

No. 37163-4-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION II
08 JUN 18 PM 1:32
STATE OF WASHINGTON
DEPUTY

GRAYS HARBOR ENERGY LLC,

Plaintiff/Appellant

v.

GRAYS HARBOR COUNTY,

Defendant/Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Richard D. Hicks)

BRIEF OF APPELLANT

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NATURE OF THE CASE

Two cases have been consolidated on appeal before this Court. One case, the “Administrative Appeal,” is a property tax valuation matter. This appeal began before the county Board of Equalization (“BOE”), was appealed to the state Board of Tax Appeals (“BTA”), and then to the Thurston County Superior Court pursuant to a petition for judicial review under the Washington Administrative Procedures Act, RCW Chapter 34.05 (“APA”).¹ The other appeal, the “Refund Case,” was a property tax refund petition filed under the original jurisdiction of the trial court pursuant to RCW 84.68.020.² Following a combined hearing, the trial court issued a memorandum opinion and orders in both appeals. These rulings were appealed to this Court, where the resulting reviews have been consolidated.

ASSIGNMENTS OF ERROR

In the Refund Case:

1. The trial court erred in temporarily staying the Refund Case until the companion Administrative Appeal case is completed by the BTA. CP06 1192-93.

¹ This case was known below as Grays Harbor Energy LLC v. Grays Harbor County, Thurston County Docket No. 07-2-00883-4. The superior court record in this case will be referred to as Clerk’s Papers (“CP07”) followed by the page number(s).

² This case was known below as Grays Harbor Energy LLC v. Grays Harbor County, Thurston County Docket No. 06-2-00957-3. The record in this case will be referred to as Clerk’s Papers (“CP06”) followed by the page number(s).

2. The trial court erred in finding (#1) that because there were only “limited facts in the record” it was unknown whether there was “any lack of uniformity between the valuation of [appellant’s] real property and . . . other real property” in Gray Harbor County. CP06 1219.

3. The trial court erred in finding (#1) that since the assessment or valuation “technique being used by the county assessor is the same for all real property in the county (other than utility property), it is presumed to be correct.” CP06 1219.

4. The trial court erred in granting (#2) the “county’s motion for partial summary judgment” on the basis that “the county assessor, and not the Department of Revenue (“DOR”), is responsible to value [appellant’s] property, both real and personal, that is located solely in Grays Harbor County, and that the DOR is only involved in using Chapter 84.12 RCW if [appellant] becomes an inter-county utility.” CP06 1219.

5. The trial court erred in finding (#3) that there was “not sufficient factual evidence to reach the question whether [the] result violates the uniformity principle of the State Constitution.” CP06 1219

6. The trial court erred in denying appellant’s “renewed motion for summary judgment that . . . Chapter 84.12 RCW applies in the valuation of its property.” CP06 1219.

In the Administrative Appeal:

7. The trial court erred in remanding the Administrative Appeal back to the BTA. CP07 224.

8. The trial court erred in Conclusion of Law (“CL”) 3, that “[t]he case *sub judice* does not have a factual record that allows the question of Chapter 8[4].12 RCW’s applicability to be reached, because the Assessor [classified] all the property . . . under construction as real property, and none that is at issue as personal property.” CP07 252. The court also erred in concluding that “a more complete record would not reach the issue of lack of uniformity in real property valuation as required in the State Constitution.” *Id.* The court further erred in concluding that the “argument is not being advanced, nor do the facts show, that the County is taxing real property differently among different county real property owners.” *Id.*

9. The trial court erred in CL 4, where it held that “[c]onsistent with the Court’s decision in the [Refund] Case, Chapter 84.12 RCW is not to be applied here, not on the basis that Chapter 84.12 RCW is completely inapplicable, but that the county assessor, and not the DOR, is responsible to value [appellant’s] property, both real and personal, that is located solely in Grays Harbor County, that the DOR is only involved using Chapter 84.12 RCW if [appellant] becomes an inter-county utility, and that there is not sufficient factual evidence in this case

to reach the question whether this result in any way violates the uniformity principle of the State Constitution.” CP07 252-53.

10. The trial court erred in CL 5, “that the first BTA ruling -- that the property was properly classified and assessed as real property -- is attacked in a second line of argument by GHE,” that being “that industrial equipment, such as the large generators at issue, are personal property under the Washington law on fixtures.” CP07 253.

11. The trial court erred in CL 6 that, the “ruling from the BTA does not answer any of the following questions: a. First, has there been actual annexation to the property? b. Second, is some, or all, of this personal property being applied to the use or purpose of the realty to which it is connected? c. Third, and what is said to be the most important, though all three prongs are required, was it the intention of the party who annexed the personal property, to the real property, to make it a relatively permanent accession to the freehold (in the same sense as is a building) -- and this prong is an objective, not a subjective, test.” CP07 253.

12. The trial court erred in CL 9, that “[l]ooking *de novo* at [the] incomplete [BTA] record the Court is unable to say, as a matter of law, that more likely than not these items of personal property meet the test so that they should be treated as fixtures or improvements and taxed as real property,” and that “[i]t may be so, or not so, upon further development of the record.” CP07 254.

13. The trial court erred in CL 10, which remanded the Administrative Appeal “back to the BTA to complete the hearing, and upon its completion to make findings of fact from the factual elements in the record, and conclusions of law through applying the appropriate legal principles to those facts, which then will be subject to further review.” CP07 254.

14. The trial court erred in CL 11, in which it held that the “BTA’s second ruling regarding mid-cycle revaluations and the RCW 84.41.030 cycle is correct, as recently held in the 5-4 decision of Advanced Silicon Materials LLC v. Grant County, 156 Wn.2d 84, 95 (2005), but only if everything is real property that cannot be determined until the full hearing at the BTA, including the issue [#1] remanded above, is determined;” so, “[t]his issue necessarily must be remanded, not because it is wrong, but because it cannot yet be finally determined.” CP07 254.

15. The trial court erred in CL 12, in which it held that the “BTA’s third ruling . . . that GHE has standing to raise all these issues because they have been the continuous owner during all the applicable tax periods,” but because “[n]either party challenges this ruling . . . however, the parties have not briefed how this might relate to the fourth ruling, *infra*.” CP07 254.

16. The trial court erred in CL 13, regarding the BTA's fourth ruling, "that the March 24, 2005, transfer from Duke to Invenergy of the . . . project was not an arms-length transaction, nor, was the cash involved the total consideration for any transfer," and the "Assessor argued that the Duke/Invenergy Purchase and Sale Agreement (BTA Exhibit #15) did not transfer legal title." CP07 254-55.

17. The trial court erred in CL 14, that an "earnest-money agreement and a purchase and sale agreement are two different instruments"; that no "case or authority is cited that a purchase and sale agreement can never transfer ownership and the obligation to pay the property taxes on the property"; that the "Purchase and Sale Agreement, BTA Exhibit #15, pp 403-484 certainly raises a factual issue as to whether this was an arms-length transaction or not"; and that the "record does not support a conclusion that as a matter of law, reasonable minds could not differ, that it was not an arms-length transaction, especially taking all facts and reasonable inferences therefrom in the light most favorable to the non-moving party". CP07 255.

18. The trial court erred in CL 15, that "[r]uling four of the BTA must be reserved as premature, and made without an adequate factual basis, or, on a factual basis that is contested and must be resolved." CP07 255.

19. The trial court erred in CL 16 in which the “BTA’s partial summary judgment [was] reversed on rulings one, two, and four, and the case remanded to the BTA to complete its hearing, and make a final ruling on all points that are properly presented to it for determination.” CP07 255.

STATEMENT OF ISSUES

The following issues pertain to the assignments of error:

1. Did the trial court err in staying the Refund Case and remanding the Administrative Appeal to the BTA? (Assignments of Error 1, 7, 10, 11, 12, 13, 14, 17, 18, 19.)

2. Did the BTA err in holding that all of appellant’s property, including buildings and power generation equipment, was real property? (Assignments of Error 11, 12, 14.)

3. Did the trial court err in failing to apply Chapter 84.12 RCW to the assessment and taxation of appellant’s property? (Assignments of Error 2, 3, 4, 5, 6, 8, 9.)

4. Did the BTA err in ignoring Chapter 84.12 RCW’s application to the assessment and taxation of appellant’s property? (Assignments of Error 8, 9.)

5. Was the sale from Duke to Invenergy conducted at arm’s length? (Assignments of Error 15, 16, 17, 18.)

I.

INTRODUCTION

The fundamental issue to be decided in this case is whether certain property of the appellant, Grays Harbor Energy LLC (“GHE”), is properly characterized as real or personal. The property in question during all relevant times was a partially constructed, functionally inoperable, gas-fired electric generating plant. The plant consisted of three broad categories of property: (1) land, (2) buildings, and (3) power generation equipment. GHE and the respondent, Grays Harbor County (the “County”), agree that the land is real property. The parties disagree as to the characterization of the remaining property, i.e., the buildings and power generation equipment.

The County contends that all property, including the buildings and power generation equipment, is real; GHE disagrees.

First, under the common law of Washington, neither the buildings nor power generation equipment are real property; instead, under the undisputed facts of this case, they are properly classified as personal property as a matter of law. Moreover, that characterization is controlling on the County, under the authority granted to the County by the Legislature to levy a property tax.

Second, RCW Chapter 84.12 (hereinafter “RCW 84.12”) addresses, for property tax purposes, the assessment and taxation of

certain public utilities. RCW 84.12.200(4) defines an “electric light and power company” as a public utility, and GHE falls squarely under this definition. RCW 84.12.280 goes on to classify all property of an “electric light and power company” as personal, except land and buildings.

Why is it so important that the Court determine the classification of GHE’s property as real or personal? Because, once the proper characterization of the property is made, it resolves a number of follow-on issues, the most important of which is what of GHE’s property may be allowed to be taxed during the taxing periods at issue. Perhaps of greatest importance in this regard is the fact that GHE’s power plant was only partially constructed during all relevant time periods, and Department of Revenue (“DOR”) regulation WAC section 458-12-342(1) (“Rule 342”) establishes that during a “construction in process” (or “CIP”) only real property is subject to property tax.

Thus, the dispute between the parties boils down to whether: (1) the land, the buildings, and the power generation equipment may be assessed and taxed as real property, as the County contends; or (2) as GHE contends: (a) the land and buildings can be assessed and taxed as real property, but not the power generation equipment, under RCW 84.12; or (b) just the land can be assessed and taxed as real property, but not the buildings and power generation equipment, under the common law characterization rules. This Court’s decision on the characterization of the

buildings and power generation equipment as real property or personal property will ultimately resolve the dispute over what is allowed to be assessed and taxed.

Neither the BTA nor the trial court came to effective grips with the characterization of the property under either the common law or RCW 84.12. The BTA ignored RCW 84.12 altogether and, without any analysis or discussion, ruled that all of GHE's property was real property. The trial court reversed and remanded the matter back to the BTA on the basis that there were not enough facts in the record to make a decision. Yet the material facts regarding GHE's property were fully developed and not in dispute, and the common law in this state on real versus personal property is equally well-developed. There is nothing further to explore on remand that would shed light on whether GHE's buildings or power generation equipment are properly classified as real or personal property under the common law.

The application of the common law, as well as the applicability of RCW Chapter 84.12, to the undisputed facts, are questions of law that should have been decided by the trial court as a matter of law, and without further proceedings either before the BTA or before the court itself. Accordingly, GHE respectfully requests that this Court now decide these issues as a matter of law. GHE's buildings and power generation equipment are personal property under the common law in Washington --

principles that have been developed by more than a century of decisions. Whether GHE is an “electric light and power company” under RCW 84.12.200(4), whose property therefore must be classified under RCW 84.12.280, may be an issue of first impression in this state, but the application of RCW 84.12 to the undisputed facts is a question of law which this Court can decide on the present record. And following these decisions, the Court will then be able to apply Rule 342, to determine what of the property may be subjected to property tax by the County during the years in question.

II.

STATEMENT OF THE CASE

A. The Undisputed Facts About The Property.

The property at issue³ is a partially constructed, functionally inoperable, gas-fired combustion turbine electric energy generating facility. AR at 821; CP06 94.⁴ The plant is on a 22-acre parcel of land

³ The same underlying facts and evidence were present in both the Administrative Appeal and the Refund Case and the records in both cases before the trial court in the combined hearing were, for all practicable purposes, identical. The evidence in the Administrative Appeal is found in the Administrative Record (“AR”), which was the record created by the parties in the formal APA proceeding before the BTA. The evidence in the Refund Case is found in the Clerk’s Papers under Thurston County No. 06-2-00957-3 (“CP06”). The Clerk’s Papers in Thurston County No. 07-2-00883-4 (“CP07”) are primarily the parties’ briefs in the Administrative Appeal.

⁴ The plant was functionally inoperable because it was not complete, not because it was abandoned. At the time of the assessments in question (January 1, 2004 and 2005) the market conditions precluded a decision to complete or finish constructing the plant and placing the equipment into operation. AR 821-25; CP06 95-98.

located at the Satsop Development Park, in Satsop, Grays Harbor County, Washington. AR 821; CP06 93.⁵

In addition to the land, GHE's property includes three metal buildings plus energy generation equipment. See AR 519; CP06 264 (photos of warehouse building); AR 566; CP06 270 (photo of administration and water treatment buildings) (also showing some of the equipment).⁶ The electric generating equipment included two General Electric 7241FA combustion turbine generators, one General Electric D-11 steam turbine generator, one nine-cell cooling tower, two heat recovery steam generators (boilers), and related equipment ultimately required to make the plant functional. AR 821; CP06 94.

⁵ This site is within the property originally developed for the construction of the defunct nuclear power plants by the former Washington Public Power Supply System ("WPPSS" now known as Energy Northwest). AR 821; CP06 93. The 22-acre site now owned by GHE was previously used as an equipment laydown area and for contractors' field offices when the nuclear plants were under construction. *Id.* There is no connection between GHE and WPPSS or Energy Northwest, nor between GHE's power plant and the former nuclear plants.

⁶ AR 505-584 and CP06 242-294 are a series of photographs depicting the project site at the time this dispute originated. These photos contain a complete "picture" of the property, i.e., a photomontage of the incomplete power plant and the power generation equipment, both installed and uninstalled. The Court is particularly directed to AR 505-584, which are color photographs of the project and project site.

On the two tax assessment dates (January 1, 2004 and 2005) and tax years (2005 and 2006) in question,⁷ the plant was 56 percent complete. AR 822; CP06 95.⁸ On any of these dates or years, the plant could not generate electricity without completing installation and assembly of all required mechanical and electrical equipment, including the equipment that was to be connected to, or otherwise installed by, the Bonneville Power Administration (“BPA”). AR 822-23; CP06 95-96. In fact, a substantial portion of the plant’s parts and equipment was still crated and not attached to anything; the equipment was instead located either in one of two storage warehouses near the project site, or was otherwise set out in approximately 10 acres of “laydown” area at the site. AR 823; CP06 96.

The two General Electric 7241FA combustion turbine generators are the primary power-generating engines of the plant. AR 824; CP06 98.⁹ These turbines have a useful life of 200,000 operating hours (about 25 years). *Id.* A review of the project photos reveals that the power

⁷ See Transamerica Title Insurance Company v. Hoppe, 26 Wn. App. 149, 153, 611 P.2d 1361 (1980) (“Under the Washington taxing system, taxes are levied . . . after values have been assessed. . . . Tax bills are [sent out] in February of the year following the assessment year. Taxes on the property assessed are payable by April 30 [and October 31] of the year following the assessment year. RCW 84.56.020”). Thus, GHE’s property was assessed on January 1, 2004, and the taxes based on this assessment were paid in 2005. Similarly, the January 1, 2005 assessment was for taxes that GHE paid in the following year, 2006.

⁸ This completion level was estimated by determining direct construction and procurement progress and factoring indirect activities such as project management, engineering, commissioning and startup. AR 822; CP06 95.

⁹ The turbines are essentially giant jet engines similar to what one sees on a commercial airliner, only much larger and more robust for power generation application.

generation equipment is large and generally not enclosed in any building or structure; instead, the equipment is out in the open air on a flat, bare parcel of land. AR 505-584; CP06 242-294. All of the power generation equipment, including the turbines, are modular in form for ease of takedown, removal and transportation. AR 827; CP06 107. Accordingly, the equipment can, with relative ease, be disconnected, disassembled and moved. The photos show that, for the most part, the power generation equipment is merely bolted to concrete pads on the surface of the ground. AR 521, 525, 528-29, 531, 537-540; CP06 246, 251, 253-54, 258, 260-62, 265-68, 276. The plant was designed so that the equipment is not permanently built into, and to facilitate its eventual removal from, the land.¹⁰

¹⁰ It is not unusual for power generation equipment to be disconnected and transported even after an installation. The “Invenergy” group of companies, of which GHE is a part, has moved similar equipment from site to site. AR 822; CP06 95. At the time of acquiring this project, Invenergy had six (6) gas-fired combustion turbines similar to those at Satsop in storage. *Id.* This equipment could be sold, and moved or deployed virtually anywhere in North America, Central America and elsewhere in the world that utilizes 60Hz (cycles per second), as was the case with the GHE equipment. *Id.* At the time this dispute began, Invenergy was moving an entire power plant acquired in Nelson, Illinois, and redeploying it to a location near Sarnia, Ontario, Canada. *Id.*

B. The Undisputed Facts About The Land And Permit For The Project.

GHE is owned by Invenenergy Grays Harbor LLC (“IGH”). AR 821; CP06 92.¹¹ IGH is, in turn, owned by Invenenergy Development Company LLC, and one of its owners, Stark Event Trading Ltd. (“Stark”), provided the Washington State Energy Facility Site Evaluation Council (“EFSEC”), the primary state permitting authority, with a Letter of Credit (“LOC”) pursuant to an EFSEC Order On Financial Assurances For Site Restoration (AR 601-04; CP06 311-14). AR 588-592, 825; CP06 99, 298-302. This LOC (in the amount of \$5,519,064) was for site restoration, as the permit for this project issued by the EFSEC requires that the land be restored to its original condition when power generation activities are concluded. *Id.*¹²

Under state law, the original certificate holder of the permit to build and operate this power plant provided the EFSEC with information on plans for site restoration in the event of cessation of project activity at any time: during construction, at the completion of construction, during

¹¹ IGH is likewise part of the “Invenenergy” group of companies, which are privately held and invested in energy generation property, plant and equipment. AR 820; CP06 92. Formed in 2001, Invenenergy is a developer, owner and operator of natural gas fueled power generation and energy delivery assets. AR 820; CP06 93. Invenenergy is also developing and building, and owns and operates, wind energy facilities in the Pacific Northwest through another affiliate, Invenenergy Wind LLC. *Id.*

¹² The LOC was established by an independent party hired by the EFSEC. AR 825, 594-98; CP06 99, 304-09. The amount was determined to be the funds needed, in addition to the salvage value of the equipment and materials on the site, to complete the restoration pursuant to the EFSEC order. *Id.* This financial requirement continues as a condition precedent for any further or future activities at the site. *Id.*

operation, or at the close of operation. AR 825; CP06 99. The site restoration plan also addresses funding arrangements to meet the site restoration and management costs. AR 825-26; CP06 99. When this project began, the requirement for site restoration was found in former WAC 463-42-655. AR 826; CP06 100. This regulation required the certificate holder to provide an initial plan for site restoration at the conclusion of the plant's operating life. *Id.*¹³

The Initial Site Restoration Plan ("ISRP") for this project was approved by the EFSEC on June 18, 2001. AR 826; CP06 101 (a complete copy of the ISRP can be found at AR 625-640 and CP06 335-354). The ISRP provided that upon permanent termination of the project, whether elective or upon conclusion of the project's function life, the site is to be restored to its original vacant industrial land status. AR 827; CP06 101. This obligation included the removal of all the power-generating assets, including associated foundations that might otherwise be considered affixed to the land, and all other physical objects on the site.

¹³ The Site Certification Agreement (AR 606-623; CP06 316-333) issued for this project also required the following:

The Certificate Holder is responsible for site restoration pursuant to [EFSEC] rules. [WAC 463-42-655.] At least six months prior to beginning construction, the Certificate Holder shall present to [EFSEC] its initial site restoration plan. Construction may not begin until [EFSEC] has approved a plan adequately providing for site restoration and for the funding of site restoration in the event of the Satsop Combustion Turbine Project being terminated before it has completed its planned useful operating life. A detailed Satsop Combustion Turbine Project site restoration plan shall be submitted to [EFSEC], consistent with its rules.

AR 826; CP06 101 (bracketed inclusions supplied).

*Id.*¹⁴ The ISRP also required the preparation of a Final Site Restoration Plan, which “shall include a proposal for removal of salvageable and non-salvageable equipment and materials at the site.” AR 827; CP06 101-102, 104.

The ISRP provided detailed requirements as to what was to be done with the power generation equipment. AR 827; CP06 105. The turbine generators are to be reconditioned and sold in the used equipment market. *Id.* (“The turbine generators are potential candidates for reconditioning and sale in the used equipment market.” CP06 105). The sale of salvageable materials is to finance the cost of demolition and restoration activities, and all facilities are to be removed or salvaged. AR 827; CP06 105-06. The Final Site Restoration Plan contemplated not only plant decommissioning, but that the site would be maintained, secured, and made available for further industrial use. AR 827; CP06 105.

The ISRP provisionally allowed for certain improvements to remain in place, such as foundations, driveways, parking areas, roadways and utilities, but not the plant buildings or the power generation equipment. AR 827; CP06 106. However, if these improvements were

¹⁴ The ISRP stated:

“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.”

CP06 102.

not useable for future industrial or commercial use, the certificate holder is required to also remove the foundation materials, refill the depressions, restore the site to a level contour, remove driveways, parking areas, and roadways, and remove utility infrastructure within the site, including water, wastewater, natural gas, and electrical connections. *Id.*

C. The Undisputed Facts About The History Of The Project.

Duke Energy North America, LLC (“Duke”) began construction of this project in 2001. AR 821; CP06 94. Duke was a subsidiary of a large publicly traded entity, Duke Energy Corporation, a company engaged in a variety of diversified business interests and activities. AR 820; CP06 92. At the time this project was conceived in the mid-1990s, Energy Northwest was the EFSEC certificate holder. AR 826; CP06 99. In 2001 Energy Northwest and Duke became co-holders of the Site Certification Agreement for the project. AR 826; CP06 99-100. Duke subsequently succeeded to Energy Northwest’s interests in the project and became the sole owner until the sale to IGH. AR 826; CP06 100.

Duke halted construction in September 2002, and all related construction shutdown activities, including equipment preservation, concluded by January 2003. AR 821; CP06 94. The cessation of construction was due primarily to overbuilding in the power industry, both

nationally and regionally. AR 821-22; CP06 94.¹⁵ In January 2004, Duke announced plans to divest itself of several power generating facilities, one of which was the partially completed Grays Harbor project. AR 822; CP06 94 (see Duke's offering letter at CP06 212-240). Thereafter, on December 27, 2004, Duke, as seller, and IGH, as buyer, entered into a binding Purchase and Sale Agreement ("PSA") for the sale of the member interests in Duke Energy Grays Harbor, LLC, the owner of the Grays Harbor project. AR 820; CP06 92 (a complete copy of the PSA can be found at AR 403-484 and CP06 114-195). The purchase price was \$21 million. *Id.*¹⁶

Duke and IGH were unrelated parties. AR 820; CP06 93. The Duke-IGH sale was completed with the final or financial closing on March 24, 2005. AR 820; CP06 92 (a copy of the settlement statement is at CP06 197-200). Thereafter, on April 15, 2005, Duke Energy Grays Harbor, LLC changed its name to Grays Harbor Energy LLC (the

¹⁵ In the early 2000's, the U.S. power generation industry, in particular gas-fired combustion turbine capacity, was overbuilt, leading to many project curtailments and cancellations. AR 822; CP06 95. In the state of Washington alone, there were other notable non-economic power generation projects other than this project, in either partial construction curtailment (Mint Farm in Cowlitz County) or in a non-economic operating state (Chehalis Power in Lewis County, a completed power plant). *Id.*

¹⁶ At the time of the execution of the PSA on December 27, 2004, a large quantity of power-generating equipment was available from developers, power companies and on the used market through dealers and brokers. AR 822; CP06 95. Gas-fired combustion turbine based power plants were being built globally and there was a relatively active market for generator sets. *Id.*

appellant in this proceeding). AR 820; CP06 93 (see CP06 206-210 for name change documents).

As previously stated, at the time construction was stopped in late 2002 the project was partially constructed and only 56 percent complete, and this was the state of the plant when IGH acquired the property in early 2005. AR 822; CP06 95. The plant was also functionally inoperable and could not be operated without a future agreement by BPA to allow completion of the interconnection and transmission of any generated power. AR 823-24; CP06 96-97.¹⁷

When Duke halted construction in 2002, the project was put in lay-up mode to preserve the assets (primarily the gas turbines and generators) and to maintain the potential warranty on the gas turbines related to their performance, workmanship and environmental specifications. AR 824; CP06 98. The major financial consideration in the purchase and sale transaction was the two partially assembled General Electric 7241FA combustion turbine generators. *Id.* These assets were not only the primary power-generating engines of the plant, at the time they were state-of-the-art equipment that still remained desirable in the secondary equipment marketplace. *Id.*

¹⁷ Due to the particular constraints of the site and locality, BPA is also the sole potential party to accept and transmit any power generated at this site. AR 824; CP06 97. At all times relevant to this proceeding, there was no agreement between BPA and IGH to allow interconnection and transmission of power generated. *Id.*

Like IGH, Duke had site restoration requirements; in fact, Duke and Energy Northwest submitted the ISRP for the project, which was the plan approved by the EFSEC on June 18, 2001. AR 826; CP06 101. The ISRP specified that a corporate guarantee from Duke Energy North America, LLC, in the amount of \$5 million within six (6) years of the commencement of commercial operations. *Id.* (see CP06 351-54).¹⁸

At the time of the execution of the PSA on December 27, 2004, there was no specific intention on IGH's part to resume construction. AR 825; CP06 98. The purchase price (\$21 million) reflected the estimated amount that the two gas-fired combustion turbines could bring in a negotiated sale in the open market if the decision was made to permanently cancel the project, less other costs of closure, and sell the assets. *Id.* IGH allocated the total purchase as follows:

Land	\$	203,130
Water Pumping Equipment		43,328
Power Generation Equipment		20,753,328 ¹⁹
Total	\$	21,000,000

¹⁸ Duke was able to provide a corporate guarantee to the EFSEC, rather than a LOC, because of its significant assets estimated to be in the billions of dollars. AR 825; CP06 99. As noted, this financial requirement continues as a condition precedent for any future activities with the site. *Id.*

¹⁹ Included in this part of the purchase price were the three buildings on the site. The buildings included: (i) a 4872 square foot administration building, (ii) a 3886 square foot water treatment building, and (iii) a 5166 square foot warehouse building. The buildings were approximately 50 percent constructed and not useable or ready for occupancy on any of the dates in question. GHE estimates their value at the time of approximately \$750,000.

AR 824; CP06 97.²⁰

D. The Procedural History Of The Two Cases Below.

1. The Administrative Appeal.

The County originally valued the partially constructed power plant for the January 1, 2004 assessment (taxes payable in 2005) then owned by Duke at \$119,124,000. AR 163. Thereafter, Duke requested a reduction in the value and, through informal negotiations, the County agreed to reduce the value to approximately \$97.5 million. AR 164. In these valuations, the County classified all of the property -- land and “improvements” -- as real property.

Following its acquisition of the property on March 24, 2005, GHE appealed the January 1, 2005 assessed value to the local BOE, contending that the value was no greater than \$21 million, the price paid for the plant less than three months after the 2005 assessment date. AR 226-27. The BOE held a hearing on January 27, 2006 (AR 1055), and issued a decision on February 16, 2007. AR 1051-54. This decision was in GHE’s favor, reducing the value of the property from \$97,748,130 to \$20,956,458.²¹ AR 1051-54. *Id.*

The County appealed the BOE order to the BTA, requesting a formal review under the APA. AR 1041-49. GHE made a second appeal

²⁰ In early 2007 GHE restarted construction of the plant, which will be operational on July 1, 2008. These facts do not affect the years at issue in this proceeding.

²¹ These amounts did not include the water pumping equipment valued at \$43,328.

to the BOE, this time of the January 1, 2006 valuation of the property, which was also in the amount of \$97,748,130. AR 1142-43. GHE's second appeal was transferred directly by the BOE to the BTA, pursuant to RCW 84.40.038(3). AR 1015. The two administrative appeals were consolidated by the BTA. AR 1008-9. Thereafter, the County moved for summary judgment (AR 865-882) and, following a hearing, the BTA issued a summary judgment order (AR 122-29), substantially in the County's favor. GHE petitioned the BTA for reconsideration (AR 92-120), which was denied in a new, modified order. AR 47-54.²² GHE then petitioned the Thurston County Superior Court for judicial review. AR 5-44.

²² The original and modified order of the BTA were virtually identical. In the final, modified order the BTA ruled:

- The Subject is real property. The subject property is properly classified and assessed as real property as of January 1, 2004, not personal property. The buildings, gas turbines, and other property affixed to the land are "improvements" to real property and assessed on a four-year cycle in Grays Harbor County starting January 1, 2004.
- Valuation date is January 1, 2004 for the 2005 and 2006 appeals. Energy's mid-cycle request for revaluation for assessment years 2005 and 2006 must present proof of valuation for the subject property relating to January 1, 2004.
- Energy has standing to file the appeals. Energy has standing to bring appeals for assessment years 2005 and 2006. Energy has been the owner of the property since 2001.
- The March [24], 2005 "sale" of the subject was not available to the Assessor for her January 1, 2004 valuation. The sale is not an arm's-length transaction (sale) under RCW 84.40.030. In addition, the sale consideration includes both cash and contingent terms. The contingent terms had a monetary value as of the date of sale. However, the monetary value of the contingent terms is difficult to value as of the date of sale. The sale did not occur in the year of assessment and was not available to the Assessor for use in her January 1, 2004, valuation. The subsequent sale should not be given any weight for the January 1, 2004 assessment.

AR 47-54; see AR 122-129 for the original order.

2. The Refund Case.

The Refund Case took a different and initially separate track. GHE filed a complaint for refund of property taxes on May 24, 2006. CP06 5-25.²³ GHE later filed a summary judgment motion with the trial court on March 16, 2007. CP06 60-63. The trial court heard this motion on May 4, 2007. CP06 887. On this same day, GHE filed the petition for judicial review in the Administrative Appeal. CP07 4-43. The trial court was informed of this fact, and decided to make no substantive rulings in the Refund Case at the time; instead, the court simply denied summary judgment so that the two cases could be assigned to a single department of the court and then heard in a combined hearing due to the common parties, facts and issues. CP06 887; see VRP05/04/07 21-25.²⁴

3. The Combined Hearing.

A second hearing was then scheduled and heard on October 26, 2007. VRP10/26/07 1. At this hearing, the trial court considered GHE's renewed motion for summary judgment in the Refund Case (CP 891-987) and argument of the parties in the Administrative Appeal (see CP07 54-170, 171-206, and 207-222 for the parties' briefs). No rulings were made following the hearing, and the trial court took both matters under

²³ The complaint was later amended on December 8, 2006. CP06 32-57.

²⁴ There are two Verbatim Reports of Proceedings, one for the May 4, 2007, summary judgment hearing and one for the October 26, 2007, combined hearing. The reports of proceedings will be referred to herein as "VRP05/04/07" and "VRP10/26/07" followed by the page number(s).

advisement. VRP10/26/07 3-4, 64-65; CP06 1189; CP07 223. The court issued a Memorandum Opinion less than one week later, on October 31, 2007, which addressed both the Administrative Appeal and the Refund Case. CP06 1194-1214; CP07 225-245. The court also issued orders staying the Refund Case and remanding the Administrative Appeal back to the BTA for further fact finding and decision. CP06 1215-16; CP07 224.

On November 30, 2007, Findings of Fact, Conclusions of Law and Order were entered in the Administrative Appeal (CP07 247-57), and an Order Denying Summary Judgment (CP06 1217-1221) was issued in the Refund Case. The two cases were separately appealed (CP06 1222-1253; CP07 258-295), and this Court consolidated.

III.

STANDARD OF REVIEW

The Refund Case was decided by the trial court on summary judgment. This Court reviews “summary judgment orders de novo and perform[s] the same inquiry as the trial court,” Owen v. Burlington N. Santa Fe R.R., 153 Wn.2d 780, 787, 108 P. 3d 1220 (2005) (citing Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P. 3d 108 (2004)), examining “the pleadings, affidavits, and depositions before the trial court and ‘take[s] the position of the trial court and assume[s] facts [and reasonable inferences] most favorable to the nonmoving party.’” Owen, 153 Wn.2d 780 (quoting Ruff v. King County, 125 Wn.2d 697, 703, 887

P. 2d 886 (1995)), citing in turn Hartley v. State, 103 Wn.2d 768, 774, 698 P. 2d 77 (1985)). “Summary judgment is proper if the record before the trial court establishes ‘that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Owen, supra (quoting CR 56(c)).

The Administrative Appeal was before the trial court on an APA petition for judicial review. CP07 4-43. The County had elected a formal hearing before the BTA (*Id.*) and under RCW 82.03.180, “judicial review may be obtained only pursuant to RCW 34.05.510 through 34.05.598.” Under the APA, the “court shall grant relief from an agency’s adjudicative order if it fails to meet any of [the] nine standards delineated in RCW 34.05.570(3).” Lewis County v. Western Washington Growth Management Hearings Board, 157 Wn.2d 488, 498, 139 P. 3d 1096 (2006). In its petition, GHE alleged the following APA grounds for relief:

The court shall grant relief from an agency order in an adjudicative proceeding only if it determines that:

(a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;

...

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.

...

(i) The order is arbitrary or capricious.

RCW 34.05.570(3); see CP07 13, 17, 19, 21, 22.

The standard of judicial review in APA review proceedings is the same for this Court as it was for the trial court. Appellate courts “stand in the same position as trial courts when reviewing the decision of an administrative agency.” Farm Supply v. Wash. Util. & Trans. Comm’n, 83 Wn.2d 446, 448, 518 P.2d 1237 (1974). “[Q]uestions of law are reviewed de novo” and “[w]hether the law was correctly applied to the facts as found by the agency is also a question of law that [the court] review[s] de novo.” Silverstreak, Inc. v. Department of Labor & Industries, 159 Wn.2d 868, 880, 154 P.3d 891 (2007) (citing Tapper v. Employment Sec. Dep’t, 122 Wn.2d 397, 403, 402, 858 P.2d 494 (1993)). If there are “mixed questions of law and fact” this Court is to “determine the law independently, then apply it to the facts as found by the agency.” Lewis County, 157 Wn.2d at 498 (quoting Thurston County v. Cooper Point Ass’n, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002) (citing Hamel v. Employment Sec. Dep’t, 93 Wn. App. 140, 145, 966 P.2d 1282 (1998))).

In this case, where the issue is whether the buildings and power generation equipment constitute real or personal property, the BTA’s decision should be given no weight. The court gives “great weight to an agency’s interpretation . . . within its area of expertise”, although the court is also “not bound by the agency’s interpretation”. Department of Labor & Industries v. Tyson Foods, Inc., 143 Wn. App. 576, 582, 178 P.3d 1070

(2008) (citing Washington Cedar & Supply Co., Inc. v. Dep't of Labor & Indus., 137 Wn. App. 592, 598, 154 P. 3d 287 (2007)). While the BTA is presumed to have special expertise in the tax area, it has no special expertise in distinguishing real property from personal property, and therefore no deference is due to the BTA's characterization determinations. See Seattle Building and Construction Trades Council, et al., v. Apprenticeship and Training Council, et al., 129 Wn.2d 787, 799, 920 P. 2d 581 (1996).

IV.

ARGUMENT

- A. **The Common Law Test In Washington For Distinguishing Real and Personal Property Has A Long And Consistent History. Under That Test, Property Becomes Real Property Only When It Is Permanently Affixed To The Land. The Undisputed Facts Of This Case Conclusively Establish That Neither GHE's Buildings Nor Its Equipment Were Permanently Affixed To The Land, And Therefore, Both Should Be Characterized As Personal Property.**

The initial question before the Court is whether GHE's property, other than land, is real or personal under the common law.²⁵ This issue in turn boils down to whether the buildings and power generation equipment have become permanently affixed -- i.e., whether they have become

²⁵ The County's authority to assess and tax property derives from the State Constitution and statutes. See Const. Art. VII, RCW 84.40.020, RCW 84.40.030. In RCW 84.04.090 and 84.04.080, the Legislature defined "real property" and "personal property" and mandated that the characterization of property be determined using the common law tests laid down and applied by the courts. See WAC 458-12-010(3)(d).

“fixtures” -- and are, therefore, real property. Over more than 100 years the courts of this state have developed what has evolved into a three-part test to determine whether an item is real property or personal property. As our Supreme Court put the matter in Department of Revenue v. Boeing, 85 Wn.2d 663, 538 P. 2d 505 (1975):

“The true criterion of a fixture is the united application of these requisites: (1) Actual annexation to the realty, or something appurtenant thereto; (2) application to the use or purpose to which that part of the realty with which it is connected is appropriated; and (3) the intention of the party making the annexation to make a permanent accession to the freehold.”

Boeing, 85 Wn.2d at 667 (quoting Lipsett Steel Products, Inc. v. King County, 67 Wn.2d 650, 652, 409 P. 2d 475 (1965)).

A recent application of the three criteria or elements in a tax context is found in Glen Park Associates, L.L.C. v. Department of Revenue, 119 Wn. App. 481, 82 P. 3d 664 (2003), in which this Court stated:

A chattel becomes a fixture if: (1) it is actually annexed to the realty, (2) its use or purpose is applied to or integrated with the use of the realty it is attached to [footnote omitted], and (3) the annexing party intended a permanent addition to the freehold. *Boeing*, 85 Wn.2d at 667-68 (quoting *Lipsett* [citation omitted]). Each element of this three-pronged test must be met before an article may properly be considered a fixture. *Id.* at 668. The court should consider all pertinent factors reasonably bearing on the annexor’s intent, including, but not being limited to, the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for which the annexation is made. [*Id.*]

119 Wn. App. at 487-488.

The three-part test has been part of the Washington common law since the 1890's, when it was first recognized in Chase v. Tacoma Box Co., 11 Wash. 377, 381, 39 P. 639 (1895). The Supreme Court in Boeing provided this illuminating history of the test's origins:

This test, originally imported into the law in Washington in *Chase v. Tacoma Box Co.*, [citation omitted], and followed by most American courts, had its genesis in *Teaff v. Hewitt*, 1 Ohio St. 511 (1853), which is generally considered to be the leading case on the law of fixtures. *See generally 5 American Law of Property* § 19.3 (1952)

Boeing, 85 Wn.2d at 667-68.

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 test, and this case presents no factors that would deviate from this well-established norm. In Cherry v. Arthur, 5 Wash. 787, 32 P. 744 (1893), the question was whether a lumber planer was a fixture.²⁶ The Supreme Court held that the planer, even though bolted to the floor, was not a "fixture":

In ascertaining whether such 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

²⁶ A sawmill owner had mortgaged certain realty and fixtures, together with the machinery at issue. The owner had originally bought the machines under a conditional sales contract, which retained title in the seller. The court held for the seller, in a contest between the seller and the mortgagees.

those objects becomes a part of it, even though there be no permanent fastening such as would cause permanent injury if removed. But mere furniture, although some fastening may be necessary to its advantageous use, is removable. Peculiarly subject to this rule are machines which can be used in one place as well as another, and which add nothing to the building, though they may be of advantage to the business conducted there; and we think the planer in this case is of the class mentioned

Id. at 788 (emphasis added).

Thus, in a case involving a piece of industrial machinery used in the manufacturing of lumber that was required to be bolted to the floor of the building, the court formulated the basic test for determining whether machinery is a fixture. That test is whether the machinery is affixed to the realty in order to enhance the value of the realty; if it is affixed simply to make the machinery itself usable in the particular manufacturing business taking place in the building, it is not a fixture and therefore not real property.

The facts here fall squarely under the latter situation. GHE's power generation equipment has been affixed or placed on the land simply to make it usable in the particular business (power generation) taking place on this land. Otherwise, the land is simply a bare, flat 22-acre site zoned for industrial use, and which is adaptable for any industrial use so long as it can take place on a 22-acre parcel. And although the majority of the power generation equipment is bolted to concrete pads and these pads are affixed to the surface of the ground, there are no facts supporting any

contention that this power generation equipment was affixed to the realty to enhance the realty's value.

The next case in which a similar issue arose was Chase v. Tacoma Box Co., 11 Wash. 377, 39 P. 639 (1895). This case involved holders of separate mortgages on the same premises -- a box factory. The first mortgage covered only realty, while the later mortgage covered both the realty and all the "machinery and apparatus" used in the factory. Chase, 11 Wash. at 378. The first mortgagee claimed the machinery and equipment was realty. The Supreme Court held that the machinery was personalty, and decided in favor of the holder of the later mortgage. In so deciding, the court set forth an extensive discussion of the concept of a fixture as it applies to manufacturing machinery, and introduced into Washington law the three-part test. See Chase, 11 Wash. at 380-81. The role of the third element in the test -- the intention of the annexor -- was also put into proper perspective:

. . . while the intention of the party affixing the machinery enters into the elements of each case, still such mere intention will not determine or alter its legal character, and whether or not, in a given case, it remains personalty, or becomes a fixture must depend upon the facts and circumstances, and not on his opinion.

Id. at 381.²⁷

²⁷ In its later decision in Lipsett, the Supreme Court identified the third part of the test -- intention of the parties -- to be "one of the dominant factors or determinants." See 67 Wn.2d at 652.

Thus, the court held that intent must be determined from the annexor's actions at the time of the annexation. Moreover, the court has repeatedly underscored this point in its later decisions. In Westinghouse v. Hawthorne, 21 Wn.2d 74, 150 P.2d 55 (1944), the court stated:

Considering the question of the intention of the party making the annexation, this court, in the case of *Washington Nat. Bank v. Smith*, 15 Wash. 160, 45 P.736, said:

“That the intention with which machinery is placed upon the real estate is one of the elements to be taken into consideration in determining whether or not it remains a chattel, or becomes a part of such real estate is conceded, but it does not follow that such intention can be shown by testimony as to the actual state of the mind of the person who attached the machinery to the real estate at the time it was attached. On the contrary his intention must be gathered from circumstances surrounding the transaction and from what was said and done at the time, and cannot be affected by his state of mind retained as a secret.”

Upon this same subject, in the later case of *Ballard v. Alaska Theatre Co*, 93 Wash. 655, [662-63], 161 P. 478, this court said:

“The intent is not to be gathered from testimony of the actual state of mind of the party making the annexation . . . but is to be inferred, when not determined by an express agreement, from the nature of the article affixed, the relation and situation to the freehold of the party making the annexation, the manner of the annexation, and the purpose for which it is made.”

Westinghouse, 21 Wn.2d at 79. In turn, the Supreme Court in Boeing reiterated:

. . . Evidence of intent, of course, must be gathered from all the surrounding circumstances [*a*]t the time of installation of the jigs, and is not to be gathered from the testimony of

the annexor as to his actual state of mind. *Ballard v. Alaska Theatre Co.*, 93 Wash. 655, 161 P. 478 (1916); *Westinghouse Elec. Supply Co. v. Hawthorne*, 21 Wn.2d 74, 150 P. 2d 55 (1944). Moreover, all pertinent factors reasonably bearing on the intent of the annexor should be considered in assessing the intent at the time of annexation including, but not being limited to, the nature of the article affixed, the relation and situation to the freehold of the annexor, the manner of annexation, and the purpose for which the annexation is made. *Strain v. Green*, 25 Wn.2d 692, 172 P. 2d 216 (1946); *Ballard v. Alaska*, 93 Wash at 655.

Boeing, 85 Wn.2d at 668 (court's italic emphasis; underscored emphasis added).

In Boeing, the question was whether large industrial tooling called “jigs,” which kept components in place during the manufacture of the 747 aircraft, were real property that had been incorporated into the plant or remained personal property. The Supreme Court acknowledged that two factors supported the proposition that the jigs were real property: (1) Boeing was also the owner of the freehold, giving rise to the presumption that the owner intended to enhance the freehold (this fact is present in GHE’s case, too); and (2) the jigs were necessary to the production of the 747 aircraft and there was no evidence of intent to use the building for any other purpose. *Id.* at 668-69. But, “counterbalanced against these two considerations” were “several other factors, the cumulative effect of which” convinced the court (and should convince this Court, too) “that the annexation was not intended to be a permanent benefit to the freehold”:

[T]he supposed permanency of the jigs is totally dependent upon Boeing's continued use of the building to manufacture the Boeing 747 in its present form without substantial structural design changes. According to the record, it would not be feasible to modify the jigs so that they could be used in the production of other aircraft. But the plant itself could certainly be used to manufacture either larger or smaller aircraft, in which case the present jigs would have to be discarded and new ones brought into the plant.

Id. at 669.

Here, the supposed permanency of the power generation equipment, as well as the three buildings erected as part of the plant, is totally dependent on GHE's continued use of this land to generate electricity. But this land could be used for other commercial or industrial purposes. Indeed, the ISRP requires removal of all the buildings and equipment at the termination of the project to make way in the future for other industrial uses of the land, making all of these structures personal property under the common law test. What better or more convincing objective evidence of intent -- GHE's adherence to the ISRP requirements -- could possibly be shown? As the Supreme Court observed in Boeing:

[T]he manner in which the jigs are secured to the floor of the plant is indicative of an intent that they be easily removable upon any changes in the current program. For instance, the concrete floor was not poured so that the jigs would be sunken into it and thereby become a part of the building. Rather, the jigs are simply bolted down in such a fashion that they can be easily removed without any harm to the building itself.

Boeing, at 669.

Here, too, the manner in which the power generation equipment is secured to the land is indicative of the intent that it be easily removed upon any changes to the use of the property. As in Boeing, concrete slabs have been poured, but the power generation equipment merely sits on top of these slabs, is bolted to them, and is not incorporated into the concrete. The undisputed evidence is also that the power generation equipment is modular and easily removed without any harm to the land, as were the jigs at issue in Boeing:

[T]he jigs themselves were designed in such a manner that they can be disassembled and moved in or out of manufacturing plants without undue difficulty or harm to the jigs. Indeed, similar albeit smaller jigs have been moved from plant to plant in past aircraft construction programs. It is difficult to ascribe an intent to Boeing that the jigs be a permanent part of the realty when they can be so readily moved out of the plant and thus transformed back into personalty.

Id.

Again, the undisputed evidence here is that the power generation equipment was designed to be modular, easily disassembled and movable from this site without undue difficulty or harm to the equipment itself or to the underlying land. The uncontroverted evidence showed that GHE's affiliates have moved similar equipment -- indeed, a similar partially constructed power plant -- in the recent past. AR 822; CP06 95. Applying what the court said in Boeing to this case, "It is difficult to ascribe an

intent to [GHE] that the [power generation equipment] be a permanent part of the realty when [it] can be so readily moved [off] of the [site] and thus transformed back into personalty.” See Boeing, 85 Wn.2d at 669.²⁸

In summary, the Boeing case is “on all fours” with this case. In Boeing, the Supreme Court held that “we do not think that the totality of the circumstances can reasonably be construed to indicate an intent by Boeing for the jigs to be a permanent accession to the freehold.” Boeing, at 670-71. The same can be said of GHE’s power generation equipment. The totality of the circumstances here do not just reasonably -- but conclusively and as a matter of law -- demonstrate an intent not to make this equipment a permanent accession to the freehold.

The second element of the three-part test must also be present, not just the first and third. The Supreme Court in Chase gave an illustration of how the second element -- application to the use or purpose of the realty to which it is connected -- is to be applied:

“Movable machines . . . whose number and permanency are contingent on the varying circumstances of the business, subject to its fluctuating conditions, and liable to be taken in or out, as exigencies may require, are different in nature and legal character from the steam engine, boilers, shafting and other articles secured by masonry . . . designed to be permanent and indispensable to the enjoyment of the freehold.”

²⁸ The court also noted that Boeing considered the jigs to be personal property for property tax purposes. See Boeing at 670. GHE likewise considered its power generation equipment for property tax purposes as personal property. AR 770-71, 777.

Chase, 11 Wash. at 381-82 (quoting Rogers v. Brokaw, 25 N.J. Eq. 496 (1875)).

This distinction is critical in understanding the second element, and why certain types of machinery and equipment are fixtures and other types are not. The determining factor is the nature and purpose of the equipment. Machinery such as the “steam engine” and “boilers” are installed in a building and are “designed to be permanent and indispensable to the enjoyment of the freehold.” They supply heat and power to the building no matter what particular use or manufacturing operation is taking place within. The modern equivalent would be the heating, lighting, and power equipment that is built into most every building and which is necessary for the building to have any utility for virtually any purpose. On the other hand, certain types of machinery and equipment are “permanent” solely in relationship to the particular operation taking place in the building or, in GHE’s case, taking place on the land. The particular manufacturing operation may continue for a long time, or even indefinitely, yet the machinery at issue will still be characterized as personalty. As the Supreme Court observed in Chase, “[t]he intent that they [the machines] should remain . . . for permanent use [in the building] is unimportant.” 11 Wash. at 382 (citing and quoting Wolford v. Baxter, 33 Minn 12, 21 N.W. 744 (1884)).

Thus, to determine whether the second element is present, the purpose of the physical attachment must be determined. Is the purpose to make the use of the machine itself “more beneficial”? Or is the purpose of the attachment the same as the purpose served by installation of heating, lighting, and power facilities, *i.e.*, to enhance the value and utility of the building itself? The Supreme Court in Chase resolved this point, as follows:

We do not think that mere adaptability of machinery to use in the business which happens to be conducted upon the realty is of itself enough to give the character of realty to the machinery. To constitute machinery and apparatus fixtures, it is not alone sufficient that they be placed in the shop or factory with the intent that they should remain there for permanent use, but the intent must be to make them a permanent accession to the freehold.

Chase, 11 Wash. at 385 (emphasis added).²⁹

Here, the undisputed facts conclusively establish that GHE did not intend to make the buildings or power generation equipment a permanent accession to the freehold. Furthermore, the fact that the equipment may be

²⁹ In a decision subsequent to Chase, the Supreme Court expressed this same distinction as follows:

“If the annexation is not intended to be permanent, the chattel will not be deemed a fixture. As it is sometimes expressed, ‘it must be for the benefit of the inheritance.’ The degree and mode of annexation may be looked at, and whether it is to make the chattel or the land more useful.”

Welsh v. McDonald, 64 Wash. 108, 111, 116 P. 589 (1911). In Welsh the court ruled that several buildings erected upon leased land for purposes of carrying on the business of the lessee were removable and did not become part of the realty.

large is not determinative of an intent to make a permanent annexation to the freehold. As pointed out in Lipsett:

[I]t can be said that the physical nature of the huge scrap shear -- its immense size and weight, the physical aspects of its installation -- could be quite misleading as to whether it is real or personal property. Consequently, it is understandable that the learned trial judge erred in concluding that the shear had become permanently affixed to the realty and should be regarded as real rather than personal property.

67 Wn.2d at 652.

In summary, the Washington courts have repeatedly and uniformly found industrial and manufacturing machinery and equipment to be personal property. See, e.g., Sherrick v. Cotter, 28 Wash. 25 68 P. 172 (1902) (large hop press installed in hop house is personal property); Washington Nat'l Bank v. Smith, 15 Wash. 160, 45 P. 736 (1896) (mill machinery retains personal property character); Zimmerman v. Bosse, 60 Wash. 556, 111 P. 796 (1910) (sawmill equipment retains personal property character); Cherry v. Arthur, 5 Wash. 787, 32 P. 744 (1893) (sawmill planer that is bolted to floor and attached to mill engine by belts is personal property); Lipsett, 67 Wn.2d 650 (1965) (large shear was personal property); Boeing, 85 Wn.2d 663 (1975) (jigs used to build 747 aircraft were personal property). The County's and the BTA's characterization determinations fly in the face of this history. The BTA embraced the County's view without offering a shred of analysis to support it. The trial court acknowledged the BTA's error but inexplicably

remanded the matter back for further factual analysis, when the established facts clearly compel an outright reversal in favor of GHE. This Court should make the decision the trial court wrongly refused to make, and apply settled Washington law in favor of GHE.³⁰

B. Leaving Aside The Common Law For The Moment, RCW 84.12 Unquestionably Makes GHE's Power Generation Equipment Personal Property.

As an independent grounds for relief, RCW 84.12 is directly applicable to this case. RCW 84.12 specifically addresses the assessment and taxation of public utilities for property tax purposes. Public utilities covered by this chapter include “electric light and power” companies, which are defined to mean:

. . . any person owning, controlling, operating or managing real or personal property, used or to be used for or in connection with or to facilitate the generation, transmission or distribution of electricity in this state, and engaged in the business of furnishing, transmitting, distributing or generating electrical energy for light, heat or power for compensation as owner, lessee or otherwise.

RCW 84.12.200(4) (emphasis added).

³⁰ The same characterization -- personal property -- is true in the case of the three buildings on the site. These are relatively small (less than 5200 square feet each) metal structures. The ISRP mandates removal of these structures from the site at the conclusion or termination of the project. AR 827, CP06 101. This requirement is akin to a lease agreement that mandates removal of property at the conclusion of the lease. See Lipsett, 67 Wn.2d 650. Accordingly, the three buildings are personal property under the common law test.

Is GHE a public utility-electric light and power company under RCW 84.12.200(4)?³¹ GHE owns real and personal property that is “to be used . . . in connection with” and “to facilitate the generation . . . of electricity in this state.” RCW 84.12.200(4). GHE’s business is to “generat[e] electric energy for light, heat or power purposes for compensation as an owner.” *Id.* In fact, GHE’s only business is generating electric energy.³² Yet the BTA ignored RCW 84.12 in its order (AR 47-54), and the trial court also failed to rule on whether this law applies here. CP07 252-53. This Court should right these two clear wrongs.

RCW 84.12.280 statutorily characterizes the property of public utilities, including electric light and power companies. As a matter of law, all property of an electric light and power company (RCW 84.12.200(4)), except land and buildings, is personal for property tax purposes. RCW 84.12.280. Because GHE is an electric light and power company under RCW 84.12.200(4), its property must be characterized pursuant to RCW 84.12.280, which means under this statutory authority all property except land and buildings is personal property.

³¹ The BTA completely ignored and thus failed to come to grips with this issue even though the question was squarely presented to it. See AR 94-98.

³² GHE is a Federal Energy Regulatory Commission (“FERC”)-certified electric wholesale generator and, as such, can only sell electricity to the wholesale market.

The County contends, however, that RCW 84.12 applies only to multiple or inter-county utilities that are centrally assessed by the Department of Revenue (“DOR”). AR 57-62. This contention cannot be sustained under the plain and unambiguous language of RCW 84.12. If RCW 84.12 applies only to inter-county utilities words would have to be added to the statute to achieve this result. “Where the legislature omits language from a statute, whether intentionally or inadvertently, [the] court will not read into the statute the language it believes was omitted.” Qwest Corp. v. City of Kent, 157 Wn.2d 545, 553, 139 P. 3d 1091 (2006) (citing State v. Cooper, 156 Wn.2d 475, 480, 128 P. 3d 1234 (2006)). Most recently, this Court stated that “we cannot add language to an unambiguous statute even if we believe that the legislature intended something other than what it expressed.” G-P Gypsum Corporation v. State Revenue, No. 35883-2-II, 2008 WL 2116412 (Wash. App. May 20, 2008) (citing Am. Cont’l Ins. Co. v. Steen, 151 Wn.2d 512, 518, 91 P. 3d 864 (2004); State v. Watson, 146 Wn.2d 947, 955, 51 P. 3d 66 (2002)). There is absolutely nothing in RCW 84.12 that states -- or even suggests -- that RCW 84.12 is applicable only to multiple or inter-county utilities.

“Statutory interpretation requires [the] [C]ourt to give effect to the legislature’s intent. When the language of a statute is unambiguous, the legislative intent is apparent.” Qwest, 157 Wn.2d 545. As this Court recently restated the rule: “We begin our review with the statutory

language itself; if the statute’s meaning is plain on its face, we apply that meaning.” G-P Gypsum, at 1111. Here, by its plain language, RCW 84.12.200(4) defines an “electric light and power company” to mean “any person owning . . . real or personal property, used or to be used for or in connection with or to facilitate the generation . . . of electricity in this state, and engaged in the business of . . . generating electrical energy for light, heat or power as owner.” If RCW 84.12.200(4) only applied to inter-county utilities, the legislature could have simply said so, and certainly would not have used the word “any.” The “Washington courts have consistently interpreted the word ‘any’ to mean ‘every’ and ‘all.’” Cerrillo v. Esparza, 158 Wn.2d 194, 203, 142 P. 3d 155 (2006) (quoting Stahl v. Delicor of Puget Sound, Inc., 148 Wn.2d 876, 844-45, 64 P. 3d 10 (2003)). Thus, the use of the word “any” in RCW 84.12.200(4) means it was intended to apply to every and all, i.e., both single and multiple-county, utilities especially in the “complete absence of any express language establishing . . . a requirement” that it apply only to inter-county utilities. See Agrilink Foods, Inc. v. Department of Revenue, 153 Wn.2d 392, 397, 103 P. 3d 1226 (2005).

Moreover, to accept the argument that RCW 84.12 applies only to inter-county utilities means there would be one set of property tax rules for multiple-county public utilities and another set for single-county utilities. This would be so even though the utilities themselves may be identical

with the only distinguishing characteristic, as between them, the fact that the intra-county utility's property is located in a single county and the inter-county utility's property is located in multiple counties. This is not a rational or reasonable basis to classify and assess such otherwise identical property differently, and would present grave constitutional difficulties. See Parentage of J.M.K., 155 Wn.2d 374, 387, 119 P. 3d 840 (2005) ("If, among alternative constructions, one or more would involve serious constitutional difficulties, the court will reject those interpretations in favor of a construction that will sustain the constitutionality of the statute") (citing Grant v. Spellman, 99 Wn.2d 815, 819, 664 P. 2d 1227 (1983); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.11, at 75 (6th ed. 2000)).

"An interpretation that produces 'absurd consequences' must be rejected, since such results would belie legislative intent." Troxell v. Rainier Public School District, 154 Wn.2d 345, 350, 111 P. 3d 1173 (2005) (quoting State v. Vela, 100 Wn.2d 636, 641, 673 P. 2d 185 (1983)). Characterizing the property of single county utilities differently than multiple county utilities leads to an absurd result. The fact that GHE's property is located in one county and is not subject to central assessment by DOR does not mean that GHE is not an "electric light and power company" under the clear and unambiguous language of RCW 84.12.200(4), nor that its property should not be subject to

classification under RCW 84.12.280. It simply means that the County assessor, and not the DOR, values and assesses the property under principles established by these statutes; otherwise, similar properties will be valued, assessed and taxed differently, which violates the equality and uniformity provisions of the state constitution. See Const. Art. VII, § 1.³³

There are three cases in which the Supreme Court interpreted the scope of RCW 84.12. The first is Northwestern Improvement Company v. Henneford, 184 Wash. 502, 51 P.2d 1083 (1935). In this case, Northwestern owned and operated an electric light and power system wholly within one county (Kittitas). Northwestern, 184 Wash. at 503. The Tax Commission (predecessor to DOR) initiated proceedings to assess and value Northwestern's property under Chapter 123, Laws of 1935 (predecessor to RCW 84.12) for property tax purposes. Id. Northwestern challenged the Tax Commission's right to make the

³³ Here is an example of both the absurdity of the County's legal position and the inequality that results: Let's say an electric light and power company is constructing a power plant that is located in two counties. (This could occur where the power plant itself is located at or near the county line and the plant's transmission lines extend into a neighboring county to hook up with the BPA grid. It could also occur where a single company owns two or more power plants, each in a different county.) DOR would centrally assess this property. And, while the plant was new construction or CIP, DOR would assess only the land and buildings under RCW 84.12.280. This is so because Rule 342(1) defines "new construction" to mean real property only. Let's also say an identical power plant was under construction in a neighboring county, where all property was located in that one county and the county assessor is responsible for assessing the property for tax purposes. This assessor chooses to classify, as the County has done here, all property as real property during CIP. This county thus assesses and taxes during CIP all of the property, including the personal property that DOR in the neighboring counties did not assess. This would result in a gross disparity, and resulting inequality, in the valuations.

assessment, on the basis that Northwestern's property was "wholly intracounty." *Id.* The Supreme Court ruled in favor of Northwestern, holding that the act did not confer upon the Tax Commission the right to assess the property of an intra-county utility. *Id.* at 513.

The Supreme Court acknowledged the right of the Tax Commission to assess the inter-county property of utilities "out of the necessity of the case" -- i.e., they were multi-county and it was more practical for inter-county property to be centrally assessed by the Commission for uniformity, equality and apportionment purposes. Northwestern, at 510-11 (citing and quoting State ex rel. King County v. State Tax Commission, 174 Wash. 336, 24 P. 2d 1094 (1933); State ex rel. State Tax Commission v. Redd, 166 Wash. 132, 6 P. 2d 619 (1932); Great Northern Ry. Co. v. Snohomish County, 48 Wash. 478, 93 P. 924 (1908); Ames v. People, 26 Colo. 83, 56 P. 656 (1899)). The Supreme Court also said there is no reason "why the county assessor may not assess utility property wholly within his county as efficiently and effectively as he assessed all other types of county property." Northwestern, at 510. Implicit in this statement is RCW 84.12's application by the county assessor to the extent individual statutes -- like RCW 84.12.280 -- can be utilized. GHE is simply asking this Court to apply two statutes: RCW 84.12.200(4) and 84.12.280. Neither of these statutes, by their plain

and unambiguous language, can be said to apply only to inter-county utilities.

Thus, under Northwestern, the DOR's power and authority under RCW 84.12 and its progeny extend only to the assessment of multiple or inter-county utilities. But, that does not mean the provisions of RCW 84.12 -- in particular the classification provisions of RCW 84.12.280 -- are jettisoned and cannot be applied to single or intra-county utilities to assist the county assessor in "efficiently and effectively" assessing the "utility property wholly within his county." The Northwestern case holds that DOR is not vested with "the power to assess intra-county . . . utility systems" (*Id.* at 502), yet there is nothing in that case stating RCW 84.12 applies only to the valuation and assessment of inter-county utilities or that RCW 84.12 cannot be utilized in assessing and valuing intra-county utilities. Indeed, the use of the word "any" in the definitional statute (RCW 84.12.200(4)) commands such a result.

The second case is Burlington Northern, Inc. v. Johnson, 89 Wn.2d 321, 572 P. 2d 1085 (1977). Here, eight county assessors challenged the DOR's 1972 assessment of the real and personal properties of several inter-county utilities on equalization grounds. Burlington, at 323. The statutes at issue were in RCW 84.12 (pertaining to public utilities), and RCW 84.16 (applicable to private car companies). There was no question that the DOR was to value and assess the utilities because their property

was located in multiple counties. The Supreme Court also acknowledged that “[p]ersonal property . . . is valued every year” and that utilities’ operating property is “predominantly personal property.” *Id.* at 324.

In the course of its decision, the court stated:

For purposes of assessment of the operating properties of public utilities, and the apportionment and taxation thereof, the legislature has expressly classified such properties as either personal or real in RCW 84.12.280. For example, all railroad equipment which is stationary is classified as real property, while all movable property is classified as personal property. All of the operating property other than lands or buildings of electric light and power companies, telephone companies, gas companies, and heating companies is to be “assessed and taxed” as personal property. Under RCW 84.16.010 all of the operating property of a private car company is deemed to be personal property.

Burlington, 89 Wn.2d at 327. That Burlington involved inter-county utilities should not be of any consequence, in light of the court’s express statement that RCW 84.12.280 applies to all property of electric light and power companies. Burlington also went on to interpret statutes applicable only to inter-county utilities (RCW 84.12.350 and 84.16.110) and noted, “RCW 84.12 and RCW 84.16 impose upon the state, rather than upon the counties, the duty of determining the value of the operating properties of companies covered by their provisions and apportioning that value among the counties.” Burlington, at 328. The County would read this statement to mean that RCW 84.12 applies only to assessments of inter-county utilities by DOR. AR 62. But this is not what the Supreme Court said, as

the language previously quoted clearly shows. Instead, the court simply stated that RCW 84.12 imposes upon the DOR, and not the counties, the duty of valuing and apportioning inter-county utilities.

RCW 84.12.280 states that the property of all electric light and power company as defined in RCW 84.12.200(4), is to be classified as real property and personal property under a formula set forth in that statute. Reading RCW 84.12 “in its entirety, giving effect to all of the provisions and seeking to harmonize them,” there is no “intent that the classifications established in RCW 84.12.280” were enacted to apply to only multiple or inter-county utilities. See Burlington, at 331. That RCW 84.12 shall apply to all public utilities, including electric light and power companies as defined in RCW 84.12.200(4), can be assumed since the Legislature probably “had in mind the constitutional requirement of uniformity and that the classification was directed toward this end.” See Burlington, at 330. Indeed, Burlington acknowledges “the legislature’s right to classify property for purposes of taxation.” Burlington, 89 Wn.3d 321. (citing State ex. rel. Atwood v. Wooster, 163 Wash. 659, 2 P. 2d 653 (1931); Puget Sound Power & Light Co. v. Seattle, 117 Wash. 351, 201 P. 449 (1921)).

That the Supreme Court has not held RCW 84.12 applicable only to multiple or inter-county utilities is further emphasized in the third of this trilogy of cases, Inter Island Telephone Company, Inc. v. San Juan

County, 125 Wn.2d 332, 883 P.2d 1380 (1994). Inter Island was a regulated telephone company operating a local exchange in San Juan County, Washington. Inter Island, at 333. Inter Island owned property and operated only within San Juan County, i.e., it was a public utility “telephone company” (see RCW 84.12.200(6)) that operated, similar to GHE, in a single county. The court noted that “[o]ver 90 percent of [Inter Island’s] operating property is personal” (*Id.*) consistent with GHE’s contention that the great majority of its property is also personal. The underlying issue in Inter Island was again equalization under RCW 84.12.350, but the facts and ultimate ruling have direct application to this case.

DOR was brought in to value Inter Island’s property³⁴ and “made the valuations . . . using the same methodology it uses for intercounty

³⁴ Even though DOR ordinarily “directly assesses utilities which operate in multiple counties, [and] utilities which operate in a single county are assessed by the county assessor,” Inter Island, 125 Wn.2d at 333-34, DOR valued Inter Island under its authority to make advisory appraisals for county assessors under RCW 84.41.110.

property” Inter Island, at 333-34 (emphasis added).³⁵ DOR’s advisory assessment of Inter Island for the years in question in that case was clearly at odds with the County’s argument as to the proper method of assessing intra-county utility property. In rejecting that argument, the Supreme Court stated:

To analyze the main issue, we first review the statutory scheme for taxation of the operating properties of utilities. RCW 84.12 relates to the assessment and taxation of public utilities. The chapter applies to a broad category, including railroads, transportation companies, electric light and power entities, and gas and telephone companies.

Inter Island at 333 (emphasis added).

This quotation is significant. Inter Island was an intra-county utility, and the Supreme Court acknowledged RCW 84.12’s application to

³⁵ The court’s statement, acknowledging DOR’s advisory appraisal of Inter Island’s property using RCW 84.12, is in direct conflict with the Declaration of Neal Cook (dated April 5, 2007) (CP06 736-38). The County obtained a declaration from Mr. Cook to support its argument that RCW 84.12 does not apply to intra-county assessments of public utility property. Mr. Cook, an employee of DOR, stated that “RCW 84.12 applies exclusively to . . . electric light and power companies, operating in more than one county throughout the state,” “RCW 84.12.280 does not apply to county assessors’ determinations of real and personal property,” and “RCW 84.12 has no application to local assessment by county assessors.” CP06 737-38. These statements are inaccurate, especially in light of the fact that Inter Island clearly states that DOR itself valued Inter Island’s property (in an advisory appraisal performed pursuant to RCW 84.41.110) “using the same methodology [DOR] uses for intercounty property”, Inter Island at 333-34, implying that RCW 84.12 does not apply exclusively to inter-county utilities, RCW 84.12.280 can apply to county assessors’ determinations of the character of intra-county utility property, and RCW 84.12 does have application to local property tax assessments by county assessors. Mr. Cook’s statements are also at odds with DOR’s published guidelines to county assessors (AR 739-757), in which Mr. Cook is a DOR contact person for the assessors (CP06 746), which characterizes “gas” and “steam” “electric generating” assets as personal property (AR 748). Regardless of Mr. Cook’s statements, this Court’s duty is to determine legislative intent from the language of the statute, and not through an administrative agency’s purportedly contrary interpretation. AgriLink Foods, Inc. v. Dep’t of Revenue, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

Inter Island. The court did not say that RCW 84.12 was inapplicable to intra-county utilities, as contended by the County; instead, the court explicitly stated the exact opposite, lumping all utilities -- both inter-county and intra-county -- within RCW 84.12. Remember too, Inter Island was a single or intra-county utility.

In short, Inter Island's rationale is dispositive on the question of RCW 84.12's application to single-county utilities, in at least three ways. The case demonstrates that DOR, when performing advisory appraisals of public utility property for county assessors, applies RCW 84.12 to the assessments. More importantly, the Supreme Court expressly acknowledged that RCW 84.12 applied to the valuation of intra-county utility property. Inter Island, at 333. Most important, however, Inter Island at least implicitly held that inter-county and intra-county utility property must be uniformly treated as one class of property and assessed accordingly. The court stated: "[A] separate class of property for uniformity purposes does not exist merely because property of like character may be within the valuation jurisdiction of a separate entity." Inter Island, at 336. The court declined to go to the next step, i.e., to expressly "decide whether intracounty and intercounty utilities constitute one class" of property. *Id.* But, this case squarely presents that issue, and

logic, equality, and uniformity dictate that all utilities constitute one class of property.³⁶

C. The Sale From Duke To IGH Was “Arm’s Length”.

The BTA erroneously concluded that the “sale is not an arm’s-length transaction (sale) under RCW 84.40.030.” AR 52.³⁷ This conclusion is unsupported by any findings and contrary to the undisputed facts.

Prior to April 15, 2005, GHE was known as Duke Energy Grays Harbor, LLC. AR 820; CP06 93. This limited liability company, in turn, was owned by Duke Energy North America, LLC, a subsidiary of a large, publicly traded entity, Duke Energy Corporation. *Id.* On December 27, 2004, Duke entered into the PSA to sell its member interests in the limited liability company then known as Duke Energy Grays Harbor, to IGH

³⁶ If GHE sold its power plant to Puget Sound Energy, an inter-county utility (see, CP06 530-31), under the County’s contrary theory the power plant would suddenly -- overnight -- be subject to the provisions of RCW 84.12. In other words, today, the power generation equipment under GHE’s ownership is real property. Tomorrow, under Puget’s ownership, it is personal property.

TransAlta is another example. See CP06 531. TransAlta, like GHE, is an electric wholesale generator; it only sells power into the wholesale market regulated by FERC (see n.32, *supra*). TransAlta generates electricity in only one county (Lewis) but it owns property in two counties (Lewis and Thurston) so it is centrally assessed by DOR. CP06 531. By the DOR’s allocation of real and personal property (*Id.*), it is clear that TransAlta’s generating assets (power generation equipment) are classified as personal property by DOR. Why should TransAlta be treated any differently than GHE just because it owns property in two counties, even though it generates electricity in only one county?

³⁷ RCW 84.40.030 provides that a recent sale of the subject property itself is evidence of the property’s fair market value. It states, in part, that the “true and fair value of real property for taxation purposes . . . shall be based upon . . . (1) Any sales of the property being appraised.” It follows that any such sale must be at arm’s length to be recognized.

(Invenergy Grays Harbor LLC). AR 820; CP06 92. IGH is a subsidiary of a privately held company, Invenergy LLC. *Id.* On the actual date of sale (March 24, 2005), the member interests in the limited liability company, then known as Duke Energy Grays Harbor, including its underlying assets (the subject property), were sold to IGH. *Id.*

These facts plainly do not make this a related party transaction. The uncontroverted testimony was that, “Duke Energy and Invenergy Grays Harbor LLC were unrelated parties” and the “purchase and sale transaction . . . was arm’s length.” AR 820; CP06 93. The County offered no evidence or testimony contrary to these undisputed facts and there was no other evidence before the BTA to refute this evidence. For this not to have been an arm’s-length transaction, Duke and Invenergy would have had to at least have been related parties. In fact, Duke and Invenergy were clearly unrelated parties.

The term “arm’s length transaction” is defined in the property tax regulations to mean “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.” WAC 458-14-005(2).³⁸ The facts do not

³⁸ The Ohio Supreme Court in Shiloh Automotive, Inc. v. Levin, 117 Ohio St.3d 4, 8, 881 N.E.2d 224 (2008), recently stated three “primary characteristics” for an arm’s length transaction: “(1) it is voluntary, (2) it generally takes place in an open market, and (3) the parties act in their own interests.”

demonstrate that Duke or IGH were under “duress” or “motivated by special purposes.” There is also no evidence that the parties had personal or economic relationships between them prior to this sale and the evidence presented showed they were both seeking to maximize their positions. Duke announced a divestiture of certain electric generating assets in early 2004 (AR 822; CP06 94) and later issued an offering statement or prospectus for the property (AR 499-502; CP06 212-240) and it took almost one year for Duke to accept an offer from IGH (AR 403-484; CP06 114-195). This transaction fell squarely under the regulation as an “arm’s length transaction.” WAC 458-14-005(2).

There are limited decisions on the arm’s length standard in Washington, but several rulings of the BTA itself are helpful. In San Juan County Assessor v. Bryan, Docket Nos. 57803-5 (2003), the BTA found that the sales in question were arm’s-length transactions because there was no business or personal relationship between the parties prior to or during the purchase negotiations, and there was no evidence of duress. These facts are present in the Duke-IGH sale, as well.

In Whatcom County Assessor v. Trillium Corporation, Docket Nos. 99-42 to 99-82; 99-209 to 99-252 (2001), the BTA ruled that the transaction was arm’s length because the parties were motivated by ordinary business considerations, and it was still an arm’s length

transaction even though done at a “somewhat low market price.” Again, these facts are present here, too.

More recently, in Washington Beef, Inc., v. County of Yakima, 143 Wash. App. 165, 168, 177 P.3d 162 (Div. 3, 2008), the court upheld the trial court’s finding that a transaction between Washington Beef and AgriBeef was not at market value because it was not an arm’s length transaction. The court deferred to the trial court’s findings regarding the transaction:

(1) Washington Beef was in distress at the time, (2) Washington and AgriBeef had been in partnership and debtor-creditor relationships during the marketing and sale of the plant, (3) the lawsuit challenging the tax assessments was pending during the marketing and sale, and (4) none of the debt-assumption that comprised most of the consideration for the sale was allocated to the plant.

(*Id.*, at 183).

In finding the transaction was not arm’s length, the trial court also concluded that Washington Beef did not make a vigorous attempt to market the property or reach out to the universe of buyers who would have been a good fit for Washington Beef. *Id.* at 169. Here, there was no evidence that Duke was in distress at the time of the sale to IGH. It is true that there were issues of overcapacity in the power generation industry, but Duke was a highly diversified, multi-billion dollar company that was apparently withstanding the economic down-turn. (Duke is still in business today, see www.duke-energy.com.) Duke and IGH had no prior

relationship and they were not in partnership. The marketing and sale of the property occurred over an approximately one-year time period, and Duke made a vigorous attempt to market the property. It put out an offering letter (AR 499-502; CP06 212-240) and waited nearly a whole year before entering into the PSA with IGH. These facts have all the earmarks of an arm's length transaction and the BTA was wrong to rule otherwise.

V.

CONCLUSION

To conclude, the common law holds GHE's buildings and power generation equipment to be personal property. Even if the common law rules were otherwise, the legislature has statutorily characterized the property of public utility -- electric light and power companies like GHE. Under RCW 84.12.280, GHE's land and buildings are real property and all remaining property -- principally power generation equipment -- is personal property. Once the property is properly characterized, Rule 342 determines what property may be assessed and taxed during the years in question.

The BTA wrongly determined that all of GHE's property was real. The trial court correctly reversed, but incorrectly remanded on the ground that the facts were not fully developed. This Court should reverse both the BTA and trial court and rule, as a matter of law, that GHE's power

generation equipment, and even the buildings under the facts of this case, are personal property under the common law, as the facts demonstrate and 100-plus years of decisions so clearly hold.

As to RCW 84.12, the BTA ignored this chapter's application to GHE's property, or perhaps the BTA's ruling, *sub silentio*, was that RCW 84.12 did not apply as suggested by the trial court. Either way, the BTA should be reversed on this issue as the plain and unambiguous language of RCW 84.12.200(4) and 84.12.280 apply to GHE's property. The trial court did acknowledge that a decision on RCW 84.12's application to GHE has to be made, but then refused to make it. The applicability of RCW 84.12 to GHE is a question of law this Court must make, regardless of what the BTA and trial court did below, and the proper ruling is that these statutes apply.

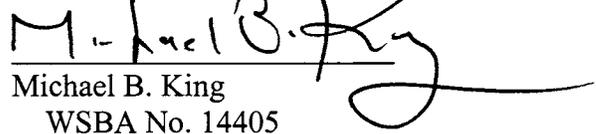
Finally, the BTA erroneously concluded that the sale of the member interests in the company, now known as GHE, from Duke to IGH was not arm's length. The BTA failed to apply its own precedents and the decisions of the appellate courts. If it had the BTA would have concluded that the sale was arm's length. This decision must likewise be reversed.

RESPECTFULLY SUBMITTED, this 18th day of June, 2008.



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STATE OF WASHINGTON

BY _____
DEPUTY

No. 37163-4-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

GRAYS HARBOR ENERGY LLC,

Plaintiff/Appellant

v.

GRAYS HARBOR COUNTY,

Defendant/Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Richard D. Hicks)

DECLARATION OF SERVICE

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I certify that on the date set forth below I served a copy of each of the following documents:

1. Brief Of Appellant;
2. Motion For Acceptance Of Overlength Brief; and
3. This Declaration of Service.

via United States Mail, postage prepaid, on the Respondent's counsel of record, as follows:

James G. Baker
Senior Deputy Prosecuting Attorney
Grays Harbor County Prosecuting Attorney's Office
102 W. Broadway, Room 102
Montesano, WA 98563

I certify under penalty of perjury pursuant to the laws of the state of Washington that the foregoing is true and correct.

DATED this 7th day of June, 2008.



Kara Harrington