the Commission sustains the Division's Revised Assessment except for the change found in the Division's Hearing Appraisal regarding the missing aircraft, which increased the system wide value for Delta's property to \$14,800,000,000.

80. Using the \$14,800,000,000 as the starting point instead of the \$14,600,000,000 Revised Assessment, the Utah assessed value for the portion of the property assessed property tax is as follows:

Utah Apportioned Flight Equipment	\$168,226,538	Less 5.3% TEFRA	\$159,310,532
Utah Apportioned Terminal Equipment Assessed Value			

Utah Terminal Property	\$14,467,827	Less 5.3% TEFRA	\$13,701,032
Total Property Tax Assessed Portion			\$173,011,564

II. FINDINGS OF FACT ON PRIVILEGE TAX ISSUE

A. Stipulated Facts.

The parties stipulated to the following facts in this matter regarding the privilege tax issue in a Stipulated Statement of Facts:⁶⁸

81. The Division issued a Notice of Revised Assessment 2017 Air Carrier against Delta that included an assessment of privilege tax under Utah Code Ann. § 59-4-101 (“Privilege Tax”) in the aggregate amount of \$26,926,410 (“Privilege Tax Assessment”) for Delta’s use of government-owned property at the Salt Lake City International Airport (“Airport”).⁶⁹

82. Utah Code Ann. § 59-4-101(2017) provides in part:

(1)(a) Except as provided in Subsections (1)(b), (1)(c), and (3), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property that is exempt for any reason from taxation, if that property is used in connection with a business conducted for profit.

...

(2)(a) The tax imposed under this chapter is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property.

...

(3) A tax is not imposed under this chapter on the following:

(a) the use of property that is a concession in, or relative to, the use of a public airport, park, fairground, or similar property that is available as a matter of right to the use of the general public;

...

(e) the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates;

(4) For purposes of Subsection (3)(e):

...

(b) a lessee, permittee, or holder of an easement still has exclusive possession of the premises if the owner has the right to enter the premises, approve leasehold improvements, or inspect the premises.

⁶⁸ Stipulated Statement of Facts, dated December 5, 2020.

⁶⁹ Privilege tax was assessed in the amount of \$26,926,410. However, this amount, along with the remainder of the assessment, was reduced to \$25,499,310 pursuant to a Tax Equity and Fiscal Responsibility Act adjustment.

83. The Airport is owned, controlled, and managed by Salt Lake City Corporation (the “City”).

84. The Salt Lake City Department of Airports (“SLCDA”), a department of the City, operates and manages the Airport on behalf of the City.

85. The Airport is exempt from property tax.

86. Delta’s use of the Airport property is in connection with a business conducted for profit.

87. The Airport is zoned as a special purpose district by Salt Lake City Ordinances and designated as the “Airport District” pursuant to Salt Lake City Code § 21A.32.060.

88. Applicable rules, regulations, and ordinances that Salt Lake City’s and its tenants’ use of the property must meet are set forth in Salt Lake City Department of Airports Rules and Regulations (“SLCDA Rules and Regulations”); Salt Lake City International Airport *Airport Certification Manual* (“ACM”); and Salt Lake City Code §§ 16.04.010, et seq.

89. Delta has, under separate agreements with the City, rights to use the following properties at the Airport: (1) areas of the passenger terminal buildings (“Terminal Facilities”); (2) certain hangar and operations facilities (“HO facilities” or “Hangar Facilities”); (3) a marketing, reservation, and training center (“MRT Complex”); and (4) specific cargo facilities (“Cargo Facilities”).

90. Privilege Tax has not been assessed on all areas of the Terminal Facilities used by Delta.

91. Of the Terminal Facilities, the Privilege Tax has been assessed on Delta’s use of office space, employee breakrooms, and storage areas in the following areas of the Terminal Facilities: Terminal, Second Level, Conditioned (Delta Connection Ops); Concourse B, Ground Level, Conditioned (Delta Connection); Concourse C, Ground Level, Conditioned; Concourse D, Ground Level, Conditioned; Terminal 2, Second Level, Conditioned; and Terminal 2, Tower.

92. Privilege Tax has been assessed on Delta’s use of all areas of the Hangar Facilities, MRT Complex, and Cargo Facilities.

93. Delta’s use of the Terminal Facilities is governed by the Airline Use Agreement made and entered into on July 1, 2014, by and between Salt Lake City Corporation and Delta (“AUA”).⁷⁰

⁷⁰ A full and complete copy of AUA was provided to the Commission as Exhibit 29.

94. Under the AUA, “Airline Premises” means “those areas at the Airport assigned to [Delta] or any other Passenger Carrier as *Exclusive Use Premises, Preferential Use Premises, Joint Use Premises, and Common Use Premises*, as shown in Exhibit A.” (AUA § 1.09).⁷¹

95. Under the AUA, “Exclusive Use Premises” means any office space, storage area, VIP lounge, employee breakroom or other areas of the Terminal designated by City for exclusive use by Delta as depicted on Exhibit A of the AUA. (AUA § 1.37).

96. With respect to the Terminal Facilities, the Division only assessed areas used by Delta that are not accessible by the general public and which are designated under the AUA as Exclusive Use Premises.

97. The Privilege Tax Assessment did not include Delta’s use of the portions of concourses A through D not listed above, namely the ticket counters, baggage claim areas, and baggage processing areas on the ground floor of Terminal 2.

98. Under the AUA, the City has the right, with 30 days advance written notice, to reallocate part or all of the Exclusive Use Premises assigned to Delta or any other passenger carrier (1) for implementation of improvements at the Airport, (2) for accommodation of the traveling public, or (3) in order to maximize the use of the Terminal and related facilities by passenger carriers and other tenants, lessees, permittees, and users thereof. (AUA § 4.05.1).

99. Upon a City-imposed reallocation of Airline Premises, including the assessed areas, the City agrees to fund all moving costs, subject to recovery of such costs through rates charged to passenger carriers under Article 8. (AUA § 4.05.1)

100. The AUA provides that “subject to the terms and provisions of this Agreement,” Delta shall have the right to exclusive possession of any Exclusive Use Premises made available to [Delta] under the provisions of this Agreement.” (AUA § 18.34).

101. The City agrees that, so long as Delta keeps all covenants and agreements contained in the AUA, Delta “shall peaceably have and enjoy its Airline Premises and all rights, privileges, and licenses of the Airport, its appurtenances and facilities granted” in the AUA, subject to the terms and conditions of the AUA. (AUA § 18.04. 1).

102. Under the AUA, Delta’s right to use the Airport is for the specific purpose of operating its Air Transportation Business and all activities reasonably necessary for such operations. (AUA, art. 5). The AUA does not permit Delta to use the Airport for any purpose other than the conduct of its Air Transportation Business. (AUA, art. 5).

⁷¹ Exhibit A to the AUA was provided to the Commission as Exhibit 29 (starting at SLCom Delta 000074).

103. “Air Transportation Business” is defined by the AUA to mean the business operated by Delta at the Airport for the commercial transportation by air of persons, property, mail, parcels and/or cargo. (AUA § 1.04).

104. The AUA defines “In-Terminal Concessions” as including, but not limited to, “companies or other business organizations that (i) sell consumable food or beverage items, excluding automated vending operations, (ii) sell retail or news products, excluding automated vending items, or services, or (iii) advertise to the traveling public at the Terminal, pursuant to concession agreements with the City.” (AUA § 1.46).

105. As concessions, In-Terminal Concessions do not pay privilege tax for their use of Airport property, including office space and storage rooms. They do, however, pay property tax on personal property and improvements.

106. Under the AUA, any and all rights and privileges not specifically granted to Delta for its use of and operations at the Airport pursuant to the AUA are reserved for and to the City. (AUA § 5.02.15).

107. The AUA states that: “Airline shall not sell food and beverages or engage in revenue-generating concession activities of any kind in Airline’s public premises, including but not limited to any Gates. . . .” (AUA § 5.01.15).

108. Under the AUA, the conduct of any business or performance by Delta of any acts at the Airport not authorized by the AUA or by other agreements between the City and Delta constitutes an event of default if such business or acts do not cease within thirty days of receipt of the City’s written notice to cease such business or acts. (AUA § 13.01.1).

109. Upon reasonable notice to Delta, the City may enter the Exclusive Use Premises to either review Delta's operations or enforce the terms of the AUA. (AUA § 5.02.13).

110. The AUA requires Delta to pay all taxes and assessments, if any, which may be levied against Delta upon or in respect to such facilities of the Airport as are made available for use by Delta. (AUA § 18.32.1).

111. Under the AUA, Delta may contest the validity of any tax or assessment or the inclusion of the premises as taxable or assessable property. (AUA § 18.32.1).

112. Delta’s use of the Hangar Facilities and MRT Complex are governed by (1) the *Ground Lease and Maintenance and Operations Services Agreement* dated June 1, 1987, as amended (“Ground Lease”), (2) the *Nonexempt Facilities Lease Agreement* dated June 1, 1987 (“Nonexempt Facilities Agreement”), and (3) the *Amended and Restated Exempt Facilities Lease Agreement* dated November 1, 2000 (“Exempt Facilities Agreement”).

113. The Ground Lease is for a period of 36 years, plus a 10-year renewal period at the election of Delta. (Ground Lease, art. 3).

114. Under the Ground Lease, Delta is responsible to pay “applicable taxes, assessments or charges which during the term hereof may become a lien or be levied by the State, County, City or other tax levying body on all personal property of Company, upon all improvements made to the Premises by Company in connection with occupancy thereof, and upon the possessory interest, if any, of Company in the Premises.” (Ground Lease, art. 14).

115. Under the Ground Lease, Delta has the right to sublease without the City’s consent. (Ground Lease, art. 22).

116. Under the Ground Lease, the sublessee under any sublease granted without the City’s consent shall not be permitted any uses or privileges with respect to the subleased premises not permitted by Delta under the Ground Lease. (Ground Lease, art. 22).

117. Under the Ground Lease, the "City warrants and represents that it has a marketable title and unencumbered fee interest to the Premises and that [Delta] shall have quiet enjoyment of such Premises, the Facilities and other improvements. City will defend Company’s right to quiet enjoyment . . . from the claims of third persons.” (Ground Lease, art. 26).

118. The Hangar Facilities are not open to the general public, but are subject to the City’s right to inspect upon reasonable notice for compliance with the lease. (Ground Lease, art. 24).

119. The MRT Complex is not open to the general public, but is subject to the City’s right to inspect upon reasonable notice. Such inspection by the City “shall not unreasonably interfere with the Company’s use.” (Nonexempt Facilities Agreement §§ 6.4, 6.5; Exempt Facilities Agreement §§ 6.7, 6.8.).

120. Article 8 of the Ground Lease limits Delta’s right to use the premises of the Hangar Facilities and MRT Complex to the conduct of Aviation Activities, which is defined to mean those activities which involve aircraft maintenance, marketing and reservations centers, inflight training, pilot ground training, other ground training, technical operations, aircraft simulation, cabin service, warehouse and other operational needs and related purposes.

121. Delta may not use the Hangar Facilities and MRT Complex to perform any services other than those falling within the definition of Aviation Activities as defined by the Ground Lease and Services and Agreement.

122. Delta’s use of the Cargo Facilities is governed by the *Facilities Lease Agreement* dated January 1, 2014 (“Cargo Agreement”).

123. Article 6 of the Cargo Agreement grants Delta “a nonexclusive right and privilege in connection with [Delta’s] use of the Leased Premises to engage in commercial aviation activities as they relate to [Delta’s] cargo operations business.” (Cargo Agreement, art. 6(A)).

124. The Cargo Agreement does not grant any rights to any third-party to use the Cargo Facilities.

125. Article 12 of the Cargo Agreement requires Delta to pay “all nondiscriminatory taxes, including without limitation privilege taxes, assessments, or charges, which, during the term hereof, may become a lien or be levied . . . if applicable.” (Cargo Agreement, art. 12).

126. Article 22 of the Cargo Agreement provides that the “City will defend [Delta’s] right to quiet enjoyment of Leased Premises from the claims of third persons.”

127. In connection with its use of the Cargo Facilities, Delta is prohibited from providing any services at these premises other than its cargo operations. (Cargo Agreement, art.6 (D)).

128. The Cargo Facilities have a front desk that Delta’s customers can access to send and receive cargo shipments. The area behind the front desk is secured, except that the City “retains the right of ingress and egress over, through, and across [the] Leased Premises at any time.” (Cargo Agreement, art. 6(B)).

129. Not all areas of the Cargo Facilities used by Delta are accessible by the general public.

130. If it becomes necessary in the development of the Airport, the City may, in its sole discretion and upon 90 days prior written notice, require Delta to relocate its personal property and equipment, at Delta’s sole cost and expense, to other space selected by the City which, in the sole judgment of the City, is reasonably suited for Delta’s cargo operations. (Cargo Agreement, art. 1(B)).

131. On September 10, 2018, representatives from the Property Tax Division and Salt Lake County went on a tour with Delta of its leased premises at the Salt Lake City International Airport. During the tour, Delta representatives indicated:

a. Terminal Areas. The general public has access to Delta’s ticketing counter and gates. The general public does not have access to meeting rooms, office space, and the areas below the terminals where there are maintenance areas, part storage areas, and break rooms.

b. Hangar and Operations Facilities. In the hangar space, Delta performs tire and airplane repair, along with storage of supplies for flights, including for example, pillows, toilet paper, and drinks. This area is not open to the general public.

c. Marketing, Reservation, and Training Center. This building is located behind the hangar and is not open to the public.

d. Cargo Facilities. The Division did not inspect this area during the tour. Delta representatives indicated that this area has a front desk that is accessible by the general public. The area behind the front desk, however, is secured and the general public does not have access.

132. Salt Lake City Department of Airports Rules and Regulations define “concessionaire” to mean “[a] business entity with an active agreement paying the Airport either a percentage of revenue, a fixed sum, or other amount or fee for the ability to conduct business at the Airport.” (SLCDA ¶¶ 2.18.).

133. Section 9.4 of the SLCDA Rules and Regulations addresses “Concession and Service Privileges” and provides that the “SLCDA will develop concession solicitations, agreements and practices that result in a customer service oriented environment providing variety and quality products and services to customers.” Section 9.5 of the SLCDA Rules and Regulations addresses “Concessions Hours of Operation and Conduct” for “services to the traveling public.” (SLCDA ¶¶ 9.4, and 9.5.).

B. Hearing Facts.

134. During the hearing the parties stipulated to these additional facts:

a. Delta’s VIP Lounge was not included in the privilege tax assessment.

b. Delta’s de-icing facilities were not included in the privilege tax assessment and were not subject to privilege tax.

c. The Salt Lake County Assessor does assess privilege tax on locally assessed properties at the airport.

135. At the hearing, Brandon Grable, an employee of the Salt Lake County Assessor’s Office who worked on the assessment of properties at the airport testified regarding the County’s local assessment of other properties at the airport. He clarified that Salt Lake County does not assess Delta’s operating property at the airport because it “is not under the local assessment,”⁷² but there were other properties at the airport upon which the County assessed a privilege tax, for

⁷² Transcript Day 4, pg. 80.

instance the FedEx building located on city owned property. With respect to FedEx, he testified that the County assessed a property tax on the building improvements and a privilege tax on the land, stating, "I believe the improvements are privately owned, and there would be a notice for that, and the land that the improvements are on would have a privilege tax because the land is owned by the City, which would be an exempt entity under normal operations."⁷³

136. Mr. Grable also testified regarding how the County determined if a tenant at the airport was a concessionaire. He explained that he would call Phil Bevan who worked for Salt Lake City and ask for the City's tenant designation. Mr. Grable testified Mr. Bevan would tell him whether the tenant was a concessionaire. Mr. Grable testified, "I don't make that determination. I follow the information I am given . . ."⁷⁴

137. Based on the exhibits received into evidence at this hearing, tax year 2017 was not the first tax year that the Division had assessed a privilege tax to Delta on the property owned by Salt Lake City at the airport but used by Delta in connection with Delta's business conducted for profit. The assessments issued by the Division for tax years 2009 through 2017 show an assessment for this property.⁷⁵ Also based on the exhibits received into evidence, regarding the Hangar Facilities, in addition to the rights that the City has retained as noted above, the City has the right to approve leasehold improvements.⁷⁶

II. FACT CONCLUSIONS REGARDING PRIVILEGE TAX

138. As noted above, Delta's use of the Airport property is use in connection with a business conducted for profit. The rights retained by and controls placed on the Airport property by the City pursuant to the agreements are noted in the Findings above, and the zoning restrictions in place are based on Salt Lake City Ordinances. The Division has not assessed a privilege tax on areas that the public or third parties may enter or access.

139. However, as noted in the Findings of Fact above, pursuant to the terms of its lease or use agreements, Salt Lake City does retain some rights regarding the properties assessed the privilege tax. For the Terminal Facilities, pursuant to the AUA, the City has the right to "reallocate part or all of the Exclusive Use Premises." Additionally, under the AUA, Delta's right to use the Terminal Facilities "is for the specific purpose of operating its Air Transportation Business and all activities reasonably necessary for such operations." Delta does not have the right to use the

⁷³ Transcript Day 4, pg. 70.

⁷⁴ Transcript Day 4, pgs. 63-65.

⁷⁵ Exhibits 17-24.

⁷⁶ Exhibit 37, Section 12.

premises for other types of business. For example, it may not sell food and beverages on these premises. The City does have the right to enter and inspect the premises pursuant to the AUA.

140. As noted in the Findings above, the Hangar Facilities and MRT Complex are not open to the general public. Pursuant to the agreements between the City and Delta, Delta may only use these facilities for “Aviation Activities.” The City does have, upon reasonable notice, the right to enter into and inspect these premises, but the inspection “shall not interfere with” Delta’s use of these premises.

141. As noted in the Findings regarding the Cargo Facilities, the agreement does not grant any rights to any third-party to use the Cargo Facilities. Delta’s use of the Cargo Facilities is limited to engaging in commercial aviation activities as they relate to Delta’s cargo business. The Cargo Facilities have a front desk, which the public can access to send and receive shipments. The rest of those facilities are secured and not accessible by the general public. The parties have stipulated to the fact, however, that the City may, in its sole discretion and upon 90 days prior written notice, require Delta to relocate its personal property and equipment, at Delta’s sole cost and expense, to other space selected by the City which, in the sole judgment of the City, is reasonably suited for Delta’s cargo operations.

APPLICABLE LAW

I. APPLICABLE LAW ON VALUATION ISSUE

The Utah Constitution, Article XIII, Sec. 2 provides, “So that each person and corporation pays a tax in proportion to the fair market value of his, her or its tangible property, all tangible property in the state that is not exempt under the laws of the United States or under this Constitution shall be: (a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and (b) taxed at a uniform and equal rate.”

Utah Code Subsection 59-2-201(1)(a)(2017) provides as follow:

By May 1, of each year, the following property unless otherwise exempt under the Utah Constitution or under Part 11 . . . , shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter:

- (i) except as provided in Subsection (2), all property that operates as a unit across county lines, if the values must be apportioned among more than one county or state;
- (ii) all property of public utilities;
- (iii) all operating property of an airline, air charter service, and air contract service;

...

Utah Code Ann. § 59-2-201(4), was enacted in 2017 and made retrospective to the lien date January 1, 2017. It provides as follows:

- (a) As used in this Subsection (4), “aircraft pricing guide” means a nationally recognized publication that assigns value estimates for individual commercial aircraft that are:
 - (i) identified by year, make, and model; and
 - (ii) in average condition typical for the aircraft’s type and vintage.

- (b) (i) Except as provided in Subsection (4)(d), the commission shall use an aircraft pricing guide, adjusted as provided in Subsection (4)(c), to determine the fair market value of aircraft assessed under this part.
 - (ii) The Commission shall use the Airliner Price Guide as the aircraft pricing guide, except that:
 - (A) if the Airliner Price Guide is no longer published or the commission determines that another aircraft pricing guide more reasonably reflects the fair market value of aircraft, the commission, after consulting with the airlines operating in the state, shall select an alternative aircraft pricing guide;
 - (B) if an aircraft is not listed in the Airliner Price Guide, the commission shall use the Aircraft Bluebook Price Digest as the aircraft pricing guide; and
 - (C) if the Aircraft Bluebook Price Digest is no longer published or the commission determines that another aircraft pricing guide more reasonably reflects the fair market value of aircraft, the commission, after consulting with the airlines operating in the state, shall select an alternative aircraft pricing guide.

- (c) (i) To reflect the value of an aircraft fleet that is used as part of the operating property of an airline, air charter service, or air contract service, the fair market value of the aircraft shall include a fleet adjustment as provided in this Subsection (4)(c).
 - (ii) If the aircraft pricing guide provides a method for making a fleet adjustment, the commission shall use the method described in the aircraft pricing guide.
 - (iii) If the aircraft pricing guide does not provide a method for making a fleet adjustment, the commission shall make a fleet adjustment by reducing the aircraft pricing guide value of each aircraft in the fleet by .5% for each aircraft over three aircraft up to a maximum 20% reduction.

- (d) The commission may use an alternative method for valuing aircraft of an airline, air charter service, or air contract service if the commission:
 - (i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; and
 - (ii) cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value.

Utah Code Ann. § 59-2-804 provides the statutory formula for allocating Delta's mobile flight equipment to Utah as follows:

- (1) As used in this section:
 - (a) "Aircraft Type" means a particular model of aircraft as designated by the manufacturer of the aircraft.
 - (b) "Airline ground hours calculation" means an amount equal to the product of:
 - (i) the total number of hours aircraft owned or operated by an airline are on the ground, calculated by aircraft type; and
 - (ii) the cost percentage.
 - (c) "Airline revenue ton miles" means, for an airline, the total revenue ton miles during the calendar year that immediately precedes the January 1 described in Section 59-2-103.
 - (d) "Cost percentage" means a fraction, calculated by aircraft type, the numerator of which is the airline's average cost of the aircraft type and the denominator of which is the airline's average cost of the aircraft type:
 - (i) owned or operated by the airline; and
 - (ii) that has the lowest average cost.
 - (e) "Ground hours factor" means the product of:
 - (i) a fraction, the numerator of which is the Utah ground hours calculation and the denominator of which is the airline ground hours calculation; and
 - (ii) .50.
 - (f) (i) Except as provided in Subsection (1)(f)(ii), "mobile flight equipment" is as defined in Section 59-2-102.
 - (ii) "Mobile flight equipment" does not include tangible personal property described in Subsection 59-2-102(25) owned by an:
 - (A) air charter service; or
 - (B) air contract service.
 - (g) "Mobile flight equipment allocation factor" means the sum of:
 - (i) the ground hours factor; and
 - (ii) the revenue ton miles factor.
 - (h) "Revenue ton miles" is determined in accordance with 14 C.F.R. Part 241.
 - (i) "Revenue ton miles factor" means the product of:
 - (i) a fraction, the numerator of which is the Utah revenue ton miles and the denominator of which is the airline revenue ton miles; and
 - (ii) .50.
 - (j) "Utah ground hours calculation" means an amount equal to the product of:
 - (i) the total number of hours aircraft owned or operated by an airline are on the ground in this state, calculated by aircraft type; and
 - (ii) the cost percentage.
 - (k) "Utah revenue ton miles" means, for an airline, the total revenue ton miles within the borders of this state:
 - (i) during the calendar year that immediately precedes the January 1 described in Section 59-2-103; and
 - (ii) from flight stages that originate or terminate in this state.

(2) For purposes of the assessment of an airline's mobile flight equipment by the commission, a portion of the value of the airline's mobile flight equipment shall be allocated to the state by calculating the product of:

- (a) the total value of the mobile flight equipment; and
- (b) the mobile flight equipment allocation factor.

Effective for tax year 2017, Utah Code Sec. 59-2-109(2017) provided the following regarding burden of proof⁷⁷:

(1) As used in this section, "assessing authority" means: (a) the commission for property assessed under Part 2, Assessment of Property; and (b) a county assessor for property assessed under Part 3, County Assessment.

(2) Notwithstanding Section 59-1-604, in an action appealing the value of property assessed by an assessing authority, the assessing authority has the burden of proof before a board of equalization, the commission, or a court of competent jurisdiction, if the assessing authority presents evidence or otherwise asserts that the fair market value of the assessed property is greater than the value originally assessed by the assessing authority for that calendar year.

Utah Admin. Rule R884-24P-62 defines what properties are "unitary" properties, provides guidance and identifies preferred valuation methodologies to be considered in the assessment and appraisal of unitary property as follows:

(1) Purpose. The purpose of this rule is to:

(a) specify consistent mass appraisal methodologies to be used by the Property Tax Division ("Division") in the valuation of tangible property assessable by the Commission; and

(b) identify preferred valuation methodologies to be considered by any party making an appraisal of an individual unitary property.

(2) Definitions:

...

(b) "Fair market value" means the amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value reflects the value of property at its highest and best use, subject to regulatory constraints.

....

(d) "Unitary property" means operating property that is assessed by the Commission pursuant to Subsections 59-2-201(1)(a) through (c).

(i) Unitary properties include:

(A) all property that operates as a unit across county lines, if the values must be apportioned among more than one county or state; and

(B) all property of public utilities as defined in Section 59-2-102.

⁷⁷ Utah Code Sec. 59-2-109 has been amended; however, it is the version of this section that was in effect for tax year 2017 that is applicable in this matter.

(ii) These properties, some of which may be cost regulated utilities, are defined under one of the following categories.

(A) "Telecommunication properties"

(B) "Energy properties"

(C) "Transportation properties" include the operating property of all airlines, air charter services, air contract services, including major and small passenger carriers and major and small air freighters, long haul and short line railroads, and other similar properties.

* * *

(3) All tangible operating property owned, leased, or used by unitary companies is subject to assessment and taxation according to its fair market value as of January 1, and as provided in Utah Constitution Article XIII, Section 2. Intangible property as defined under Section 59-2-102 is not subject to assessment and taxation.

(4) General Valuation Principles. Unitary properties shall be assessed at fair market value based on generally accepted appraisal theory as provided under this rule.

(a) The assemblage or enhanced value attributable to the tangible property should be included in the assessed value. See *Beaver County v. WilTel, Inc.*, 995 P.2d 602 (Utah 2000). The value attributable to intangible property must, when possible, be identified and removed from value when using any valuation method and before that value is used in the reconciliation process.

(b) The preferred methods to determine fair market value are the cost approach and a yield capitalization income indicator as set forth in Subsection (5).

(i) Other generally accepted appraisal methods may also be used when it can be demonstrated that such methods are necessary to more accurately estimate fair market value.

(ii) Direct capitalization and the stock and debt method typically capture the value of intangible property at higher levels than other methods. To the extent intangible property cannot be identified and removed, relatively less weight shall be given to such methods in the reconciliation process, as set forth in Subsection (5)(d).

(iii) Preferred valuation methods as set forth in this rule are, unless otherwise stated, rebuttable presumptions, established for purposes of consistency in mass appraisal. Any party challenging a preferred valuation method must demonstrate, by a preponderance of evidence, that the proposed alternative establishes a more accurate estimate of fair market value.

(c) Non-operating Property. Property that is not necessary to the operation of unitary properties and is assessed by a local county assessor, and property separately assessed by the Division, such as registered motor vehicles, shall be removed from the correlated unit value or from the state allocated value.

(5) Appraisal Methodologies.

(a) Cost Approach. Cost is relevant to value under the principle of substitution, which states that no prudent investor would pay more for a property than the cost to construct a substitute property of equal desirability and utility without undue delay. A cost indicator may be developed under one or more of the following methods: replacement cost new less depreciation (RCNLD), reproduction cost less depreciation (reproduction cost), and historic cost less depreciation (HCLD).

(i) "Depreciation" is the loss in value from any cause. Different professions recognize two distinct definitions or types of depreciation.

(A) Accounting. Depreciation, often called "book" or "accumulated" depreciation, is calculated according to generally accepted accounting principles or regulatory guidelines. It is the amount of capital investment written off on a firm's accounting records in order to allocate the original or historic cost of an asset over its life. Book depreciation is typically applied to historic cost to derive HCLD.

(B) Appraisal. Depreciation, sometimes referred to as "accrued" depreciation, is the difference between the market value of an improvement and its cost new. Depreciation is typically applied to replacement or reproduction cost, but should be applied to historic cost if market conditions so indicate. There are three types of depreciation:

(I) Physical deterioration results from regular use and normal aging, which includes wear and tear, decay, and the impact of the elements.

(II) Functional obsolescence is caused by internal property characteristics or flaws in the structure, design, or materials that diminish the utility of an improvement.

(III) External, or economic, obsolescence is an impairment of an improvement due to negative influences from outside the boundaries of the property, and is generally incurable. These influences usually cannot be controlled by the property owner or user.

(ii) Replacement cost is the estimated cost to construct, at current prices, a property with utility equivalent to that being appraised, using modern materials, current technology and current standards, design, and layout. The use of replacement cost instead of reproduction cost eliminates the need to estimate some forms of functional obsolescence.

(iii) Reproduction cost is the estimated cost to construct, at current prices, an exact duplicate or replica of the property being assessed, using the same materials, construction standards, design, layout and quality of workmanship, and embodying any functional obsolescence.

(iv) Historic cost is the original construction or acquisition cost as recorded on a firm's accounting records. Depending upon the industry, it may be appropriate to trend HCLD to current costs. Only trending indexes commonly recognized by the specific industry may be used to adjust HCLD.

(v) RCNLD may be impractical to implement; therefore the preferred cost indicator of value in a mass appraisal environment for unitary property is HCLD. A party may challenge the use of HCLD by proposing a different cost indicator that establishes a more accurate cost estimate of value.

(b) Income Capitalization Approach. Under the principle of anticipation, benefits from income in the future may be capitalized into an estimate of present value.

(i) Yield Capitalization. The yield capitalization formula is $CF/(k-g)$, where "CF" is a single year's normalized cash flow, "k" is the nominal, risk adjusted discount or yield rate, and "g" is the expected growth rate of the cash flow.

(A) Cash flow is restricted to the operating property in existence on the lien date, together with any replacements intended to maintain, but not expand or modify, existing capacity or function. Cash flow is calculated as net operating income (NOI) plus non-cash charges (e.g., depreciation and deferred income taxes), less capital expenditures and additions to working capital necessary to achieve the expected growth "g". Information necessary for the Division to calculate the cash

flow shall be summarized and submitted to the Division by March 1 on a form provided by the Division.

(I) NOI is defined as net income plus interest.

(II) Capital expenditures should include only those necessary to replace or maintain existing plant and should not include any expenditure intended primarily for expansion or productivity and capacity enhancements.

(III) Cash flow is to be projected for the year immediately following the lien date, and may be estimated by reviewing historic cash flows, forecasting future cash flows, or a combination of both.

(Aa) If cash flows for a subsidiary company are not available or are not allocated on the parent company's cash flow statements, a method of allocating total cash flows must be developed based on sales, fixed assets, or other reasonable criteria. The subsidiary's total is divided by the parent's total to derive the allocation percentage to estimate the subsidiary's cash flow.

(Bb) If the subject company does not provide the Commission with its most recent cash flow statements by March 1 of the assessment year, the Division may estimate cash flow using the best information available.

(B) The discount rate (k) shall be based upon a weighted average cost of capital (WACC) considering current market debt rates and equity yields. WACC should reflect a typical capital structure for comparable companies within the industry.

(I) The cost of debt should reflect the current market rate (yield to maturity) of debt with the same credit rating as the subject company.

(II) The cost of equity is estimated using standard methods such as the capital asset pricing model (CAPM), the Risk Premium and Dividend Growth models, or other recognized models.

(Aa) The CAPM is the preferred method to estimate the cost of equity. More than one method may be used to correlate a cost of equity, but only if the CAPM method is weighted at least 50% in the correlation.

(Bb) The CAPM formula is $k(e) = R(f) + (\text{Beta} \times \text{Risk Premium})$, where $k(e)$ is the cost of equity and $R(f)$ is the risk free rate.

(Cc) The risk free rate shall be the current market rate on 20-year Treasury bonds.

(Dd) The beta should reflect an average or value-weighted average of comparable companies and should be drawn consistently from Value Line or an equivalent source. The beta of the specific assessed property should also be considered.

(Ee) The risk premium shall be the arithmetic average of the spread between the return on stocks and the income return on long term bonds for the entire historical period contained in the Ibbotson Yearbook published immediately following the lien date.

(C) The growth rate "g" is the expected future growth of the cash flow attributable to assets in place on the lien date, and any future replacement assets.

(I) If insufficient information is available to the Division, either from public sources or from the taxpayer, to determine a rate, "g" will be the

expected inflationary rate in the Gross Domestic Product Price Deflator obtained in Value Line. The growth rate and the methodology used to produce it shall be disclosed in a capitalization rate study published by the Commission by February 15 of the assessment year.

(ii) A discounted cash flow (DCF) method may be impractical to implement in a mass appraisal environment, but may be used when reliable cash flow estimates can be established.

(A) A DCF model should incorporate for the terminal year, and to the extent possible for the holding period, growth and discount rate assumptions that would be used in the yield capitalization method defined under Subsection (5)(b)(i).

(B) Forecasted growth may be used where unusual income patterns are attributed to:

- (I) unused capacity;
- (II) economic conditions; or
- (III) similar circumstances.

(C) Growth may not be attributed to assets not in place as of the lien date.

(iii) Direct Capitalization is an income technique that converts an estimate of a single year's income expectancy into an indication of value in one direct step, either by dividing the normalized income estimate by a capitalization rate or by multiplying the normalized income estimate by an income factor.

(c) Market or Sales Comparison Approach. The market value of property is directly related to the prices of comparable, competitive properties. The market approach is estimated by comparing the subject property to similar properties that have recently sold.

(I) Sales of comparable property must, to the extent possible, be adjusted for elements of comparison, including market conditions, financing, location, physical characteristics, and economic characteristics. When considering the sales of stock, business enterprises, or other properties that include intangible assets, adjustments must be made for those intangibles.

(II) Because sales of unitary properties are infrequent, a stock and debt indicator may be viewed as a surrogate for the market approach. The stock and debt method is based on the accounting principle which holds that the market value of assets equal the market value of liabilities plus shareholder's equity.

(d) Reconciliation. When reconciling value indicators into a final estimate of value, the appraiser shall take into consideration the availability, quantity, and quality of data, as well as the strength and weaknesses of each value indicator. Weighting percentages used to correlate the value approaches will generally vary by industry, and may vary by company if evidence exists to support a different weighting. The Division must disclose in writing the weighting percentages used in the reconciliation for the final assessment. Any departure from the prior year's weighting must be explained in writing.

(6) Property Specific Considerations. Because of unique characteristics of properties and industries, modifications or alternatives to the general value indicators may be required for specific industries.

...
(c) Airlines, air charter services, and air contract services.

(i) For purpose of this Subsection (6)(c):

(A) "aircraft pricing guide" means a nationally recognized publication that assigns value estimates for individual commercial aircraft that are in average condition typical for their type and vintage, and identified by year, make and model;

...
(C) "airline market indicator" means an estimate of value based on an aircraft pricing guide; and

...
(ii) In situations where the use of preferred methods for determining fair market value under Subsection (5) does not produce a reasonable estimate of the fair market value of the property of an airline operating as a unit, an airline market indicator published in an aircraft pricing guide, and adjusted as provided in Subsections (6)(c)(ii)(A) and (6)(c)(ii)(B), may be used to estimate the fair market value of the airline property.

(A) (I) In order to reflect the value of a fleet of aircraft as part of an operating unit, an aircraft market indicator shall include a fleet adjustment or equivalent valuation for a fleet.

(II) If a fleet adjustment is provided in an aircraft pricing guide, the adjustment under Subsection (6)(c)(ii)(A)(I) shall follow the directions in that guide. If no fleet adjustment is provided in an aircraft pricing guide, the standard adjustment under Subsection (6)(c)(ii)(A)(I) shall be 20 percent from a wholesale value or equivalent level of value as published in the guide.

...
II. APPLICABLE LAW ON PRIVILEGE TAX ISSUE

Utah Code Ann. § 59-4-101(2017) provides in part:

(1)(a) Except as provided in Subsections (1)(b), (1)(c), and (3), a tax is imposed on the possession or other beneficial use enjoyed by any person of any real or personal property that is exempt for any reason from taxation, if that property is used in connection with a business conducted for profit.

...
(2)(a) The tax imposed under this chapter is the same amount that the ad valorem property tax would be if the possessor or user were the owner of the property.

...
(3) A tax is not imposed under this chapter on the following:

(a) the use of property that is a concession in, or relative to, the use of a public airport, park, fairground, or similar property that is available as a matter of right to the use of the general public;

(e) the use or possession of any lease, permit, or easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates;

(4) For purposes of Subsection (3)(e):

...

(b) a lessee, permittee, or holder of an easement still has exclusive possession of the premises if the owner has the right to enter the premises, approve leasehold improvements, or inspect the premises.

CONCLUSIONS OF LAW

I. CONCLUSIONS OF LAW ON VALUATION APPEAL

1. The Utah Constitution, Article XIII, Sec. 2 provides for property taxation, "So that each person and corporation pays a tax in proportion to the fair market value of his, her or its tangible property, all tangible property in the state that is not exempt under the laws of the United States or under this Constitution shall be: (a) assessed at a uniform and equal rate in proportion to its fair market value, to be ascertained as provided by law; and (b) taxed at a uniform and equal rate."

2. The subject property is assessed by the Commission through its Property Tax Division and pursuant to Utah Code Subsection 59-2-201(1)(a) is to be assessed based on 100% of its fair market value. Utah Code Subsection 59-2-201(1)(a) provides, "By May 1, of each year, the following property unless otherwise exempt under the Utah Constitution or under Part 11 . . . , shall be assessed by the commission at 100% of fair market value, as valued on January 1, in accordance with this chapter: (i) except as provided in Subsection (2), all property that operates as a unit across county lines, if the values must be apportioned among more than one county or state; (ii) all property of public utilities; (iii) all operating property of an airline, air charter service, and air contract service; (iv) all geothermal . . . ; (v) all mines and mining claims . . . ; and (vi) all machinery used in mining" The subject property is centrally assessed by the Commission under Subsection (1)(a)(iii), as "all operating property of an airline."

3. The County pointed out that the Utah Constitution requires that all taxable property be assessed at a uniform and equal rate in proportion to its fair market value. Utah Const. art. XIII § (1). The County argued that the Division's 2017 Revised Assessment and Hearing Appraisal failed to meet the constitutionally required fair market value standard. The County argued that both Utah

Code Subsection 59-2-201(4) and Utah Code Sec. 59-2-804⁷⁸ violate Utah and U.S. Constitutional mandates of uniformity and equality.⁷⁹ The County argued Utah Code Subsection 59-2-201(4) prevented the Division from giving weight to other methods of value that the Division could reasonably conclude necessary to reach fair market value and argued the Division should give no weight to the APG-Fleet Discount value as it reflects an impermissible valuation level and discount not given to other taxpayers assessed using a similar method. The County argued additionally that the 20% discount violates uniformity on its face. The County cited to *Board of Equalization of Salt Lake County v. Utah State Tax Comm'n ex rel. Benchmark, Inc.*, 864 P.2d 882 (Utah 1993); and *Amax Magnesium Corp. v. Utah State Tax Comm'n*, 796 P.2d 1256, 1262 (Utah 1990).⁸⁰ The County also noted that previous legislative attempts to cap or exceed a fair market value result have been rebuffed by the Utah Supreme Court, citing *Moon Lake Elec. Ass'n v. Utah State Tax Comm'n*, 356 P.2d 612 (1959); *Kennecott Copper Corp. v. Salt Lake County*, 799 P.2d 1156, 1161; *State ex. Rel. rel. Salt Lake City v. Eldredge*, 76 P. 337, 341. (Utah 1904); *State ex re. rel. Public Serv. Comm'n v. Southern Pac. Co.*, 79 P.2d 25, 41 (Utah 1938); *Evans & Sutherland Computer Corp. v. Utah State Tax Comm'n*, 953 P.2d 435, 443 (Utah 1997).⁸¹

4. In reviewing the constitutional arguments made by the County, the Tax Commission also must consider that acts of the Legislature are presumed constitutional. *Rio Algom Corp. v. San Juan Cty.*, 681 P.2d 184, 190 (Utah 1984). The Utah Supreme Court has previously held that the Utah State Tax Commission lacks authority to determine the constitutionality of Utah laws, finding “[i]t is not for the Tax Commission to determine questions of legality or constitutionality of legislative enactments.” *Jim Nebeker Trucking v. Utah State Tax Comm'n*, 2001 UT 74, ¶18; citing *State Tax Commission v. Wright*, 596 P.2d 634 (Utah 1979). *See also Steiner v. Tax Commission*, 2019 UT 47, ¶11. Therefore, the Tax Commission declines to opine in regards to the County’s arguments that Utah Code Subsection 59-2-201(4) or Section 59-2-804 are unconstitutional and applies these statutes as they are written to the facts in this matter to determine the proper assessment for the subject property.

5. In property tax cases generally, a party challenging an assessment carries a two-part burden of proof pursuant to *Utah Power & Light Co. v. Utah State Tax Comm'n*, 590 P.2d 332 (Utah

⁷⁸ In regards to Utah Code Sec. 59-2-804, the County cited to *Alaska Airlines, Inc., v. Department of Revenue*, 769 P.2d 193 (Or. 1989), in which the Supreme Court of Oregon rejected the contention of Alaska Airlines that the Commerce Clause requires the use of a revenue ton miles factor, which excludes flyover miles in Oregon.

⁷⁹ County’s Post-Hearing Brief, pg. 4.

⁸⁰ County’s Pre-Hearing Brief, pg. 15.

⁸¹ County’s Pre-Hearing Brief, pgs. 29-31.

1979) to (1) demonstrate substantial error or impropriety in the Division's assessment; and (2) provide the Commission with a sound evidentiary basis upon which the Commission could adopt its requested value. *See also Utah Railway Co. v. Utah State Tax Comm'n*, 2000 UT 49, ¶ 6, 5 P.3d 652 and *Salt Lake City S.R.R. Co. v. State Tax Comm'n*, 1999 UT 90, ¶ 3, 987 P.2d 594; In this appeal, other than the limited and specific correction that was not refuted by any party regarding the missing aircraft, it was only the County that was challenging the Division's property tax portion of the assessment and, therefore, the County has the two fold burden of proof in regards to the property tax portion.

6. Utah Code Subsection 59-2-201(4) provides a statutory summation method for valuing Delta's aircraft, which is roughly two-thirds of Delta's operating property. This statutory provision was adopted during the 2017 Legislative Session and made retrospective to the lien date January 1, 2017. In order to comply with this new law, the Division applied a hybrid of unitary and summation assessment methodologies in its assessments and appraisal of the subject property for the 2017 tax year.

7. Specifically Utah Code Subsection 59-2-201(4)(b)(i) requires, "except as provided in Subsection (4)(d), the commission shall use an aircraft pricing guide, adjusted as provided in Subsection (4)(c), to determine the fair market value of aircraft assessed under this part." Subsection (4)(b)(ii) then states that, subject to certain exceptions, "[t]he Commission shall use the Airliner Price Guide as the aircraft pricing guide . . ." The Division complied with this requirement and used the Airliner Price Guide as the basis of its assessment for the aircraft. The Airliner Price Guide provides both a current market or retail value and a wholesale value for each type of aircraft by year of manufacturer. Utah Code Subsection 59-2-201(4) does not specify whether current market or retail value, or wholesale value, should be used. The Division's interpretation of this provision was that the appropriate value was the retail value. This interpretation was not substantially challenged at the hearing, and the Tax Commission finds that the Division's application complies with the statute. For its value of the aircraft portion of Delta's operating property, the Division listed all of Delta's operating aircraft by type and year of manufacture, found the retail value for that aircraft by type and year of manufacture in the APG and summed up all of those values.

8. Utah Code Subsection 59-2-202(4) requires an additional reduction in the value of the aircraft by making a "fleet adjustment." Utah Code Subsection (4)(c) states, "To reflect the value of an aircraft fleet that is used as part of the operating property of an airline . . . the fair market value of the aircraft shall include a fleet adjustment . . ." Subsection (4)(c)(ii) provides, "If

the aircraft pricing guide provides a method for making a fleet adjustment, the commission shall use the method described in the aircraft pricing guide.” As stated in the Findings above, the Commission concluded based on the information submitted at this hearing that the APG does not provide a method for making a “fleet adjustment” that would be applicable to the assessment of Delta’s operating aircraft. Therefore, Utah Code Subsection 59-2-201(4)(c)(iii) applies. Utah Code Subsection 59-2-201(4)(c)(iii) states, “If the aircraft pricing guide does not provide a method for making a fleet adjustment, the commission shall make a fleet adjustment by reducing the aircraft pricing guide value of each aircraft in the fleet by .5% for each aircraft over three aircraft up to a maximum 20% reduction.” The Division, based on the statute, applied the “fleet adjustment” set out at Subsection (4)(c)(iii). In its application of this fleet adjustment, the Division applied the full 20% discount to all of the aircraft in Delta’s fleet, which had more than 800 aircraft.

9. However, the County and even Delta questioned the Division’s approach to granting the 20% discount to each operating aircraft in Delta’s fleet. Utah Code Sec. 59-2-201 provides no definition or guidance as to what is meant by “fleet” for purposes of Subsection (4)(c)(iii), including whether the “fleet” consisted of all of Delta’s 800 plus aircraft or whether Delta had many “fleet” groupings with each “fleet” being comprised of aircraft that all had the same aircraft type and year of manufacture. The testimony of the Division was that the Division had struggled with how this “fleet adjustment” discount should be applied and the parties provided additional legal argument on this issue in their post hearing submissions. It was the Division’s position that under a basic interpretation of the instructions of the statute, an airline qualifies for the full 20% discount if it has 43 or more aircraft and Delta clearly met this threshold. Furthermore, the Division stated that the statute required that the fleet adjustment be applied to the “value of each aircraft in the fleet.” Delta points out in its post hearing brief that the Commission could construe the statute to require a fleet adjustment that is based on a fleet comprised of the same type of aircraft, noting this would be consistent with how aircraft are more typically purchased by airlines and noting the allocation statute requires the Commission to take into account aircraft types in the interstate allocation of mobile flight equipment. The County argued that the Division did not apply the fleet adjustment correctly and the cost and income appraisal methods of all the appraisers indicated that the 20% adjustment was not warranted to determine the fair market value of the aircraft. The County argued that instead the enhancement value should have been added to the APG retail values. Additionally, the County argued that the 20% reduction violates principles of uniformity and is unconstitutional. Upon review of the information in this matter, the Commission finds that the Division’s interpretation of Subsection 59-2-201(4) was reasonable as applied to Delta

and upholds the Division's application of the 20% fleet adjustment to each aircraft in Delta's operating fleet.

10. The County argued that the Commission should use an alternative method to the APG for valuing Delta's aircraft, arguing that the APG-Fleet Discount method results in a value substantially lower than the fair market value of Delta's property. Utah Code Subsection 59-2-201(4)(d) does allow for an alternative method of valuing the aircraft, but its scope is very limited. Subsection (4)(d) provides, "The commission may use an alternative method for valuing aircraft of an airline, air charter service, or air contract service if the commission: (i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; and (ii) cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value." The County argued at the hearing that the appraisal prepared by Mr. Eyre was "clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft...."⁸² The parties addressed in their Post-Hearing Briefs the question of how the "clear and convincing evidence" standard of Utah Code Subsection 59-2-201(4)(d) should be applied. The Division pointed out that this is a legal standard and not an appraisal standard, and provided the opinion that it is a "high standard." The Division cited to the Utah Supreme Court's discussion of the "clear and convincing" standard in *Essential Botanical Farms, LC v. Kay*:

The definition of clear and convincing evidence presents quantitative difficulties. "[I]t implies something more than the usual requirement of a preponderance, or greater weight, of the evidence; and something less than proof beyond a reasonable doubt." 2011 UT 71, ¶24 (internal citations omitted).

Delta argued that the Legislature provided a statutory method for valuing aircraft that it presumed would result in a fair and equitable valuation commensurate with the valuation of other kinds of property. In its Post-Hearing brief, Delta stated, "The Legislature then 'wisely enacted' Subsection (4)(d), granting the Commission the authority to use an alternative method to value aircraft if the Commission determines by clear and convincing evidence that the aircraft pricing guides do not reasonably reflect fair market value."⁸³ Delta argued, however, that the County's appraisal does not rise to the level of meeting the standard. The County, on the other hand, argued that requiring the Division to issue its assessment based on the APG, unless "clear and convincing" evidence is provided to show it fails to meet fair market value, is unconstitutional. To apply Utah Code

⁸² See Findings of Fact, ¶¶58-59 and Exhibit 56.

⁸³ Delta's Post-Hearing Brief, pgs. 11-12.

Subsection 59-2-201(4)(d), the Commission must consider the plain text of the statute as well as consider each section in connection with every other part or section. The Court has noted, “[a]s in all cases of statutory interpretation, we begin with the text.” *Steiner v. Tax Commission*, 2019 UT 47¶58. In *Ivory Homes v. Tax Commission*, 2011 UT 54, the Court explained, “[w]e presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning . . . our interpretation of a statute requires that each part or section be ‘construed in connection with every other part or section so as to produce a harmonious whole (internal citations omitted).’” Keeping that in mind, Utah Code Subsection 59-2-201(4)(d) provides, “The commission may use an alternative method for valuing aircraft of an airline . . . if the commission: (i) has clear and convincing evidence that the aircraft values reflected in the aircraft pricing guide do not reasonably reflect fair market value of the aircraft; and (ii) cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value.” The Commission concurs with the Division that “clear and convincing” is a “high standard,” something higher than the “preponderance of the evidence” standard.

11. Additionally, “clear and convincing” needs to be considered in context with the statute as a whole. Subsection (i) indicates that “clear and convincing evidence” needs to show that the aircraft values reflected in the aircraft pricing guide “do not reasonably reflect fair market value of the aircraft.” The statute does not refer to the value of the entire operating unit. Furthermore, Subsection 201(4)(d)(i) is not independent from Subsection 201(4)(d)(ii). Subsection (ii) provides the alternative method may not be applied unless the Commission “cannot identify an alternative aircraft pricing guide from which the commission may determine aircraft value.” Delta’s witness provided testimony at the hearing⁸⁴ that there were other airliner pricing guides from which the Commission could have determined “aircraft value.” No one compared what aircraft value would be achieved from other pricing guides compared to the APG. Based on the plain reading of the statutory provision, Subsection (ii) has not been addressed and the County’s argument for an alternative method for valuing the aircraft is unsupported. The Division has valued the operating property of Delta based on the statutory provisions of Utah Code Subsection 59-2-201(4) and the County has not supported the use of an alternative method under Utah Code Subsection 59-2-201(4)(d).

12. The County also argued the Division’s method was improper for determining the allocation factor to allocate the percentage of the system wide value of the subject property to Utah. The Division’s Hearing Appraisal had determined the system wide value for the subject property as

⁸⁴ Findings of Fact, ¶63.

of the 2017 lien date was \$14,800,000,000. The Commission has concluded in Finding of Fact 77 that \$14,800,000,000 is the correct system wide value based on application of Utah Code Subsection 59-2-201(4). Of that amount, \$12,567,801,671 was for the mobile flight equipment and \$2,232,198,329 was for the terminal equipment. Mr. Hales used the same allocation percentages as the Division had in the Revised Assessment. The Utah allocation percentage for the mobile flight equipment was 1.34% and for the terminal equipment, 0.65%. It was clear that the Division, Mr. Hales and Mr. Eyre had followed the express provisions of Utah Code Sec. 59-2-804 in regards to the formula used to allocate the mobile flight equipment. The County, however, argued that the statutory formula in regards to the revenue ton miles required by Utah Code Sec. 59-2-804 improperly reduced the Utah allocation. However, the Division has clearly followed the statute on this point and the Tax Commission must apply the statute. Therefore, the Commission declines to disturb the Division's allocation formula, which was in compliance with Utah Code Sec. 59-2-804.

13. The Division had followed Utah Code Subsection 59-2-201(4) in issuing its original assessment, its Revised Assessment and in its Hearing Appraisal. Because the Commission finds the Division's values complied with Utah Code Subsection 59-2-201(4) and Utah Code 59-2-804, the Commission upholds the Division's Revised Assessment with the correction for the aircraft missing from the Revised Assessment.

II. CONCLUSIONS OF LAW ON PRIVILEGE TAX ISSUE

14. Property owned by a city or other specified government entities is exempt from property tax under provisions of Utah Code Sec. 59-2-1101. The property that has been assessed a privilege tax in this matter, which is portions of the Terminal Facilities, the Hangar Facilities, the MRT Complex and the Cargo Facilities (collectively referred to herein as "Airport Property"), is property owned by Salt Lake City.

15. However, Utah Code Section 59-4-101 imposes a privilege tax on property "that is exempt for any reason from taxation, if that property is used in connection with a business conducted for profit." Delta's use of the Airport Property that was subject to the privilege tax was a use in connection with a business conducted for profit.

16. The Court has noted that the purpose of the privilege tax is "closing gaps in the tax law" between businesses that operate on exempt land and those that operate on non-exempt land. *ABCO Enterprises v. Utah State Tax Com'n.*, 2009 UT 36, ¶¶ 23 - 25, 211 P.3d 382. In that decision, the Court explained the privilege tax statute "ensures that exempt property used in connection with a for-profit business is taxed at an equal rate to the same business conducted on nonexempt property." *Id.* at ¶ 23. The Court also explained that the policy favoring taxation "is

directly supported by the principles that there should be an equal distribution of the tax burden among the entire tax base, absent overriding reasons to the contrary.” *Interwest Aviation v. County Bd. of Equalization of Salt Lake County*, 743 P.2d 1222, 1225 (Utah 1987) (citations omitted). The County pointed out that the privilege tax is not unique to Delta as the Property Tax Division of the Tax Commission assesses a privilege tax on similar property used by other airlines that operate at the airport and Salt Lake County imposes privilege tax on locally assessed properties at the airport. Furthermore, based on the Property Tax Division’s assessments submitted in this matter,⁸⁵ the Property Tax Division has assessed a privilege tax on Delta for many years.

17. Delta argued, however, that Airport Property should not have been assessed privilege tax based on two specific exemptions from privilege tax which are found at Utah Code Subsection 59-4-101(3). First, Delta argued that it was exempt from privilege tax pursuant to Subsection 59-4-101(3)(a) which states “[a] tax is not imposed under this chapter on the following: (a) the use of property that is a concession in, or relative to, the use of a public airport, park, fairground, or similar property that is available as a matter of right to the use of the general public . . .” Delta also asserted that the Airport Property is exempt from privilege tax under Subsection 59-4-101(3)(c), arguing that Delta does not have exclusive possession of the Airport Property. While Subsection 59-4-101(1) imposes a privilege tax, Subsection 59-4-101(3) provides some exemptions from the privilege tax. The Commission considers the facts noted in the Findings of Fact above and the language of Subsection 59-4-101(3)(a) regarding the concession exemption. In *Salt Lake County Bd. of Equalization v. Tax Comm’n*, 2004 UT App 472, ¶ 15, 106 P.3d 182 (“*Rio Grande*”) the Court of Appeals specifically found that Subsection (3)(a) was an exemption from tax, and as such it should be construed narrowly. The Court stated, “[i]n determining whether Rio qualifies for the concession exemption, we follow well settled rules of statutory construction: First, we construe statutes that grant exclusions from taxation strictly against the party seeking an exemption, and that party accordingly bears the burden of proving that it qualifies for the exemption sought.” In another exemption case, the Court explained that “a liberal construction of exemption provisions results in the loss of a major source of municipal revenue and places a greater burden on nonexempt taxpayers, thus, these provisions have generally been strictly construed.” *Board of Equalization of Utah County v. Intermountain Health Care, Inc. and Tax Comm’n of the State of Utah*, 709 P.2d 265 (Utah 1985).⁸⁶

⁸⁵ Exhibits 14-25.

⁸⁶ The Court also noted, “[s]tatutes which provide for exemptions should be strictly construed, and one who so claims has the burden of showing his entitlement to the exemption.” *Parson Asphalt Prods., Inc. v. State Tax Comm’n*, 617 P.2d 397, 398 (Utah 1980). See also *Corporation of the Episcopal Church in Utah v. Utah*

18. There is no statutory definition of “concession” in the Privilege Tax Act and no Utah appellate court decisions have considered whether the use of a facility at an airport by an airline company in connection with that airline conducting a business for profit is a concession. In interpreting statutory provisions, courts “look first to the plain language of the statute to discern the legislative intent.” *Keene v. Bonser*, 2005 UT App 37, ¶10, 107 P.3d 693 (citation omitted). As the Division has noted in this appeal, “In construing the plain language of a statute, words ‘which are used in common, daily, nontechnical speech, should in the absence of evidence of a contrary intent be given the meaning which they have for laymen in such daily usage.’” *Id.* (citation omitted). The Division also pointed to the direction provided in *Ambassador Athletic Club v. Utah State Tax Comm’n*, 27 Utah 2d 377, 378 (Utah 1972) noting that where the Legislature did not define a word, “it must be assumed it was intended to have a meaning generally understood and accepted by the public.”

19. Delta pointed to the Utah Court of Appeals’ decision in *Salt Lake Cty. Bd. of Equalization v. Tax Comm’n*, 2004 UT App 472, 106 P.3d 182 (“*Rio Grande*”), arguing that the Court defined “concession” in that case. The Court in *Rio Grande* indicated a “concession” was “a grant of property or a franchise by a government entity to be used for a specific purpose.” *Id.* at ¶. Delta argued that Delta’s use of the property is governed by the specific agreements noted in the Findings, and those agreements show that Delta’s use for each of those facilities was “for a specific purpose.” The parties stipulated to Findings of Fact indicating that for each of the four facilities that comprise the Airport Property, the agreements between Delta and the City limited Delta’s use of those facilities to a specific type of use. For example, Delta can use the Terminal Facilities only for the “specific purpose of operating its Air Transportation Business and all activities reasonably necessary for such operations.”⁸⁷

20. However, in contrast to the facts in this appeal, the question in *Rio Grande* was in regards to whether a restaurant inside of the railroad depot was a “concession” for purposes of Utah Code Subsection 59-4-101(3). Food establishments typically have been a type of business treated as a concession in public spaces. The property located at a public airport that constitutes the air transportation business of an airline has not typically been considered to be a concession. The exhibits in this appeal show that Delta has been assessed privilege tax since at least 2009. It is the restaurants, snack bars and retail stores that operate in public spaces that have traditionally been

State Tax Commission and County Board of Equalization of Salt Lake County, 919 P.2d 556 (1996) in which the Court states, “[t]he exemption provided in Article XIII, section 2(2)(c) is an exception to the general rule that all land is taxable. Exemptions are strictly construed.”

⁸⁷ See Findings of Fact ¶¶102, 120-121, 123.

considered to be the concessions. This is demonstrated by the agreements and regulations used or followed by Salt Lake City for its property at the airport.⁸⁸ As noted in the Findings of Fact, No. 104, the AUA defines “In-Terminal Concessions” as including, but not limited to, “companies or other business organizations that (i) sell consumable food or beverage items, excluding automated vending operations, (ii) sell retail or news products, excluding automated vending items, or services, or (iii) advertise to the traveling public at the Terminal, pursuant to concession agreements with the City.” (AUA § 1.46). The AUA does not define Delta as a concession, but instead Paragraph 2.51 indicates Delta is the “Signatory Airline” or the “air transportation company that is a party to the Airline Use Agreement (AUA).” As noted in the Findings of Fact, No. 103, “Air Transportation Business” is defined by the AUA to mean the business operated by Delta at the Airport for the commercial transportation by air of persons, property, mail, parcels and/or cargo.” (AUA § 1.04) As noted in Findings of Fact, No. 107, the AUA states that an “Airline shall not sell food and beverages or engage in revenue-generating concession activities of any kind in Airline’s public premises, including but not limited to any Gates. . . .”⁸⁹ Upon review of the parties’ arguments, the facts and the applicable law support the finding that Delta does not satisfy the generally understood meaning of “concession.” If the Utah Legislature had intended “concession” for purposes of the exemption at Utah Code Subsection 59-4-101(3)(a) to be something other than the meaning generally understood and accepted by the public, they could have enacted language to do so. The Commission finds that Delta’s use of airport property for an air transportation business is not use of property that is a “concession in, or relative to, the use of the public airport.” Therefore, the property is not exempt from the privilege tax pursuant to Utah Code Subsection 59-4-101(3)(a).

21. Delta argued in the alternative that the Airport Property is not subject to tax pursuant to the exemption found at Subsection (3)(e). Subsection (3)(e) provides a privilege tax is not imposed on “the use or possession of any lease, permit, or easement unless the lease, permit, or

⁸⁸ See Exhibit 29, the 2014 Airline Use Agreement between Salt Lake City Corporation and Delta (“AUA”), relating to its Terminal Property. See also Salt Lake City Department of Airports Rules and Regulations, which distinguish between an airline and a concessionaire. Salt Lake City Department of Airports Rules and Regulations (Apr. 2020), available at <https://slcairport.com/assets/pdfDocuments/Rules-and-Regs/Rules-and-Regulations-Update-April-2020.pdf> (last visited Feb. 17, 2021). See also Findings of Fact, ¶¶132 &133.

⁸⁹ Additionally, the Division provided examples at <https://www.cinemark.com/concession-promotions> (last visited Oct. 25, 2018); <http://www.slcdocs.com/parks/Liberty/140702-Liberty%20Park%20Report.pdf> at pp. 13, 23, 27 (last visited Oct. 25, 2018). See also *S. Shores Concession, Inc. v. State*, 600 P.2d 550, 551 (Utah 1979) (describing contract allowing concessionaire in state park to sell souvenirs, gifts, clothing, food services, beach equipment rental, and beach services).

easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates; . . .” Delta argued in this appeal that Delta does not have exclusive possession of the premises, pointing out that the City has the right to reallocate the Terminal Facilities and the Cargo Facilities to other areas of the airport upon short notice and that Delta is limited in the scope of its use of the premises. For example, as noted in the Findings, for the Terminal Facilities, Delta’s use is limited to “operating its Air Transportation Business and all activities reasonably necessary for such operations.”⁹⁰ The Division pointed out that even a fee simple owner is subject to zoning restrictions, and the subject property is zoned “Airport District.” The Division argued that the right of the City to relocate Delta is consistent with a lease of limited duration where exclusive possession lasts only as long as the term of the lease. The Division argued that the fact that the lease will end at some point does not negate Delta’s exclusive use while it occupies the premises.

22. To determine whether any portion of the Airport Property is exempt from privilege tax pursuant to the Utah Code Subsection 59-4-101(3)(e) exemption, the Tax Commission looks to decisions from the Utah Supreme Court and the Utah Court of Appeals, which addressed this exemption in *Alliant Techsystems, Inc. v. Salt Lake Cty. Bd. of Equalization*, 2012 UT 4, 270 P.3d 441 (“*Alliant P*”) and *Alliant Techsystems, Inc. v. Salt Lake County Board of Equalization*, 2015 UT App 288, ¶23, (“*Alliant IP*”) In *Alliant I*, the Utah Supreme Court provided a definition of “exclusive possession” as follows:

“exclusive possession” means having the present right to occupy and control property akin to that of an owner or consistent with a lessee. To qualify as exclusive possession, the user or possessor must have this right over a definite space for a definite time. While not an exhaustive list, examples of the type of control needed for exclusive possession include (1) the general power to admit or exclude others, including the property owner, from any present occupation of the property and (2) the authority to make broad use of the property with only narrow exceptions. *Alliant I* 2012 UT 4, ¶ 28.⁹¹

The Utah Supreme Court then articulated a three factor test to be applied in determining whether exclusive possession exists, stating:

To have the same present right to occupy or control property as an owner or lessee, an entity must have the power to exclude the property owner from occupying the property, the authority to make broad use of the property (with narrow exceptions

⁹⁰ See Findings of Fact, ¶¶ 98, 102, 103, 130.

⁹¹ Delta also pointed out that the Court had stated in *Alliant I*, “because the tax is imposed as if the possessor or user were the owner of the property, it appears that the legislature was concerned with taxing an entity whose use of [government] property was akin to that of an owner.” Citing *Id.* at ¶ 23.