

IN THE  
UTAH SUPREME COURT

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SALT LAKE COUNTY  
*Petitioner/Appellant,*

v.

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

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Reply Brief of Appellant

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

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## ARGUMENT

### **I. RESPONSE TO DELTA’S FACIAL CONSTITUTIONAL ARGUMENTS**

Delta contends the County’s brief is ambiguous on whether the County is making a facial challenge or an as-applied challenge. (Delta’s Br. pg. 9). The County disagrees, but since Delta devoted significant space defending against a facial challenge, the County affirms this appeal is an as-applied challenge. The Airline Valuation Law was applied to value Delta’s property and the County contends that application is unconstitutional.

However, because Delta makes several arguments in defending against a facial challenge that are also relevant to the County’s as-applied challenge, the County will address three of those arguments: (1) that the Legislature has authority to prescribe valuation methods; (2) that Utah Code § 59-2-201 (4)<sup>1</sup> (the “Airline Valuation Law”<sup>2</sup>) allows the Commission discretion to use other methodologies to reach fair market value; and (3) that the Legislature is complying with the uniformity clause by mandating all airlines are valued using the same methodology. (Delta’s Br., pgs. 13, 17, 21).

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<sup>1</sup> All Utah statutory citations are to the 2017 version of the Utah Code unless otherwise noted.

<sup>2</sup> Delta refers to the statute as the “**Aircraft** Valuation Law,” but its mandates are broader than just aircraft. The statute prohibits using unitary valuation methods that value an airline’s property operating together. Therefore, the County uses the broader term “**Airline** Valuation Law” since its restrictions go beyond just how aircraft are valued.

### **A. Legislative Authority to Prescribe Valuation Methods**

Delta argues the Legislature has “the constitutional authority to prescribe valuation methods,” relying primarily on *U.S. Smelting v. Haynes*. (Delta Br., pgs. 21, 24-26). However, *U.S. Smelting v. Haynes* and other mining cases were decided when the Utah Constitution had a specific mining provision<sup>3</sup> that gave “the Legislature broader latitude in devising a formula for the assessment of mines.” See *Kennecott Copper Corp. v. Salt Lake County*, 799 P.2d 1156, 1161 (Utah 1990) (providing a historical overview of the constitutional mining assessment provisions).

Moreover, in *U.S. Smelting*, no one was challenging the constitutionality of the statutory net proceeds formula. *Kennecott Copper Corp.*, 799 P.2d at 1161; *U.S. Smelting v. Haynes*, 176 P.2d 622, 627 (Utah 1947). Rather, they were challenging only the statutory interpretation to include government premium payments as part of the statutory proceeds formula and whether that interpretation violated the uniformity clause. *U.S. Smelting*, 176 P.2d at 624, 626.

Accordingly, this Court has never directly held the Legislature has authority to proscribe valuation methods outside of the mining context, and even then, the mining statutes still had to comply with the fair market value and uniformity provisions. *Kennecott*, 799 P.2d at 1160. Cases involving mandated valuation methodologies outside

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<sup>3</sup> Article XIII, § 4 has since been repealed, but during *U.S. Smelting* and other mining valuation cases, the provision stated: “All metalliferous mines or mining claims, both placer and rock in place, shall be assessed as the Legislature shall provide . . . .” *Kennecott* at 1159, n.3.

the mining context have not fared well. *See Harmer v. Tax Comm'n*, 452 P.2d 876, 878, 881 (Utah 1969) (holding assessments valuing property as agricultural land violated the constitution); *Moon Lake Electric Ass'n, Inc. v. Tax Comm'n*, 345 P.2d 612 (Utah 1959) (striking down statutes valuing nonprofit electric and telephone corporations as unconstitutional); *Stillman v. Lynch*, 1920 UT 192 P. 272 (Utah 1920) (holding statute providing valuation formula for bank stocks was unconstitutional).

Even if one broadly applies the standard in mining cases, the Airline Valuation Law still fails. The statute runs afoul of this Court's warning 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.*, 79 P.2d 25, 35 (Utah 1938). Regardless of context, every specific valuation formula, mandate, or discount challenged to the Utah Supreme Court, even when initially upheld facially, has eventually been held unconstitutional in an as-applied challenge or at least called into question and subsequently changed. (See cases listed in County Br., pg. 18). This case provides another illustration that when the Legislature insists on a dogmatic valuation formula with no fair market safety outlet provision, it will invariably run afoul of the uniformity and fair market value provisions.

**B. The Airline Valuation Law does not Allow the Commission Discretion to Use Other Methodologies.**

Delta rightly acknowledges the County's concern that the Airline Valuation Law removes discretion from the Commission to select appropriate methodologies to value airline property, but Delta disagrees about that lack of discretion. (Delta Br. pgs. 6, 21-23,

26-27). As Delta argues, “if the Commission has clear and convincing evidence that the values reflected in the available aircraft pricing guides do not reasonably reflect fair market value, an alternative valuation method may be used.” (Delta Br. pg. 26).

First, even if one jumps through all the hoops of the statute, it does not appear that a unitary approach could be used as an alternative valuation method. The statute consistently focuses on valuing aircraft only, including for alternative methods. Utah Code § 59-2-201 (4)(d) states “[t]he commission may use an alternative method *for valuing aircraft* . . .” if the statutory conditions are met. Therefore, any alternative methodology must value only the aircraft and cannot be a unitary methodology that values everything together. Moreover, if this reading of the statute is wrong and a unitary methodology can be used as an alternative method to value the aircraft, then a unitary methodology should also be permitted to meet the clear and convincing standard. Since the entire statute focuses on how aircraft are valued, then a unitary method can either show the value of individual aircraft or it cannot.

Second, even if Delta is somehow correct that a unitary method can be used under the statute to value aircraft as an alternative method, but not to meet the clear and convincing standard, the conditions required to use a unitary method remove the option as a practical matter. According to Delta, to use a unitary methodology that values all of Delta’s property operating together, a party must first show the statutory method did not reach fair market value for one component of Delta’s property—the aircraft, and individual aircraft at that.

However, both Delta and the County agree that using a methodology that values all of Delta's operating property together versus valuing just the aircraft is an apples to oranges comparison. (Delta Br., pgs. 41-42). It would be like valuing a car, but the appraiser is prohibited from using sales transactions of cars sold unless one could first show that a price guide for tires incorrectly valued the tires in a summation method for the various components of the car. In other words, the statute only allows discretion to use alternative data sources for one component, not discretion to choose a methodology that values the property as a unit. And it is the discretion to choose the appropriate valuation methodology for the property being valued that matters.

To be clear, even if the statutory methodology is theoretically capable of reaching fair market value in some circumstances, this does not resolve the lack of discretion. While the County agrees with the Commission that it would generally be coincidental if the statute's type of summation methodology reached fair market value, just as there may be some limited circumstances where the best way to value a car is by adding up the cost of the individual components,<sup>4</sup> there may be some circumstances where the statutory methodology is the most appropriate method to use. (Jt. Ex. 28, R. 2956). But that does not change the fact there is no practical discretion under the statute to consider other methodologies beyond a summation methodology.

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<sup>4</sup> One example may be a custom-built vehicle with no open market transactions because of its uniqueness. In that case, adding up the cost to build the vehicle may be one methodology to consider when valuing it.



Finally, the clear and convincing standard<sup>5</sup> also lessens discretion.<sup>6</sup> Delta implicitly acknowledges this lack of discretion by arguing the clear and convincing standard is necessary because a lower standard would allow the Division to avoid using the statutory methodology. (Delta Br., pg. 29). In other words, removing discretion from the Division is the entire point of the clear and convincing standard.<sup>7</sup>

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<sup>5</sup> The clear and convincing standard is also non-uniform with other taxpayers and its only effect is to arrive at a different valuation than would have been arrived at under a preponderance standard. (County Br., pgs. 41-45). Delta tries to muddy this non-uniformity by pointing to a comment from a division employee stating the Commission told the Division to avoid the APG methodology if they could. (Delta Br., pg. 27). However, the employee said this was conveyed through conversation and through “rule.” (Jt. Ex. 53, R. 3724-25). There is no evidence this means anything more than the Commission has preferred methodologies under its rules and the APG methodology is not one of them. *See* Commission Rule 62(6)(c)(ii). But those methodologies can still be used by meeting a preponderance standard and indeed, as Delta points out, the Division has at times used the APG methodology. (Delta Br., pg. 14). There is no evidence the Commission has ever applied anything other than a preponderance standard for state-assessed property until this statute was passed.

<sup>6</sup> To a significant extent, the clear and convincing standard is not implicated in this appeal because even if it was changed to a preponderance standard, the statute would still prohibit the Commission from using a unitary methodology to meet that standard. This is why Delta can argue with a straight face that the County provided no evidence at all to meet the clear and convincing standard. (Delta Br., pg. 36). Under a preponderance standard, Delta would still argue the County had not provided any evidence to meet it.

<sup>7</sup> Delta argues the clear and convincing standard is appropriate because it was used by the Court in *W. Contracting Corp. v. State Tax Comm’n*, a corporate income tax case. (Delta Br., pg. 29). Delta acknowledges it was a corporate income tax case but fails to acknowledge the critical distinction between income tax and property tax: the constitution has a property tax uniformity requirement that is not present for income tax. This uniformity is necessary because when one taxpayer’s property is valued below market value, it results in a tax shift to other taxpayers. (County Br., pgs. 14-17). This is not true of income tax. Therefore, Delta’s reliance on an income tax case to defend the clear and convincing standard in a property tax context is unhelpful.

### **C. The Uniformity Clause does not Require All Airlines be Valued Using the Same Methodology.**

Delta argues the Airline Valuation Law does not violate the uniformity clause but is instead fixing the uniformity problems of the past. As support, Delta shows how various airlines were weighted between the cost and income approaches in 2016 and compares that with 2017 when all airlines were valued by the APG methodology as required by statute. (Delta Br., pg. 17). Delta then defends this statutorily mandated result by arguing that “where the *same kind of property* is being assessed (i.e., aircraft), it is appropriate that the same formula, or methodology be generally followed to secure a fair and equitable valuation. . . .” (Delta Br., pg. 13).

As an initial matter, there is no relevant caselaw that holds, every subset of taxpayers must be valued using the same methodology. Delta relies on language from *U.S. Smelting* discussing that different formula may be applied to different kinds of property, but *U.S. Smelting* itself had a broad view of the “types” of property that warranted various methodologies. *U.S. Smelting*, 176 P.2d at 627. The *U.S. Smelting* court recognized that a proceeds-based methodology, which is a type of income approach, had been used to value diverse income producing properties including not only mines, but “railroads, motor carriers and other public utilities.” *Id.*

This is consistent with this Court’s discussion in *Rio Algom* where the Court recognized the three basic methods used by the Commission are the cost, income, and stock and debt, but that a number of variations and “substantial discretions are used to modify the basic methods.” *Rio Algom Corp. v. San Juan County*, 681 P.2d 184, 189

(Utah 1984). The Court also noted the use of the income approach to value properties, but that “its application in a given case may vary.” *Id.*

When talking about different “types” of properties, the Court did not have strict classifications based on specific industries but talked about how “some properties are income-producing; some are not. Some types of property sell frequently in an open market and have a market value that may be reasonably estimated on the basis of comparable market sales; some types of property are rarely sold and have no ascertainable market value based on comparable sales.” *Id.* at 188-89. In fact, some properties “may have a value that is peculiar to the owner and no one else.” *Id.* at 189.

This is consistent with the valuation experts’ testimony below that what methodology is used and how much weight to put on the various methods depends on diverse factors relevant to that property and tax year, including 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). As one Division expert explained, the Division “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.” (R. 1239-40; R. 8712, pgs. 228-29). The Division expert also discussed the importance of being able to consider multiple indicators for each property because each indicator or sub-indicator has strengths and weaknesses. (R. 1240; R. 8712, pgs. 219-20).

It is not surprising then that Delta’s 2016 chart showed that different airlines received different weighting between the cost and income indicators because each airline

is unique in their circumstances. (Delta Br. pg. 17; Jt. Ex. 53, R. 3693). Indeed, even the same airline may have different weightings and methods from year to year as market conditions, the airline's circumstances, and information available changes. For example, when Delta was in bankruptcy around 2006, an income approach would have been difficult to do and not very reliable. (County Br. pg. 4; Jt. Ex. 53, R. 3699-3700). That does not mean an income approach should never be used to value Delta's property in other years where conditions have changed.

Ultimately, as Delta concedes, the way the uniformity provision is complied with is by valuing each property at its fair market value. (Delta Br., pgs. 13, 28). If Delta and the other airlines did not believe the Division's methodologies were reaching fair market value in any given year, they had every opportunity to present evidence to show that other methodologies such as the statutory methodology better reached fair market value. The way to reach uniformity is to use appropriate methodologies for each unique property that reaches fair market value, not to mandate a one size fits all methodology.

Had the Legislature really been concerned about reaching fair market value for airlines, it could have let the Commission do its constitutional job or if it wished to offer a methodology it believed the Commission should consider, it could have enacted something like the mining statute, which states "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." Utah Code § 59-2-201 (3)(a).

But as Delta points out, allowing the Division and Commission to choose non-APG methodologies to value airlines flies in the face of the Legislature's decision to choose the assessment methodology that would solve the airlines dilemma of having to appeal and put on evidence of what they believed was the fair market value of their property. (Delta Br., pgs. 28-29). It is not just the Legislature chose to offer a "preferred" methodology as it did in the mining statute, but it chose to mandate a methodology for all airlines no matter the circumstances and regardless of whether it reached fair market value.

Whatever the Legislature's motivation was to mandate a valuation method for all airlines, it was beyond their authority to do so if that methodology fails to arrive at fair market value. Certainly, if the Legislature had mandated a methodology that overvalued the property of airlines, Delta would understandably be first in line to argue that a uniform methodology does not satisfy uniformity if it does not reach fair market value. The County contends in this case, the statutory methodology did not arrive at fair market value for Delta's property and therefore Delta's uniformity argument fails.

## **II. The Airline Valuation Law did Not Arrive at Fair Market Value for Delta's Property.**

The ultimate question is whether the Airline Valuation Law arrived at fair market value for Delta's property. The County alleges it did not. As a threshold issue, one of the questions raised in Delta's brief regards the appropriate standard of review for appeal. The standard of review will first be addressed and then the County will address the

primary criticisms raised by Delta alleging the County did not meet its burden to show the Airline Valuation Law did not arrive at fair market value.

### **A. Standard of Review**

As the County argued in its opening brief, the Court grants “no deference to the Tax Commission’s conclusion as to the legality or constitutionality of tax statutes because they are conclusions of law.” *Amax Magnesium Corp. v. Tax Comm’n*, 796 P.2d 1256, 1258 (Utah 1990); *see also Kennecott Copper Corp.*, 799 P.2d at 1158-59 (noting constitutional issues were issues of law with no deference); *Bd. of Equalization of Salt Lake Cty. v. Utah State Tax Comm’n ex rel. Benchmark, Inc.*, 864 P.2d 882, 884 (Utah 1993) (no deference because they were questions of constitutional law and statutory construction).

Conversely, relying on *Nelson v. Salt Lake County*, Delta argues the County must satisfy a substantial evidence burden. (Delta Br., pgs. 12, 35); *see also* Utah Code § 59-1-610 (requiring the substantial evidence standard for Commission findings, but a correction of error standard for conclusions of law). However, the *Nelson* case is not helpful because it presented “a straightforward question of the accuracy of the Commission’s determination of the fair market value of petitioner’s property.” 943 P.2d 1354, 1356 (Utah 1997).

In *Nelson*, unlike here, there was no statute that dictated a methodology, rather, the appealing party was attacking a value the Tax Commission found without any constraints on what methodologies the Commission could use to reach that value. *Id.* at 1355-56. In the context of a fair market value finding by the Commission supported by appraisal

evidence as in *Nelson*, a substantial evidence standard is appropriate. *Id.* at 1356.<sup>8</sup> Unlike in *Nelson*, the Commission was not allowed to make any finding at all regarding the fair market value of Delta's property.

This Court has never directly addressed the standard of review for the constitutionality of a statute where the Commission is not allowed to make a valuation finding, but a party alleges the statutory methodology failed to reach fair market value. Previous cases are either like *Nelson* where there was a clear finding by the Commission<sup>9</sup> or only one side submitted valuation evidence, resulting in no real evidentiary dispute.<sup>10</sup>

This case aligns with the one-sided evidence cases. The Commission was not allowed to make a valuation finding and the only opinions of value provided were from the County and the Division's experts.<sup>11</sup> Had Delta provided an opinion of value

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<sup>8</sup> The Petitioner in *Nelson* also argued the Commission's valuation violated the uniformity clause of the Constitution, but this argument was summarily dismissed because the Court recognized uniformity is not violated if property is assessed at fair market value. *Nelson*, 943 P.2d at 1357. Accordingly, only the Commission's valuation finding was subject to the substantial evidence standard. *Id.*

<sup>9</sup> *Kennecott v. Tax Comm'n*, 858 P.2d 1381, 1385 (Utah 1993) (Commission's finding that Kennecott was valued according to the capitalized net revenue method was subject to substantial evidence review).

<sup>10</sup> *Amax*, 796 P.2d at 1260 (Commission admitted Amax was assessed at 100 percent of fair market value); *Benchmark*, 864 P.2d at 886-87 (Commission conceded discount was not given to individual lot owners); *Rio Algom*, 681 P.2d at 187, 190 (unrebutted evidence showing state-assessed properties were undervalued compared with locally-assessed properties); *Moon Lake Electric Association*, 345 P.2d at 614-15 (Court facially struck down the statute without requiring evidence showing it did not reach fair market value); *Stillman*, 192 P. at 279, 281 (striking down discount statute where there was no dispute the discount was given only to one class of taxpayers).

<sup>11</sup> Although the Division's appraisers were required by the statute to place 100% weighting on the statutory methodology, they still conducted a full appraisal with other value indicators and testified that absent the statute, the Division would have placed weight on its other indicators, primarily the income approach. (R. 8712, pg. 154)

supporting the value arrived at by the Airline Valuation Law, it would have put this Court in an interesting conundrum. The Court would have been stuck with expert evidence of two values with no finding or input from the Commission as to which values, if any, arrived at fair market value. This highlights the danger of removing valuation authority from the Commission as the constitutional assessing body.

Fortunately, that dilemma is not present here because Delta chose not to provide an opinion of value.<sup>12</sup> Accordingly, left only with the County expert's valuation and the Division's corroborating expert testimony on how it would have assessed Delta's property absent the statute, this case does not contain any findings with disputed evidence with which to apply a substantial evidence review. In any case, even if the Court holds the value reached by the Aircraft Valuation Law is subject to a substantial evidence review, the County still meets that burden.<sup>13</sup>

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<sup>12</sup> Delta maintains a valuation was not necessary because Delta agreed with the Division's assessment. (Delta's Br., pg. 42). Delta did attempt to criticize the County expert's valuation, but the fact remains there is no valuation that supports the value reached by the statute. (Jt. Ex. 61, R. 7698, 7736-37).

<sup>13</sup> Delta also alleges the "County failed to carry its burden of marshaling *all* the evidence presented to the Commission . . . ." (Delta Br. pgs. 12, 35). Delta appears to rely on the *Nelson* case, which was decided before this Court's clarification in *State v. Nielson* that marshaling is "a natural extension of an appellant's burden of persuasion" and not as a technical deficiency that merits default. 2014 UT 10, ¶ 41, 326 P.3d 645 (2014). The County has complied with Rule 24(8) of the Utah Rules of Appellate Procedure to support its argument with legal authority and citations to the record and believes it has met its burden of persuasion through its briefing.



**B. The County has Met its Burden to Show the Airline Valuation Law did Not Reach Fair Market Value for Delta's Property.**

Because the valuation evidence is one-sided in this case, the County has met its burden. As discussed above and in the County's brief, every expert who valued Delta's property testified the Airline Valuation Law did not arrive at fair market value for Delta's property. (R. 8712, pgs. 188, 237-38; R. 8713, pgs. 124). There is no expert appraisal evidence that supports that the statutory value reflects fair market value for Delta's property for tax year 2017 while there is significant expert appraisal evidence that it does not. In place of appraisal valuation evidence that supports the statutory value, Delta instead uses legal arguments on the Legislature's authority to mandate methodologies and unsupported criticisms of the expert appraisers who valued Delta's property. Those arguments are briefly addressed.

***1. The 20% Discount as Applied to Delta is Unconstitutional***

In its brief, the County showed there was no market evidence to support the 20% discount and applying it to Delta was both non-uniform and undervalued Delta's property. (County Br., pgs. 36-41). Delta nevertheless argues the 20% fleet adjustment is constitutional because it is not a discount *from* fair market value but is an adjustment *to arrive at* the fair market value of a fleet. (Delta Br. pg. 32). For support, Delta tries to first rely on the APG guide itself, but then ignores that the APG says the 20% discount (the APG term is the wholesale calculation method) should not be used for fleet appraisals but should only be used for 3 or more aircraft being actively sold or as part of a "bulk sale." (Jt. Ex. 27, R. 2932). This idea of giving a discount for a "bulk" sale is

precisely the Delta expert's justification because of the impact on price from multiple items for sale flooding the market simultaneously. (R. 8714, pgs. 238-39). This reasoning was already rejected in *Benchmark*. *Benchmark* 864 P.2d at 888.

Delta argues the 20% adjustment is appropriate because it applies to all airlines, but the relevant universe of similarly situated properties are not just airlines, but all properties that have multiple items of the same type of property that if sold all at once, would require a bulk discount because of the market effect. The evidence was undisputed that no other property receives a discount for having multiple items, including companies that own multiple trucks, the specific example used by Delta's expert for multiple items that should receive a bulk discount. (R. 8714, pg. 239).

Moreover, beyond the rejected bulk discount rationale, Delta did not rebut any of the appraisal experts' testimony that there was no market evidence to support such a discount outside of a hypothetical liquidation sale, which is a different premise of value than a fair market value one. (R. 8712, pgs. 134-135, 240-41; R. 8713, pgs. 125, 148; R. 8714, pgs. 54-56). A Division's expert testified the basis for making the adjustment was because the statute required it and no discount would have been provided absent the statute. (R. 8712, pgs. 134-35, 241). None of Delta's arguments change the expert testimony showing the 20% discount undervalued Delta's property and treated airlines differently than other similarly situated taxpayers.

***2. The County is Not Limited to Using the Airline Valuation Law's Methodologies to Show the Valuation Failed to Reach Fair Market Value.***

One of Delta's primary criticisms against the County expert's valuation is that the expert did not comply with the Airline Valuation Law. (Delta Br., pgs. 36, 41-42). Delta appears to be making the odd argument that only by using the statutorily required methodology can the County show the statutory methodology does not reach fair market value. The whole purpose for the County expert to value Delta's property without the constraints of the statute was to test whether the Airline Valuation Law was arriving at fair market value.

Of course, since Commission rules allow an appraiser to use any appropriate methodology to reach fair market value under a preponderance showing, the County's expert was free to use the statutory methodology if he believed that was the most appropriate methodology to arrive at fair market value. Delta faults him for not performing the statutory methodology calculations, but as the County expert explained, it was unnecessary because the Division had already performed those perfunctory calculations. (R. 8713, pgs. 264-65). Moreover, the County's expert testified he did not rely on the statutory method because that is not the methodology willing buyers and sellers would use in a market exchange for Delta's operating property. (R. 8713, pg. 160). He was free to use that methodology but determined in his expert opinion it was not the methodology that would arrive at fair market value.

***3. The County's Highest and Best Use Determination and Use of a Unitary Methodology is Supported by the Evidence.***

All parties agree that Delta's property must be valued at its highest and best use and that the property to be valued is Delta's tangible operating property operating within Utah. (Delta Br. pgs. 37, 39). Where the parties disagree is what unit of property should be valued. Delta argues the "Legislature identified in the Airline Valuation Law that the unit to be valued under that statute is an airline's aircraft—not the entire airline business."<sup>14</sup> (Delta Br. pg. 45).

Delta incorrectly assumes again that when challenging a statute's constitutionality, the statute must be followed. In determining the appropriate unit to value to test the constitutionality of a statute, it is not the statute that dictates the unit, but the market. The relevant question is at what unit level the property would be sold between a willing buyer and seller and what methodology would be used to value that unit. The experts who valued Delta's property testified the unit level at which a buyer and seller would value Delta's property would be all of its property operating together as a unit. (County Br., pgs. 25-26). And the way the market would value the property operating together is through an income approach. (County Br., pgs. 27-29). This approach captures the synergistic value of the property operating together. (R. 8712, pgs. 127, 221, 263-64; Ex. 56, R. 7479-7480). The statutory methodology does not capture this synergistic value and

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<sup>14</sup> When Delta criticizes valuing the airline business as opposed to its tangible property, Delta's implicit criticism is that intangible property is not taxable. The County is not arguing that intangible property should be taxed and as discussed more below, the County's expert and the Division both ensured their income approaches did not include intangible property.

therefore Delta would not be a willing seller of its property using that methodology. (R. 8712, pgs. 258-59, 282; R. 8714, pgs. 304-05).

Delta fights against using a unitary method by arguing unitary methodologies are not required under Utah law, but this misses the point. (Delta Br., pgs. 38-39). The County is not arguing a unitary method is always required, only that in this case, the evidence shows a unitary methodology was the best way to arrive at fair market value.

Delta also argues against using a unitary methodology<sup>15</sup> by citing tax nexus cases to argue that airlines are different than other state-assessed properties and therefore a unitary methodology should not be used. (Delta Br. pgs. 40, 46). However, the differences between airlines and railroads for purposes of a nexus analysis are not relevant. The relevant factor is whether buyers and sellers of the market would use an income methodology to value the property. In that regard, the airlines are similar to other state-assessed taxpayers in that many of them are income producing properties that would be valued in the market by looking at their income streams. (R. 8712, pgs. 257-58; R. 8713, pgs. 48-49, 69; Jt. Ex. 56, R. 7479-80).

Delta's arguments cannot escape the central fact that for Delta's property for the 2017 tax year, the appraisal experts agreed the highest and best use of Delta's property was a going concern and the best way to value the property for that use was through the

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<sup>15</sup> If Delta is arguing a unitary methodology should never be used to value airlines, it would be ironic since in 2006, it was an airline advocating that an income approach was the appropriate methodology to value airline property. (Jt. Ex. 28, R. 2948). If Delta is arguing the opposite, then only Delta's limited and undeveloped arguments as to why the unitary method should not have been used in this specific case are relevant.

income approach. Whatever the statutory methodology might have merit in other circumstances and other years, it did not arrive at fair market value for Delta's property in 2017, which is all that matters in determining whether the statute was unconstitutionally applied in this case.

***4. Both the County and the Division Removed any Captured Intangible Property from its Income Approach.***

Finally, Delta criticizes using a unitary methodology because it potentially captures intangible property, not taxable under Utah law. (Delta Br. pgs. 43-44). Delta points out the Airline Valuation Law avoids capturing any intangible property by its summation method, but as discussed, it also fails to capture the taxable enhancement value of the property operating together. This Court in *Beaver County v. WilTel* already rejected a similar argument to Delta's 2000 UT 29, 995 P.2d 602 (partially superseded by statute unrelated to its reference here). In *WilTel*, the petitioner argued for a cost approach alone to avoid capturing any intangibles. 2000 UT at ¶¶ 3, 47. The Court rejected that argument because it failed to capture fair market value. *Id.* at ¶ 47.

Instead, the Court upheld the Commission's use of a "yield capitalization approach minus any growth factor," which is the same income approach methodology used in Rule 62 in both the Division and the County experts' income approach for Delta.<sup>16</sup> *Id.* at ¶ 10; Rule 62(5)(b)(i); (Jt. Ex. 56, pg. 31). The *WilTel* Court recognized the importance of adjusting for intangibles, but also capturing the taxable enhanced value of the property

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<sup>16</sup> The Commission weighted a historical cost indicator and the yield capitalization income indicator at 50% each to arrive at fair market value. *WilTel* at 2000 UT at ¶ 10.

operating together. *Id.* at ¶¶ 10, 36, 40. The Court noted none of the parties had offered a workable alternative assessment methodology to what the Commission did. *Id.* at ¶ 47.

As in *WilTel*, both the County and the Division used the yield capitalization approach minus any real growth factor for its income approach, which is designed to avoid capturing significant intangible value. (R. 8713, pg. 275). Here, on top of using the yield capitalization approach, the County's expert removed an additional \$27 billion dollars for intangible property (40% of the income value) while the County's expert removed an additional \$25 billion (also 40% of the income value). (Jt. Ex. 13, R. 2578-79; Jt. Ex. 56, R. 7522-23).

Delta alleges there may have been additional non-booked intangible property that should have been removed. (Delta Br. pg. 44). However, the County's expert testified there was no evidence his income approach captured the value of any non-booked intangible property nor was there any evidence that such intangible property existed. (R. 8713, pgs. 275-277). Moreover, even if there had been such intangible property, the County's expert testified that part of the value for intangibles he removed could have covered those as well. (R. 8713, pgs. 205-207). Arguably, the County and Division excluded too much value for intangible property by removing the \$27 billion and \$25 billion in addition to simply relying on the yield capitalization approach that was sustained by this Court in *WilTel*. 2000 UT at ¶¶ 10, 47.

Of course, Delta was free to have its expert do its own valuation and analyze the appropriate amount of value for intangibles to remove. But like the parties in *WilTel*, Delta chose not to provide an alternative value or method for removing intangibles while

still capturing the enhancement value of the property. Beyond speculative allegations, Delta's expert provided no actual evidence of exactly what non-booked intangible property Delta had that was not removed through the County and Division's income approaches and additional adjustments. The County and Division's approach to removing intangibles was reasonable and indeed beyond what this Court sustained in *WilTel*. It is also consistent with what the Commission has done with other state-assessed property owners. (R. 8712, pgs. 196-98; R. 8713, pgs. 95-98).

### **III. The Airline Valuation Law Violated Article XIII, § 6 of the Utah Constitution.**

As an initial matter, Delta alleges in its Statement of the Issues that the County failed to preserve its challenge to Article XIII, Section 6 of the Utah Constitution, but does not actually argue the preservation issue anywhere in its brief. (Delta Br., pg. 3). Instead, Delta briefs the merits of the issue.

Contrary to Delta's allegation, the County preserved this issue. Preservation requires an issue be presented in such a way the court has an opportunity to rule on it. *Cove at Little Valley Homeowner's Ass'n v. Traverse Ridge Special Serv. Dist.*, 2022 UT 23, ¶ 23, 513 P.3d 658. Below, the County alleged the Airline Valuation Law was unconstitutional in part because it encroached upon the constitutional powers of the Commission. (R. 931). In support of this argument, the County cited *Public Serv. Comm'n* and *Evans & Sutherland Computer Corp. v. Tax Comm'n*, 953 P.2d 435 (Utah 1997), the same two cases it relies on for its argument in this appeal regarding section 6.

The Commission appeared to understand the argument the County was making because its decision summarized the County's constitutional arguments and cited the



same two cases the County relies on for its argument. (R. 1278). Although the County's argument was admittedly not exhaustive, it was sufficiently raised when considered in the context where the Commission acknowledged it had no authority to address any of the County's constitutional arguments against the statute. (R. 1278)

Moreover, even if the Court finds the County did not sufficiently raise the argument, the Court should nevertheless allow it to be raised. The preservation rule is self-imposed by the Court, and it has wide discretion when deciding whether to entertain an issue first raised on appeal. *State v. Houston*, 2015 UT 40, ¶ 19, 353 P.3d 55. This case is similar to *Abco Enterprises v. Tax Comm'n* where the Court excused the preservation requirement because raising the constitutional claims would not have served any useful purpose since the Commission could not address them and nothing could have been done to avoid them. 2009 UT 36, ¶ 12, 211 P.3d 382. Although the constitutional claims in *Abco* were facial claims, the principle still applies here as raising the County's section 6 claim more explicitly would not have changed anything. The Commission made clear it could not address the constitutional claims of the County and there are no other facts needed to adjudicate it. Therefore, applying the preservation rule in this case would serve no judicial purpose. (R. 1278).

Turning to the merits of this claim, Delta defends the statute by arguing it only limits the Commission in how it values aircraft and even then, it allows discretion because other price guides and methods can be used to value the aircraft. This ignores the heart of the County's argument, which is that the statute mandates a summation methodology, which means the Commission has no discretion to choose what

methodology most appropriately values Delta's property. Indeed, Delta criticizes the County's expert for using a unitary methodology on the basis the statute does not allow for that type of methodology. (Delta's Br., pg. 41).

Examining the Commission's role in this case provides further support for how much the statute minimized the Commission's role. At the hearing, the Commission was limited to determining whether the Division had complied with the statute by adding up the price guide values and adding the booked value of the non-mobile assets. The statute allowed no appraiser discretion or findings for the Commission to make beyond whether the APG was an appropriate guidebook to value the aircraft. Delta's expert agreed the highest and best use is a necessary finding for an appraiser to reach fair market value, but the statute allowed no discretion for the Commission to make that critical finding. (R. 8714, pgs. 227-28; R. 1240, 1258). Rather, it was the Legislature who made this critical valuation finding supplanting the Commission as the assessing authority.

Delta distinguishes the *Public Service Commission* case by arguing the issue in that case was conferring the power of assessment on another state agency, not on prescribing valuation methods to the Commission. (Delta Br. pg. 20). However, the heart of the *Public Service Commission* case was about taking valuation authority away from the Commission as the assessing body; to whom that authority was transferred was not the concern. Indeed, the Court directly addressed the Legislature by asking "[m]ay the Legislature itself make the valuation of utilities . . ." and answering that the Commission's valuation authority "cannot be directly exercised by the Legislature . . . ." *Public Service Commission* 79 P.2d at 33, 40. Thus, the Court was equally concerned

about the Legislature making the valuation as it was another agency. The Court’s concern was that “[t]he very heart of assessment is the making of valuations” and removing the Commission’s authority to value property is what drove the result. *Id.* at 38, 40.

In fact, the circumstances in this case are even more problematic because the *Public Service* Court also had concerns regarding whether the Legislature had required a valuation methodology that did not meet the fair market value standard. *Id.* at 33. It is this context where the Court warned the Legislature about establishing dogmatic formulas or methods to value properties. *Id.* at 35. The statute in *Public Service*, however, did not mandate a valuation methodology and therefore did not run afoul of the Court’s concern. *Id.* But it is certainly an issue here where the Airline Valuation Law is nothing if not a dogmatic formula. As Delta acknowledges, the Legislature had to be stringent on the APG methodology because otherwise the Division would avoid using the methodology. (Delta Br. pg. 29). Therefore, the application of the Airline Valuation Law implicates all the primary concerns expressed by this Court in *Public Service*. Accordingly, it should be struck down as infringing on the Commission’s assessment authority, which includes the critical authority to value property.

### **CONCLUSION**

For the above reasons, the County requests the Court to hold the Airline Valuation Law was unconstitutionally applied in valuing Delta’s property and remand the matter back to the Commission with instructions to value Delta’s property without the constraints of the statute.

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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 7,000** 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 April 17, 2023, an electronic copy of the Reply Brief of Appellant in searchable portable document format (pdf):

was filed with the Court by email and served to appellees by e-mail, and the appropriate number of hard copies will be mailed or hand-delivered to 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.

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