

No. 37163-4-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
IDENTITY

GRAYS HARBOR ENERGY, LLC,
Plaintiff/Appellant,

v.

GRAYS HARBOR COUNTY,
Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR THURSTON COUNTY

(The Honorable Richard D. Hicks, Judge)

BRIEF OF RESPONDENT

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I.

RESTATEMENT OF THE CASE

This appeal involves two separate cases which have been consolidated for appeal before this court. One case originated as a property tax valuation appeal before the Grays Harbor County Board of Equalization (“BOE”), which was subsequently appealed to the state Board of Tax Appeals (“BTA”), and later to the Thurston County Superior Court on a petition for judicial review under Chapter 34.05 RCW.¹ The other case is a property tax refund action filed in Thurston County Superior Court pursuant to RCW 84.68.020.² The property at issue in this appeal consists of Grays Harbor Energy’s (“GHE’s”) twenty-two acre facility located at the Satsop Development Park, 401 Keyes Road, Elma, Washington. AR 821; CP06 93. At the time these actions were commenced, GHE’s facility consisted of a partially constructed gas fired combustion turbine electric energy generating facility. AR 821; CP06 94.

¹Grays Harbor Energy LLC v. Grays Harbor County, Thurston County Docket Number 07-2-00883-4. For clarity and uniformity, the County will use the same citation to the Clerk’s Papers employed by GHE in its opening brief. See, Brief of Appellant, Footnotes 1-2, at 1. The Administrative Record (“AR”) created by the parties in the formal proceeding before the BTA is cited where applicable.

²Grays Harbor Energy LLC v. Grays Harbor County, Thurston County Superior Court Docket Number 06-2-00957-3.

GHE's property includes three buildings, two general electric 7241FA combustion turbine generators, one General Electric D-11 steam turbine generator, one 9-cell cooling tower, two heat recovery steam generators (boilers), and related equipment and machinery. Id.

Duke Energy North America, LLC ("Duke") began constructing the Satsop project in 2001. Id. Duke halted construction of the project in September 2002. Id. At the time construction was stopped in September 2002, the Satsop project was estimated to be approximately 56 percent complete. AR 822. Construction on the project ceased in part due to market conditions. AR 821-22; CP06 94.

Duke found itself in the midst of an economic downturn by the end of 2003 in the gas-fired power field. CP06 703. As a result, Duke focused on eliminating poorly performing plant assets and those under construction. AR 1134.

Invenenergy Grays Harbor ("IGH"), executed a purchase and sale agreement ("PSA") on December 27, 2004, with Duke to purchase the member interests in Duke Energy Grays Harbor, LLC ("DEGH"), the owner of the Satsop facility. AR 820; CP06 92. Duke and IGH are unrelated entities. AR 820; CP06 93. The consideration for the sale consisted of an

immediate cash payment of \$21 million at closing, with additional payments to be made in cash upon the occurrence of specified contingent events. AR 415-18; CP06 126-29. The estimated amount that the two gas-fired combustion turbines alone could bring in a negotiated market sale if the project was discontinued was \$21 million. AR 825. In addition to these immediate and future cash payments, IGH assumed certain contract debt obligations. AR 424-25, 469; CP06 135-36, 180.

GHE misstates the purchase price for the Grays Harbor (Satsop) project as amounting to only \$21 million. Brief of Appellant, 19. The record below actually shows that IGH was required to pay \$21 million immediately at closing, with future cash payments required at specified events as consideration for IGH's purchase of the project. AR 415-18; CP06 126-29.³

³These contingent payments include:

1. Within thirty days after commencement of construction by purchaser [GHE], the sum of \$20 million. AR 416.
2. Within thirty days after the commencement of construction by purchaser, the following amounts:
 - a. In the event Purchaser undertakes Commencement of Construction of an electric generating facility at the Power Plant Site that will use two or more gas turbines, an amount equal to 50% of all financial consideration paid by seller [Duke] or its affiliates to Northwest Pipeline Corporation. Id.
 - b. In the event Purchaser undertakes Commencement of Construction of an electric generating facility at the Power Plant Site that will use initially not more than a single gas turbine, and

The true purchase price for this Satsop property includes more than \$42 million in direct cash payments, as well as assumption by the purchaser of a number of material contracts.⁴ Duke's own press release announcing the sale states that "total sales proceeds and tax benefits for this transaction will be approximately \$116 million." AR 1134.

There is substantial evidence in the record below showing that, at the time the December 27, 2004 PSA was executed, IGH specifically intended to resume construction on the Satsop project. In January 2005, IGH (now GHE) Senior Vice President Kevin B. Smith stated that IGH plans to complete the plant and operate it. AR 1135. IGH also applied in January 2005 for a 18-month extension on air quality permits for the project. AR 1136. The intention by IGH at the time it executed the PSA on December 27, 2004 to resume construction, complete the project, and produce electricity is also supported by public statements by Smith that "the new owners . . . want to

amount equal to 30% of all financial consideration paid by seller or its affiliates to Northwest Pipeline Corporation. Id.

3. Four pages of material contracts passed on to purchaser, including no less than 11 purchase orders. Each of these contracts totals more than \$50,000. Actual amounts of these contracts is not reflected in the record below. AR 424, 466-69.

⁴Not long after the PSA was executed by IGH, press reports indicated the total consideration ranged from about \$113-116 million." AR 154, 156, 1135.

finish the plant and start making electricity.”⁵ AR 154. In February 2005, Mr. Smith again stated that GHE’s goal is to restart construction of its Satsop project within six to twelve months. *Id.* IGH/GHE Senior Vice-President Smith continued making public statements confirming IGH’s specific intention to resume construction of the project to completion to produce electricity.⁶

The sale of the Satsop project closed on March 24, 2005. AR 820; CP06 92. Shortly after closing this sale, DEGH changed its name to Grays Harbor Energy, LLC, the appellant here. AR 820; CP06 93 (*see* CP06 206-210 for name-change documents).

The State of Washington Energy Facilities Site Evaluation Council (“EFSEC”) and the Initial Site Restoration Plan (“ISRP”) requires the site to “be restored to its original vacant industrial land status,” in the event that GHE

⁵The December 27, 2004 PSA identifies Mr. Smith as a “person with knowledge” on behalf of the purchaser, IGH. AR 456.

⁶Shortly after IGH executed the PSA with Duke, Smith publicly stated that “the new owners . . . want to finish the plant and start making electricity,” a clear indication IGH indeed planned to restart and complete construction of the project. AR 154. Also, on February 24, 2005, Smith again told *The Daily World*:

The electricity market in the pacific Northwest is really what will drive the completion of construction. **Our goal is to restart construction within 6-12 months**, but that’s predicated on getting the contracts in place to purchase the plant’s output.

Id. [Emphasis added.]

terminates or abandons its present electrical facility. AR 625-44; CP06 335-354. The ISRP itself does not mandate termination of the project by GHE at any point in time. The ISRP makes an assumption, *for project financing purposes only*, that the planned useful life of the Satsop facility is estimated to be approximately 30 years. AR 629; CP06 339. But the ISRP also assumes that, “with proper equipment maintenance, and periodic upgrades, a longer actual project life is anticipated.” *Id.*⁷ The ISRP recognizes that long-term plans for the Satsop property “are to continue to use the property for power plants or other industrial uses.” AR 638; CP06 348. The ISRP allows buildings to remain on the site in the event GHE terminates its project on the property.⁸

Significantly, the ISRP states that “infrastructure, foundations, or buildings that may be usable for future users may remain.” AR 630; CP06

⁷Indeed, IGH granted Duke an exclusive first right to develop any energy generation facilities larger than 50 megawatts anywhere on the Satsop site for a period of 50 years, well past the estimated 30-year estimated project life-span. AR 650; CP06 360.

⁸The ISRP states:

“Demolition or removal of equipment and facilities will occur to the extent necessary to meet environmental, health and safety regulations, to salvage economically recoverable materials or to recycle the site for future use. Infrastructure, foundations, or **buildings that may be usable for future users may remain.**” [Emphasis added.]

AR 630; CP06 102.

340. The ISRP expressly anticipates redevelopment of the site into an alternative industrial use if the project is terminated, with certain components likely left in place, including foundation materials, driveways, parking areas, roadways and utility infrastructure. AR636; CP06 346. The obligation to remove power generating assets and associated materials that are otherwise affixed to land is triggered only in the event the project is permanently terminated and “project components are deemed not usable for future industrial or commercial use . . . ” *Id.*

II.

SUMMARY OF ARGUMENT

The Washington Constitution mandates tax uniformity. Constitution Article 7, Section 1 (Amendment 14). The underlying policy is that property owners should contribute proportionately to the support of government. Tax uniformity is “the highest and most important of all requirements applicable to taxation under our system.” *Savage v. Pierce County*, 68 Wash. 623 625, 123 Pacific 1088 (1912). First, the County contends that, as a matter of law, Chapter 84.12 RCW cannot be applied to GHE’s property in this case. Reading the chapter as a whole, RCW 84.12 only applies to State Department

of Revenue (DOR) centrally-assessed properties and only DOR determines who qualifies for assessment under RCW 84.12.280.

Second, applying RCW 84.12 to GHE's property at issue in this case, violates the uniformity requirement of Article VII, § 1 of the Washington Constitution in two ways. Requiring the County Assessor to apply RCW 84.12 to GHE's property to treat all property other than land and buildings, while excluding fixtures or improvements to land forces the Assessor to assess GHE's real property differently than other real property in Grays Harbor County, eliminating constitutionally-mandated tax uniformity. Requiring the County Assessor to apply RCW 84.12 to GHE's property also creates a second class of real property applicable to power facilities in Grays Harbor County for tax assessment and levy purposes in violation of Washington Constitution Article 7, § 1, which requires all real property to be treated as one class.

III.

ARGUMENT

A. STANDARD OF REVIEW

Both parties agree that the legal question presented in this involves the interpretation and application of RCW 84.12 to GHE's property. This court

reviews *de novo* decisions based on statutory interpretation. Advanced Silicon Materials LLC vs. Grant County, 156 Wn.2d 84, 89, 124 P.3d 294 (2005), citing Department of Ecology vs. Campbell and Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

The standard of review applied by the court in this consolidated appeal is, for the most part, adequately set forth in GHE's opening brief and will not be repeated here except to elaborate or dispute certain points. See Brief of Appellant, 25-27.

The burden of showing the invalidity of the BTA's and superior court's action lies with GHE as the appellant. RCW 34.05.570(1)(a). With respect to the Administrative Appeal and contrary to GHE's urging however, the BTA's decision whether buildings and power generation equipment constitute real or personal property should be given great weight. The court gives "great weight to an agency's interpretation of a regulation within its area of expertise if the interpretation is not in conflict with the regulatory language," but the court is "not bound by an agency's interpretation." Department of Labor and Industries v. Tyson Foods, Inc., 143 Wn. App. 576, 582, 178 P.3d 1070 (2008) (citing Washington Cedar & Supply Co., Inc. v. Department of Labor and

Industries, 137 Wn. App. 592, 598, 154 P.3d 287 (2007). In this case, it is the application of RCW 84.04.090, RCW 84.12 (or not), and RCW 84.41 to GHE's real and personal property that is precisely within the BTA's expertise. Whether property is characterized as realty or personal property is determined by applying statutory definitions found in *these property tax statutes*.

The BTA's determination of whether the buildings, machinery or equipment affixed to buildings or land, and power generation equipment is real or personal property is also a mixed question of law and fact. Western Ag. Land Partners v. Department of Revenue, 43 Wn. App. 167, 169-70, 716 P.2d 310 (1986) (citing Department of Revenue v. Boeing Co., 85 Wn.2d 663, 666-67, 538 P.2d 505 (1975)). The BTA's decision below whether GHE's buildings, machinery or equipment affixed to buildings or land, and power generation equipment are real or personal property is just the type of agency interpretation that should be given great weight by the court. Western Ag. Land Partners, 43 Wn. App. at 171.⁹ The BTA has special expertise in

⁹The Western Ag. Land Partners court recognized that the BTA's decision in this respect is entitled to great weight, but in that case found that its "interpretation . . . has been inconsistent and is not conclusive." 43 Wn. App. at 171.

applying property tax statutes to distinguish real property from personal property, warranting great deference to its characterization determinations.

B. THE BUILDINGS, OTHER EQUIPMENT AND MACHINERY ATTACHED TO BUILDINGS OR LAND AND POWER GENERATION EQUIPMENT ARE PROPERLY CLASSIFIED AS REAL PROPERTY OR FIXTURES TO REALTY.

When courts review an action involving determination of whether an item is personal property or a fixture to realty, a threshold presumption is that when the annexation is made by the owner of the real property, the item annexed is a fixture. Strain v. Green, 25 Wn.2d 692, 700, 172 P.2d 216 (1946); Ballard v. Alaska Theater Co., 93 Wash. 655, 663, 161 P. 478, 481 (1916) (citing several cases). In our case, the buildings, structures and installed machinery and equipment is owned by GHE, which is the fee owner of the land. To the extent they were already installed or affixed to land at the time IGH purchased the facility, their installation was accomplished by Duke, the previous land owner. Hence, the presumption attaches that the items attached by the land owner are fixtures.

Although two determining factors in whether an item is a fixture or improvement to land or personal property is the nature and purpose of the equipment or machinery at issue, these factors must be considered in the context of the purpose of the building containing the equipment, or in which the equipment is installed. In Chase v. Tacoma Box Co., 11 Wash. 377, 383-84, 39 P. 639 (1895), the court recognizes this consideration in quoting from the court's opinion in Cherry v. Arthur, 5 Wash. 787, 788, 32 P. 744 (1893):

“In ascertaining whether . . . a machine does become part of the realty, . . . the rule is that the manner, purpose, and effect of annexation to the freehold must be regarded. **If a building be erected for a definite purpose, or to enhance its value for occupation, whatever is built into it to further those objects becomes a part of it, even though there be no permanent fastening, such as would cause permanent injury if removed.**”

[Emphasis added.]

When buildings are placed on property by the fee owner, whether they may be removed without injury to the land is not a determining factor of whether the building constitutes a fixture. Ballard, 93 Wash. at 665 (quoting Rowland v. Sworts, 17 N.Y. Supp. 399 (1892)).

Applying the Cherry rule above, acknowledged by the Chase court, to GHE's machinery and power generation (and other) equipment installed in the buildings and on its Satsop facility land, the BTA correctly found that this

equipment is characterized as realty. The parties do not dispute that Duke built the three buildings on the Satsop property for the sole purpose of operating a gas-fired electric generating plant. This is a “definite purpose.” See, Cherry, 5 Wash., at 788. The electric generating equipment, as well as related equipment, is “ultimately required to make the plant functional.” Brief of Appellant, 12. In the words of the Cherry court, the electrical generating equipment “is built into it to further those objects,” *i.e.*, generating electrical power. Cherry, 5 Wash., at 788. It is instructional to also note in connection with the present appeals that the Cherry court applied this rule even though there may be “no permanent fastening” of the equipment to the building. Id.

GHE asserts that “large industrial machinery and equipment, like the power generation equipment at issue in this case, has historically been treated as personal property in Washington State under the three-part [Tacoma Box] test” Brief of Appellant, 30. But “large industrial machinery and equipment” have **not** uniformly been treated as personal property where factors supporting characterizing them as fixtures or improvements to realty exist. The determination of whether an improvement is a “fixture” or personal property is a mixed question of fact and law. Allied Stores Corp. v. North

West Bank, 2 Wn. App. 778, 783, 469 P.2d 993 (1970). Although the law to be applied in this instance is the Tacoma Box three-part test, history shows the specific facts in each case ultimately determine the characterization of machinery and equipment when the test is applied.

Keeping in mind the specific facts at issue, cases cited by GHE supporting its argument that machinery and equipment on its property constitute personal property are distinguished by unique facts present in each case. On the other hand, there are several other appellate cases where machinery or equipment has been found to be an improvement to realty or a fixture. See, Parrish v. Southwest Washington Production Credit Assn., 41 Wn.2d 586, 250 P.2d 973 (1952) (watering and sprinkling equipment, including pipe lines, sprinkler heads, pumps, motors, frames, power poles and wiring and transformers, deemed fixtures annexed to realty); Strong v. Sunset Copper Co., 9 Wn.2d 214, 114 P.2d 526 (1941) (equipment bolted to specially prepared concrete foundations are fixtures); Reeder v. Smith, 118 Wash. 505, 203 P. 951 (1922) (mining machinery and equipment are improvements affixed to realty); Western Ag. Land Partners v. Department of Revenue, 43

Wn. App. 167, 716 P.2d 310 (1986) (farm irrigation equipment installed on property deemed a fixture)¹⁰.

The facts presented in Lipsett Steel Products, Inc. v. King County, 67 Wn.2d 650, 409 P.2d 475 (1965), and Department of Revenue v. Boeing Co., 85 Wn.2d 663, 538 P.2d 505 (1975), and others cited by GHE are readily distinguished from the facts in the record below in this case. In Boeing Co., the Court determined that “fixed assembly jigs,” used only in the production of the Boeing 747, were personalty because the permanency of the jigs was totally dependent upon Boeing’s continued use of the building to manufacture the Boeing 747, and the building could be used to manufacture other Boeing products. Boeing Co., 85 Wn.2d at 669-71.

In Boeing, removal of the jigs from the plant building did not prevent Boeing from producing Boeing products other than the 747 aircraft. Boeing Co., 85 Wn.2d at 665. In contrast here, it is clear that GHE cannot produce or transmit electricity at all without the gas turbine generators installed on GHE’s property. Unlike the Boeing Company, manufactures other types of aircraft

¹⁰The fact that Western Ag. Land Partners addressed the imposition of a retail sale tax, rather than a property tax is immaterial since the Court nevertheless discusses and applies Washington common law of fixtures. 43 Wn. App. at 171-74.

without the jigs in question in that case, GHE cannot produce the only product it makes (electricity) unless gas turbine generators and their associated connections, equipment, buildings and improvements are affixed to the property. AR 822-23.¹¹

Lipsett Steel is also distinguished from the facts below in this case. In Lipsett Steel, the Court held that where the lease between Lipsett and Bethlehem Steel Company unequivocally provided that Bethlehem Steel's retention of title and ownership in land did not change title and ownership of a scrap shear and related equipment on land, and made specific provision for acquisition of title to the shear by lessor upon termination of the agreement, the shear was taxable as personalty, not realty, despite its huge size and great difficulty and expense of moving it. Lipsett, 67 Wn.2d at 653. In other words, ownership of the land and ownership of the scrap shear was maintained separately by express written agreement.

¹¹GHE's contention that the machinery must be affixed to the realty to enhance the value of the realty to become a fixture, and not simply to make the machinery usable in the particular manufacturing business is not supported by Boeing Co. See, Brief of Appellant, 31. DOR also contended in Boeing "that only annexations which are appropriated to, integrated with, and of permanent benefit to the land regardless of its future use, i.e., water systems, drainage and sewer systems, heating furnaces . . . , can qualify as fixtures." The Supreme Court recognized that not all jurisdictions adopted this approach, but declined to decide this issue. Boeing, 85 Wn.2d at 668 (Footnote 3). This argument has not been accepted in other cases where machinery and equipment affixed to land has been deemed fixtures even though dedicated to a manufacturing process and not to specifically enhance the realty. See, Strong, Reeder, supra.

This is a substantial factual difference from our case in which GHE owns **both** the land itself and all fixtures and improvements situated on the land, including the gas turbine generators, buildings and other structures it's built there. AR 821, 938. On the other hand, in Lipsett Steel, the fact the landowner (Bethlehem Steel) did not own the scrap shear, which Lipsett Steel owned separately, was determinative. Lipsett, 67 Wn.2d at 652-53. Importantly, the Lipsett majority recognizes that “[t]he parties have explicitly contracted that no change in title or change in the characterization of the property shall take place because of the application of the principles of law generally relating to fixtures and the making of improvements or additions to real estate. Id.

The Supreme Court found Lipsett Steel's express retention of legal title to the scrap shear as the critical objective factor determining the parties' intention, which is the third factor in weighing whether an improvement has become a fixture to land. Id. In the present appeal, it is undisputed by the parties that GHE owns both the land **and** the gas turbine generators, related electrical generation equipment, and built structures on that land. AR 821. This is a significant determinative fact in contrast with the facts in Lipsett

where the parties previously and explicitly agreed in writing to not change characterization of the property and to maintain separate ownership of real and personal property. Lipsett, 67 Wn. 2d at 653. Contrary to the facts presented in Lipsett, there is no such written (or verbal for that matter) agreement in this case to keep ownership of the land and machinery separate, but ownerships of both land and other property installed or affixed to GHE's land remains solely with GHE. The Supreme Court held that separate ownership of land and personal property is the determinative factor in whether the scrap shear was a fixture to the land, not that the scrap shear could have been removed by Lipsett Steel from its location on land owned by Bethlehem Steel Company. Id.

GHE emphasizes Chase v. Tacoma Box Co., 11 Wash. 377, 39 P. 639 (1895) to support its contention that its project equipment and machinery, including two gas turbines, is personal property, rather than improvements to realty or fixtures. Brief of Appellant, 30. While it is true that the Tacoma Box decision first recognized the three-part test to determine whether an item is real property (fixture) or personal property, it does not categorically exclude machinery from ever becoming an improvement to real estate or a fixture.

Again, the operative facts must be kept in mind. For example, the turbines and other equipment attached to or are the component part of “some erection, structure or machine which is attached to the freehold . . .” Tacoma Box, 11 Wash. at 382.

In light of more recent Supreme Court rulings, the continued importance of certain legal conclusions in Tacoma Box may be in doubt. For example, the Tacoma Box opinion states that “the intent that [machinery] should remain for permanent use is unimportant.” Id. But we see that more recent decisions of the court emphasize that the **primary** inquiry is into the intent of the party making the annexation when determining whether an item of property has been annexed to the freehold and is a fixture. Parrish, 41 Wn.2d at 589 (quoting Ballard v. Alaska Theater Co., supra). See also, Western Ag. Land Partners, 43 Wn. App. at 173 (citing Sunset Copper Co., supra, and Liberty Lake Sewer District 1 v. Liberty Lake Utilities Co., 37 Wn. App. 809, 813, 683 P.2d 1117 (1984) (“Intention [to make a permanent accession to the freehold] is the most important of the three factors . . .”)

Addressing the issue of “permanency” and applying the Court’s rationale in Reeder, supra, to a crucial fact below, is that in our case the equipment, gas turbines and other machinery that GHE has attached (bolted

to concrete foundations, for example) to its land render this equipment and machinery “fixed in place and **permanent in the sense that it can remain so attached and fixed until** destroyed by the elements or **worn out by use.**” Reeder, 118 Wash., at 510 [emphasis added]. Consistent with the Reeder holding, the improvements to land here are constructively permanent.

Particularly with respect to the three buildings on GHE’s property, the general rule in Washington is that buildings are presumed to be a permanent improvement to real estate: “Buildings, unless of a very light construction . . . are usually regarded as placed on the land for its permanent improvement, and so to be considered as a part thereof.” Cutler v. Keller, 88 Wash. 334, 337, 153 P. 15 (1915) (citing 1 Tiffany, Modern Law of Real Property, § 234, p. 541.) The burden of proof that buildings are personal property is on the party claiming them to remain personal property. Id.

Applications of the common law fixtures test in other states is illustrative in supporting the County’s position that GHE’s buildings, machinery and power generation equipment are fixtures. In Consolidated Edison Co. of New York, Inc. v. City of New York, 44 N.Y.2d 536, 378 N.E.2d 91 (1978), the New York Court of Appeals held that Consolidated

Edison's four barge-mounted gas turbine power plants were properly classified, for tax purposes, as structures "affixed" to land on which was situated a land-based distribution system to which such facilities were physically connected and integrally related, although the plants were not irremovably attached and separation from shore could be accomplished in a period of eight to 12 hours. Consolidated Edison, 378 N.E. 2d, at 92-93.¹² Auxiliary apparatus and equipment and fuel oil barges used in connection with the power plant were also found to be properly classified as structures affixed to land. Consolidated Edison, 378 N.E. 2d, at 94. Consolidated Edison, as does GHE in this appeal, argues that its four barge-mounted plants are personal property since they are not "irremovably attached" (i.e., "permanently affixed") to the elements of the power system on land, as it would take 8 to 12 hours to disconnect them. Id. The court found that the barges must be applied to the use to which the realty was dedicated and that the plants cannot perform the generation operations for which they were constructed to Con Ed's users unless integrated and physically connected to the land-based units. Id. The

¹²Although the New York court's opinion is partly based on a New York statutory definition of "real property," "property," or "land," the court discusses and applies the common law test for fixtures or improvements to land, which are substantively the same as Washington's. Consolidated Edison, 378 N.E. 2d, at 93-94.

court found that expenditure of \$10 million by Con Ed to modify the existing pier and installing necessary lines, services and circuits to accommodate the barge-mounted plants demonstrated the power company's intention that use of the barge-mounted power plants was of at least semipermanent duration. Id.

In Overhead Electric Co. v. State Bd. of Equalization, 227 Cal.App.3d 1230, 278 Cal.Rptr. 112 (1991), the California Court of Appeals held that generators and uninterruptible power systems purchased by contractor for installation at United States Air Force base were "fixtures" and not "machinery" or "equipment," so that contractor's purchase thereof was not exempt from California sales and use tax. Overhead Electric, 227 Cal.App.3d at 1233.

In Boston Edison Co. v. Board of Assessors of Boston, 402 Mass. 1, 520 N.E.2d 483, 486 (1988), the Massachusetts Supreme Judicial Court held that the tax board properly treated Boston Edison's electrical generating machinery as real property for property tax assessment purposes. The court notes that while it makes sense to treat a utility's property installed on public or other private lands other than its own as personal property, that

characterization is not appropriate where the utility's property is a fixture on its own property. Boston Edison Co., 520 N.E.2d at 488-89.

Both the superior court, and the BTA previously, applied the correct common law test for fixtures or improvements affixed to land with respect to the facts in the record below, and there is substantial evidence in the record supporting this ruling.

C. RCW 84.12 CANNOT APPLY TO THE ASSESSOR'S VALUATION OF GHE'S PROPERTY FOR TAX PURPOSES.

1. RCW 84.12 does not apply to intra-county utilities not assessed by the Department of Revenue.

GHE asserts that the trial court erred in denying its "renewed motion for summary judgment that . . . Chapter 84.12 RCW applies in the valuation of its property. Brief of Appellant, 2. GHE argues that it fits the statutory definition of "electric light and power company" under RCW 84.12.200(4) and therefore its property, except for land and buildings, must be characterized and assessed as personal property under RCW 84.12.280. GHE's argument that all of its property, except for bare land, falls under RCW 84.12 is without merit because this chapter simply does not apply to GHE's *intra-county*

facility.¹³ RCW 84.12 **only** applies to State Department of Revenue (“DOR”) centrally-assessed properties and only DOR determines who qualifies for assessment under RCW 84.12.280. RCW 84.12.220. In order to make its argument, GHE takes the definition of “electric light and power company” in RCW 84.12.200(4) out of context from the intent and application of RCW 84.12 as a whole.

To understand how GHE is disregarding the intent of this chapter in its attempt to fall within its operation, we have to understand what the intent of this chapter is. RCW 84.12 sets out a statutory method DOR (formerly the Tax Commission) must use to of assess inter-county public utilities. Through RCW 84.12, the Legislature delegates to DOR sole jurisdiction to assess *inter-county* utilities. Thus, the chapter applies only to companies **that DOR annually assesses**.¹⁴ RCW 84.12 gives DOR authority to assess "all operating

¹³It should be noted that GHE filed no annual reports with DOR as required by RCW 84.12.230. CP06 737. This would seem to indicate that GHE itself did not consider it to be subject to chapter 84.12 RCW prior to belatedly raising this issue before the BTA.

¹⁴See. e.g., RCW 84.12.220 ("In all matters relating to assessment and taxation the *department of revenue* shall have jurisdiction to determine what is operating property and what is nonoperating property."); RCW 84.12.230 ("Each company doing business in this state shall annually on or before the 15th day of March, make and file with the *department of revenue* an annual report . . . "); RCW 84.12.240 ("The *department of revenue* shall have access to all books, papers, documents, *statements* and accounts on file or of record in any of the departments of the state[.]"); RCW 84.12.250 (The *department of revenue*, in any matter material to the valuation, assessment or taxation of the operating property of any company, may cause the deposition of witnesses . . . "); RCW 84.12.260(1) ("If any company shall fail to materially comply with the provisions of RCW 84.12.230, the

property" of **inter-county** public utility companies. RCW 84.12.220. Property owners qualifying for DOR central-assessment must submit annual reports to DOR by March 15 of the assessment year.¹⁵ RCW 84.12.230. The Washington Supreme Court interprets RCW 84.12 as giving only DOR the power to assess the inter-county operating property of a public utility, with no

department shall add to the value of such company, as a penalty for such failure . . . "); RCW 84.12.270 ("The *department of revenue* shall annually make an assessment of the operating property of all companies[.]"); RCW 84.12.300 ("In determining the value of the operating property within this state of any company, the properties of which lie partly within and partly without this state, the *department of revenue* may, among other things, take into consideration the value of the whole system as a unit . . . "); RCW 84.12.310 ("For the purpose of determining the system value of the operating property of any such company, the *department of revenue* shall deduct from the actual cash value of the total assets of such company . . . "); RCW 84.12.330 (" . . . When the *department of revenue* shall have prepared the assessment roll and entered thereon the actual cash value of the operating property of the company, as herein required, it shall notify the company by mail of the valuation determined by it and entered upon said roll."); RCW 84.12.340 ("Following the making of an assessment, every company may present a motion for a hearing on the assessment with the *department of revenue* within the first ten working days of July."); RCW 84.12.350 ("Upon determination by the *department of revenue* of the true and fair value of the property appearing on such rolls it shall apportion such value to the respective counties entitled thereto . . . "); RCW 84.12.360 ("The true and fair value of the operating property assessed to a company, as fixed and determined by the *department of revenue*, shall be apportioned by the *department of revenue* to the respective counties and to the taxing districts thereof wherein such property is located . . . "); RCW 84.12.370 ("[T]he *department of revenue* shall certify such equalized assessed value to the county assessor of the proper county."); RCW 84.12.390 ("The *department of revenue* shall have the power to make such rules and regulations . . .")(Emphasis added).

¹⁵The County has found nothing in the record below indicating that GHE has ever submitted an annual report to DOR under the authority of or as required by RCW 84.12.230, or that DOR has ever assessed the subject property under the authority of this chapter. If GHE had any real basis to contend RCW 84.12 is applicable, it presumably would have acted on this position much earlier by citing RCW 84.12 in its correspondence remitting property tax payments under protest, in which it detailed its legal basis for protest. However, it did not do so. AR 995-1006.

power to assess strictly intra-county property.¹⁶ Northwestern Improvement Co. v. Henneford, 184 Wash. 502, 512, 51 Wn.2d 1083 (1935).

More recently, the Supreme Court held that "RCW 84.12 . . . impose[s] upon the state, rather than upon the counties, the duty of determining the value of the operating properties of companies covered by [its] provisions and apportioning that value among the counties." Burlington Northern, Inc. v. Johnston, 89 Wn.2d 321, 328, 572 P.2d 1085 (1977).

It is readily apparent from a document submitted by GHE in the BTA proceedings below that RCW 84.12 applies only to DOR assessment of inter-county utility companies. See, "*Assessed Value of Intercounty Utility Companies (Electric Light and Power Companies) Actual and Equalized Property Values for Calendar Year 2005.*" [Emphasis added.]¹⁷ AR 759-61.

GHE's Satsop facility constitutes intra-county property, which is not subject to the provisions of RCW 84.12.280 or RCW 84.12 at all. At all times

¹⁶The applicable statutes before and after codification in RCW 84.12 have not materially changed with respect to the scope of the utilities covered by their provisions. Compare Laws of 1935, ch. 123, § 1 with RCW 84.12.200. A copy of the provisions as they existed in 1935 is at AR 69-84.

¹⁷To accept the position that GHE urges, which is to require the Assessor to apply RCW 84.12 to its property, will also render RCW 84.12 unconstitutional as applied. See Sections III (c) (2) and (3) of this brief. The constitutional dangers discussed below are prohibitive reasons why RCW 84.12 cannot be applied to assessments of GHE's intra-county property by the County Assessor.

pertinent to this appeal, GHE's facility is partially constructed and functionally inoperable. AR 823. GHE's facility has neither past nor present capability to transport electrical power outside Grays Harbor County.¹⁸ *Id.* Therefore, as a matter of law, GHE's Satsop property is necessarily intra-county property not subject to DOR assessment and not subject to application of RCW 84.12.

2. Requiring the Assessor to apply RCW 84.12 to GHE's property will create separate classes of personal property for taxation purposes in violation of Washington Constitution Article VII, § 1.

If we accept GHE's argument that RCW 84.12 applies and GHE fits the definition of "electric light and power company" under RCW 84.12.200(4), the County Assessor must then categorize and assess GHE's real property in a manner different from every other Grays Harbor County taxpayer. But such an assessment and valuation of GHE's real property under RCW 84.12.280 flies in the face of the constitutional requirement that all real property constitutes one class. Washington Const. Art. VII, § 1. As an intra-county utility-electric light and power company subject to valuation and assessment by the County Assessor, GHE's property cannot be treated

¹⁸Indeed, production of electrical power and its transmission beyond Grays Harbor County are threshold conditions before the subject property can even be considered for DOR assessment under RCW 84.12.

differently (as a separate class) from other real property within Grays Harbor County without clearly violating Const. Art. 7, § 1.

GHE's interpretation will result in unconstitutionally creating separate classes of real property within Grays Harbor County. One example of this disparate assessment and valuation of real property occurs where RCW 84.12 is applied to GHE's real property, requiring operating property of all companies thereunder be assessed annually, rather than on the four-year cycle utilized by the County Assessor under authority of RCW 84.41.030. RCW 84.12.270. For electric light and power companies, "operating property" includes real property and personal property. RCW 84.12.200(12). Consequently, if RCW 84.12.270 is applied, GHE's real property must be valued and assessed annually, rather than a four-year cycle under RCW 84.41.041. Article VII, § 1 provides, in relevant part:

All taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax . . .
. The word "property" as used herein shall mean and include everything, whether tangible or intangible, subject to ownership. . All real estate shall constitute one class . . .

The requirement of Const. Art. VII, § 1 is clear that there can only be one class of real property "within the territorial limits of the authority levying the tax."

The constitution does not permit the County Assessor to create one class of public utility real property and one class of all other real property. RCW 84.12.270 and RCW 84.12.280 will be unconstitutional as applied to the County's assessment of GHE's property since the chapter creates a separate class of real estate (a one-year assessment cycle) from real estate owned by non-utility company owners (a four-year assessment cycle), both of which are situated in Grays Harbor County. Const. Art VII, § 1 "bars the creation of different classes of real estate except in the case of mining property and reforestation land." Belas v. Kiga, 135 Wn.2d 913, 921, 959 P.2d 1037 (1998). Const. Art. VII, § 1 **allows no exception** for public utility property.

Chapter 84.12 RCW only makes constitutional sense when properly applied to DOR's central assessment of intra-county public utilities. When properly applied to DOR only, RCW 84.12 recognizes just one class of real property ("electric light and utility") within the territorial limits of the authority levying the tax (DOR statewide).

The second constitutional flaw with GHE's argument that RCW 84.12 applies to its property lies with the requirement in RCW 84.12.280 that only bare land and buildings of electric light and power companies are assessed as real property. Placing this argument against the requirements in Const. Art.

VII, § 1, the result follows that RCW 84.12.280 unconstitutionally classifies utility company real property as bare land separate from its “structures, improvements to land and fixtures,” while all other real property (*not* owned by utility companies) is valued including structures, improvements to land and fixtures, as provided by Washington statutory and common law.¹⁹ Again, this results in an unconstitutional assessment of two classes of real property, rather than the constitutionally-mandated one class of real property.

3. Requiring the Assessor to apply RCW 84.12 to GHE’s property violates the tax uniformity requirement of Washington Constitution Article VII, § 1.

GHE’s argument that RCW 84.12 must be applied to value and assess its Satsop property also ignores the resulting unconstitutional violation of the uniformity requirements under Const. Art. VII, § 1. Accepting GHE’s argument and applying RCW 84.12, we find that GHE’s operating property must be assessed on an annual basis as of January 1. RCW 84.12.270. This section does not distinguish between real and personal property of electric light and power companies, which are both included under the definition

¹⁹The ISRP doesn’t unconditionally require that any building be removed, but expressly anticipates that several project components will be left in place such as foundation materials, driveways, parking areas, roadways and utility infrastructure. AR 636.

umbrella of “operating property.” RCW 84.12.200(12). Therefore, when we apply RCW 84.12 to GHE’s property, the result is a situation where GHE’s real property in Grays Harbor County is assessed annually, while every other parcel of real property situated in Grays Harbor County that is not owned by a public utility company is assessed on a four-year cycle pursuant to RCW 84.41.030. This clearly illustrates the patently unconstitutional result of GHE’s argument in which taxpayers within a class (real estate) would not and could not be uniformly treated as mandated by Const. Art. VII, § 1.

As shown above, Constitution Article VII, § 1 requires uniformity in taxation on the same class of property within the territorial limits of the authority levying taxes.²⁰ Under the facts below, the authority assessing and levying the tax is Grays Harbor County. County assessors are directed to maintain a systematic and continuous 4-year cyclical revaluation program. RCW 84.41.030; Dore v. Kinnear, 79 Wn.2d 755, 758, 489 P.2d 898 (1971). This is the precise point made by the Supreme Court in Inter Island Telephone Co. v. San Juan County, 125 Wn.2d 332, 883 P.2d 1380 (1994), when the

²⁰The “authority levying taxes” with respect to property taxes in Grays Harbor County is the County. GHE fails to provide any explanation how a taxing authority (the County) may characterize and value its real property under RCW 84.12 uniformly with other real property in Grays Harbor County not subject to that chapter. The County contends this cannot constitutionally be accomplished.

Court held that the assessor cannot constitutionally assess some property at 100 percent of value when other property is assessed at 22 percent to 36 percent below value. Inter Island, 125 Wn.2d, at 336-37. Assessing GHE's real property annually under RCW 84.12.270 - .280, while assessing other real property in the county every four years equally clearly violates Const. Art. VII § 1.

On closer examination, Inter Island also fails to support GHE's argument that its Satsop property must be assessed and taxed only as personal property, with the sole exception of bare land and buildings. The County agrees that Const. Art. VII, § 1 prohibits separate classes of personal property for taxation purposes, regardless of whether the County or DOR does the assessment. Inter Island, 125 Wn. 2d at 336. But the same requirement necessarily holds true for real property. A fatal flaw in GHE's claim is that, while RCW 84.12.280 mandates that all DOR centrally-assessed public utility property (except for land and buildings) be assessed as personal property, it can't constitutionally disregard the common law of fixtures as it applies to real property valuation. GHE's attempt to apply RCW 84.12 in this appeal and below must be rejected by this Court since it violates the Const. Art. VII, § 1

mandate that all real estate constitutes one classification and all taxes shall be uniformly assessed and levied.

Significantly, the Inter Island Court notes without deciding, “that the County’s argument that RCW 84.12.350 creates a separate class of property might well render the statute unconstitutional, at least when applied to real property, because under Const. Art VII, § 1, all real property constitutes one class.” *Id.* *But creating a separate class of real property in Grays Harbor County is precisely what GHE seeks to do and would be accomplished by applying RCW 84.12 to its Satsop property.* But unlike the facts present in Inter Island, the facts in this case directly presents the issue of whether RCW 84.12.280 (and all of RCW 84.12, for that matter) unconstitutionally creates a separate classification of real property for public utilities when applied to GHE’s intra-county property. The BTA found, as it should, that machinery and equipment installed in or on GHE’s land and buildings are improvements to real property valued with the land. AR 48, 52. While the BTA did not directly address RCW 84.12, any application of that chapter to the County Assessor’s valuation to find that GHE’s equipment and machinery must be personal property, regardless of whether they have become fixtures or improvements to real property, as long-established in Washington for non-

utility properties, will create two classifications of real property in violation of Const. Art. VII, § 1: one class of real property whose assessed value *includes* fixtures and improvements, and a second class of real property consisting of public utility property whose assessed value *excludes* fixtures and improvements.

Where possible, statutes should be construed so as to avoid unconstitutionality. Duskin v. Carlson, 136 Wash.2d 550, 557, 965 P.2d 611 (1998); City of Seattle v. Montana, 129 Wash.2d 583, 590, 919 P.2d 1218 (1996). If despite repeated and consistent references throughout RCW 84.12 referring only to DOR and not a county assessor, RCW 84.12.280 is applied to the County Assessor's valuation and assessment of GHE's "operating property," the statute cannot constitutionally be read to *exclude* inclusion of fixtures and improvements in the Assessor's valuation of real property (including buildings).²¹ Notably, the *only* provision in this chapter directing the assessor to assess property is directed to nonoperating property only and

²¹It must be kept in mind also that "operating property" as used in the statute does not include solely personal property, but "includes all property, real and personal" owned and used by a company in the conduct of its operations. RCW 84.12.200(12). RCW 84.12.280 does not change any definition of real property. The inclusion of specific examples of property in RCW 84.12.200(12) refer to examples of *operating property* and does not purport to classify any particular type of property listed as either personal or real property. Use of the terms "land and buildings" in RCW 84.12.280 cannot reasonably be viewed (and lacks any legal authority) to repeal statutory and common law definitions of real property, which includes buildings, structures, improvements to land and fixtures.

requires the assessor to assess the property “the same as the general property of the county.” RCW 84.12.380. With this section the Legislature recognized the limitations of Const. Art. VII, § 1. But accepting GHE’s argument and applying RCW 84.12 to GHE’s real property in Grays Harbor County clearly forces the County Assessor to value and assess GHE’s property differently from other real property in Grays Harbor County, in violation of Const. Art. VII, § 1.

D. THE SALE FROM DUKE TO IGH WAS NOT “ARM’S LENGTH” BECAUSE DUKE WAS UNDER ECONOMIC DISTRESS TO COMPLETE THE SALE.

GHE next contends that the “BTA erroneously concluded that the ‘sale is not an arm’s length transaction (sale) under RCW 84.40.030.’” Brief of Appellant, 54. The County agrees that Duke and IGH are not related parties. AR 820; CP06 93. Nevertheless, a sale cannot be deemed “arm’s length” where one of the parties to that sale is under either economic duress or motivated by some “special purpose” in conducting the transaction. WAC 458-14-005(2). We start with the applicable regulatory definition of an arm’s length transaction: “Arm's length transaction” means a transaction between parties under no duress, not motivated by special purposes, and unaffected by

personal or economic relationships between themselves, both seeking to maximize their positions from the transaction. Id.²²

There is evidence in the record below establishing that a primary reason Duke stopped construction of the Satsop project in September 2002 was due to market conditions, including “overbuilding in the power industry, both nationally and regionally.” See, Brief of Appellant, 18-19; AR 821-22; CP06 94. This fact alone is strongly indicative of economic duress that any company logically would suffer when faced with substantial carrying costs for unfinished facilities producing no income in a surplus-supply market. In this economic situation, it is to be expected that Duke would pursue a path of eliminating assets of poorly performing plants and those under construction. The BTA’s finding that this transaction was not an arm’s length one is based on evidence of these adverse market conditions compelling Duke to sell its Satsop property and is substantially supported in the record. A finding of

²²GHE cites the Ohio Supreme Court opinion in Shiloh Automotive, Inc. v. Levin, 117 Ohio St.3d 4, 8, 881 N.E. 2d 224 (2008), identifying three “primary characteristics” for an arm’s length transaction. Brief of Appellant, Footnote 38, at 55. To the extent the Ohio court’s “primary characteristics do not clearly fit, the more specific requirements of WAC 458-14-005(2) must apply. Even still, the Ohio Supreme Court agrees that “the absence of even a single one of these factors is sufficient to demonstrate that a transaction was not conducted at arm’s length.” Strongsville Board of Education v. Cuyahoga County Board of Revision, 112 Ohio St.3d 309, 859 N.E. 2d 540, 542-43 (2007).

duress “is analogous to a determination that a sale was not an arm's length transaction.” Strongsville Board of Education, 859 N.E. 2d, at 544.

The BTA’s finding below that Duke made the transaction under economic duress is implicit in its finding that the transaction in this case was not at arm’s length and should be affirmed in light of the analysis in the recent ruling by Division Three of the Court of Appeals in Washington Beef, Inc. v. County of Yakima, 143 Wn. App. 165, 177 P.3d 162 (2008). This opinion is helpful in determining whether economic duress in this case precludes a finding that Duke’s sale of the Satsop property to IGH was an arm’s length transaction.

In Washington Beef, the taxpayer corporation brought three actions against Yakima County, seeking refund of property taxes paid under protest. The cases were consolidated for trial and, following a bench trial, the trial court entered a judgment setting value of the property. Washington Beef, 143 Wn. App., at 170-71. The trial court found that the 2003 sale of the facility to AgriBeef, Inc., did not represent fair market value for 2003 since it was not an arm’s length transaction, in part “because of the distress situation in which the sale occurred.” Washington Beef, 143 Wn. App., at 175. The court of appeals affirmed the trial court in view of the evidence at trial showing that

Washington Beef was in distress at the time of the sale due to “declining sales in Japan, reduced capital from its Japanese owners, a tightening of the market for slaughter-ready cattle due to new Canadian processing plants, and a labor strike.” Washington Beef, 143 Wn. App., at 175-76.

There is similar evidence in the record below that Duke was in some economic distress leading up to and during the sale of the Satsop facility to IGH. As conceded by GHE, “the cessation of construction was due primarily to overbuilding in the power industry, both nationally and regionally.” Brief of Appellant, 18-19.²³ GHE Project Director Thomas F. Donovan’s declaration testimony in the BTA proceeding below implicitly recognizes the economic duress experienced by Duke at the time of the sale in his description of the curtailed or cancelled non-economic gas-fired combustion turbine generation projects. AR 822. GHE’s expert, Kent L. Osbourne, discusses the impact of significant adverse economic conditions on both buyers and sellers of power plants in his declaration concerning use of the cost approach in measuring value of such facilities. AR 833-34. GHE’s own appraiser, Stephen H. Olson, also admits “it is factually correct . . . that the power

²³GHE aptly points out in its brief the nature of the economic distress experienced by Duke, leading it to stop construction at Satsop and divest itself of the project. Brief of Appellant, Footnotes 15-16, at 19.

generating industry is struggling with fundamental and significant business challenges, which negatively impact the industry and the financial health of the various players in the market.” AR 843.

With respect to the BTA decision below, the court applies a substantial evidence test to the BTA finding that the sale of the subject property was not an arm’s length transaction. Premera v. Kreidler, 133 Wn. App. 23, 31, 131 P.3d 930 (2006) (citing Heidgerken v. Dep’t of Natural Resources, 99 Wn. App. 380, 384, 993 P.2d 934 (2000)). “The evidence must be of a sufficient quantum to persuade a fair-minded person of the truth of a declared premise.” Premera, 133 Wn. App., at 32 (citing In re Electric Lightwave, Inc., 123 Wn.2d 530, 542-43, 869 P.2d 1045 (1994)). The evidence in the BTA record below provides sufficient evidence to persuade a fair-minded person that Duke was experiencing economic duress from September 2002, when it ceased construction at the Satsop facility, to 2004-2005 when it divested itself of the nonfunctional (and non-economic) project due to detrimental financial pressures.

Just as the Washington Beef court found that declining sales and new Canadian processing plants contributed to economic distress, so too does the economic distress caused by overbuilding in the power industry and the

attendant lay-up mode preservation costs sustained by Duke without a completed electricity-producing plant make the transaction in this case not an arm's length one, and supports the BTA's finding below that it was not.

GHE's only apparent argument as to economic distress is to state that "Duke was a highly diversified, multi-billion dollar company" . . . and "is still in business . . ." Brief of Appellant, 57. The County finds no authority supporting a rule that mere survival of a company after completing a sale under economic duress converts the transaction into an arm's length one. Financial survival of a party operating under economic duress simply means they took corrective measures or otherwise withstood the duress. Whether Duke remains in business today is immaterial to whether the transaction with IGH took place in the context of economic duress experienced by Duke. The record below contains substantial evidence that Duke was in economic distress, rendering the transaction not a market transaction.

IV.

CONCLUSION

Washington common law does not unconditionally require GHE's buildings and power generation equipment, or other fixtures and

improvements to its Satsop property to be characterized and assessed as personal property by the County Assessor. Applying the common law test for fixtures and improvements to realty as discussed above in light of the facts established in the record below, substantially supports the BTA's conclusion that the County Assessor correctly characterized GHE's project property including land, buildings and fixtures as real property, not personal property. The decision of the trial court below should be affirmed, remanding the Administrative Appeal to the BTA for hearing to "fully develop" the facts establishing the correct valuation of GHE's property.

While it is unfortunate that the BTA failed to elaborate on its reasoning in not applying Chapter 84.12 RCW to GHE's property in this appeal, the County clearly shows above that this statute does not apply to the County Assessor's valuation of strictly intra-county property of an electric company, GHE. Second, the County has shown that any application of RCW 84.12 to require the County Assessor to treat GHE's property as personal property, which is in a manner completely at odds with the way the Assessor must characterize all other real property in Grays Harbor County applying other statutory and common law tests, will violate Constitution Article VII, § 1. Application of RCW 84.12 to GHE's property will both violate the uniformity

requirement of the constitution, as well as unconstitutionally create a separate class of real property. For this reason, RCW 84.12 is unconstitutional as applied to GHE's property and cannot be applied by the Assessor consistent with Constitution Article VII, § 1. The BTA and the trial court should be affirmed in this regard.

Finally, the facts below in the record support the conclusion of law by the BTA that the sale of the member interests in IGH, renamed GHE, from Duke to IGH, was not arm's length. The BTA's decision is supported by regulation and the analysis of the cited authorities above and should also be affirmed.

Respectfully Submitted,

H. STEWARD MENEFEE
Prosecuting Attorney
For Grays Harbor County

By: 

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Grays Harbor County

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY CM
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

GRAYS HARBOR ENERGY, LLC,
Appellant,

v.

GRAYS HARBOR COUNTY,
Respondent.

No.: 37163-4-II

DECLARATION OF MAILING

DECLARATION

I, Laura Harwick, hereby declare as follows:

On the 18th day of July, 2008, I mailed a copy of the **BRIEF OF RESPONDENT** to GEORGE C. MASTRODONATO, DORSEY & WHITNEY LLP, 1420 5TH AVENUE, SUITE 3400, SEATTLE, WA 98101-4010, and to MICHAEL B. KING, TALMADGE LAW GROUP PLLC, 18010 SOUTHCENTER PARKWAY, TUKWILA, WA 98188-4630, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18th day of July, 2008, in Montesano, Washington.

Laura A Harwick

DECLARATION OF MAILING

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