COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

RCN BECO-COM, LLC	**v.**	**COMMISSIONER OF REVENUE**
		and
Docket No. F253495		**THE CITY OF NEWTON**

RCN BECO-COM, LLC	**v.**	**BOARD OF ASSESSORS OF THE CITY OF NEWTON**
Docket No. F257397		Promulgated: August 19, 2003

Docket No. F253495 is an appeal under the formal procedure pursuant to G.L. c. 58A, § 6, G.L. c. 59, § 39, and G.L. c. 58, § 2,[1] from the refusal of the Commissioner of Revenue ("Commissioner") to classify the appellant as a "telephone and telegraph" company and to centrally value its "machinery, poles, wires and underground conduits, wires and pipes" ("§ 39 property") under G.L. c. 59, § 39 for fiscal year 2000.

Docket No. F257397 is an appeal under the formal procedure pursuant to G.L. c. 59, §§ 64 and 65 from the

[1] The appellant's petition refers only to G.L. c. 59, §§ 39-41.

refusal of the Board of Assessors of the City of Newton ("Assessors") to abate personal property tax assessed under G.L. c. 59, §§ 18 and 38 for fiscal year 2000 upon certain personal property owned by the appellant and located in Newton.[2]

These related appeals were consolidated and heard by Commissioner Scharaffa who was joined by Chairman Burns and Commissioners Gorton, Egan, and Rose in deciding the appeals. In rendering its decision, the Appellate Tax Board ("Board") found and ruled that for fiscal year 2000:

(1) The appellant was subject to property tax on all its tangible personal property situated in Newton on January 1, 1999, pursuant to G.L. c. 59, § 18, clause 1;

(2) The appellant was entitled to have its "machinery, poles and wires and underground conduits, wires and pipes" valued by the appellee Commissioner pursuant to his obligation under G.L. c. 59, § 39 to value such property for "all telephone and telegraph companies;"

(3) Under G.L. c. 59, § 39, the appellant, as a telephone company, was entitled to central valuation for all such property which it used for telephone service, including so-called "shared property" used for telephone, cable television, and Internet and including all wires laid in or erected upon public ways or private property;

[2] For purposes of these appeals, the City of Newton, as Intervenor in RCN-BecoCom's appeal against the Commissioner and the Board of Assessors of the City of Newton, as appellee in RCN-BecoCom's appeal against the Assessors, are considered the same party, and are hereinafter referred to as simply "Assessors."

(4) The remainder of appellant's tangible personal property situated in Newton was subject to valuation and assessment of tax by the appellee Assessors pursuant to G.L. c. 59, §§ 18, 29 and 38; and

(5) Based on the parties' Statement of Agreed Facts – RE: Valuation and in accordance with the parties' agreement that the total valuation for all appellant's personal property located in Newton was in the amount of $3,331,600 as was assessed by the appellee Assessors, the appellant was not entitled to an abatement of tax nor was it subject to an additional assessment of tax under G.L. c. 59, § 39.

These findings of fact and report are made at the requests of the parties pursuant to G.L. c. 58A, § 13 and 8.31 CMR 1.32.

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Daniel A. Shapiro, Esq. and *Lutof G. Awdeh*, Esq. for the appellee Commissioner.

Richard G. Chmielinski, Esq. and *Catherine A. Lester Salchert,* Esq. for the appellee Assessors.

FINDINGS OF FACT AND REPORT

On the basis of a Statement of Agreed Facts, Amendment to Statement of Agreed Facts, Statement of Agreed Facts – RE: Valuation, testimony and exhibits, and a view of the

subject property, the Board made the following findings of fact.

Introduction

At all relevant times, RCN-BecoCom, LLC ("RCN-BecoCom" or "the Company") was a Massachusetts Limited Liability Company ("LLC") that provided cable television, telephone communications, and Internet access to Massachusetts homes and businesses. RCN-BecoCom's members were RCN Telecom of Massachusetts, Inc., a Massachusetts corporation, which owned 51% of RCN-BecoCom, and BecoCom, Inc., a Massachusetts corporation, which owned 49% of RCN-BecoCom. RCN Telecom of Massachusetts, Inc. was a subsidiary of RCN Corporation. BecoCom, Inc. was a subsidiary of Boston Edison Company (now known as Nstar, Inc.). The Company was originally formed to qualify as a competitive local exchange carrier ("CLEC") under the 1996 Telecommunications Act, 47 U.S.C. §§ 251-53 ("the Act"), to compete with the established providers of these services in Massachusetts. The Act required the local exchange carriers ("LECs"), who were the established telephone service providers, to enter into interconnection agreements with the CLECs to allow them to tie their own network into the LECs' already existing broader telephony network.

The Company submitted regulatory filings to the Federal Communications Commission ("FCC") and the Massachusetts Department of Telecommunication and Energy ("DTE") with respect to its telephone and other services. As of January 1, 1999, the Company was offering "on net" service in four communities and "off net" service in as many as two hundred communities.[3] The Company was expanding and planned to continue to expand its on net service until all of its off net customers were on net.

The Company owned the so-called "Mega-Pop" facility in South Boston, which contained the necessary equipment and connections to process telephone, Internet access, and cable television signals and communications for transportation along a fiber optic network, called the backbone. The backbone transported these signals and communications to community-based Hubs. The Hubs distributed the signals and communications to the Company's customers over the local portion of the backbone and then the drop lines that run from the telephone poles supporting the backbone to the outside of the customer's home or building housing the customer's business.

[3] When the Company provided service that ran wholly through its lines and facilities, it was known as "on net" service. When it provided service that ran partially through a competitor's lines or facilities, it was termed "off net" service.

The Commissioner's Bureau of Local Assessment ("BLA") annually provided advance notice, but no form return, to "telephone and telegraph companies" that had previously filed for central valuation under G.L. c. 59, § 39 ("Section 39" or "§ 39"). The purpose of the notice was to notify telephone and telegraph companies that had previously filed that the filing information for the upcoming fiscal year was due on March 1st. BLA reviewed the information supplied and applied depreciation percentages to cost values to determine the property's value. On or about the May 15th statutory deadline, BLA provided the Commissioner with recommended valuations, which were then summarized in a booklet that the Commissioner issued to the affected companies and communities for the assessment of personal property taxes.

Jurisdiction

On February 23, 1999, at the request of RCN-BecoCom's representatives, the Chief of BLA faxed correspondence dated February 1, 1999 to the Company about the filing of returns by telephone and telegraph companies for fiscal year 2000 pursuant to G.L. c. 59, § 41 ("§ 41"). The Commissioner had not as yet developed form returns or

written guidelines for completing them.[4] The Commissioner's practice, at the time, was to accept the information as submitted by the company. RCN-BecoCom obtained an extension of the March 1, 1999 deadline for filing the fiscal year 2000 return until March 15, 1999. By correspondence dated March 15, 1999, RCN-BecoCom submitted relevant information to BLA. On March 23, 1999 and again on April 20, 1999, RCN-BecoCom made additional submissions to BLA. RCN-BecoCom's filings under § 41 were more comprehensive than any of the other companies that filed under § 41. The return that the Commissioner developed in February 2001 for use in fiscal year 2002 was based in part on RCN-BecoCom's submissions. By letter dated May 15, 1999, a Saturday, the Commissioner's Deputy Commissioner of the Division of Local Services informed RCN-BecoCom that the Company did "not qualify for classification as a telephone and telegraph company" under § 39 and the Commissioner, therefore, declined to centrally value its property. May 15th was the statutory deadline for the Commissioner to certify and determine values under § 39. Through a compilation dated May 15, 1999, BLA provided the valuations of the telephone and telegraph companies for

[4] In February 2001, during the pendency of these appeals, the Commissioner first issued State Form 5941, for fiscal year 2002, as the return of personal property of telephone or telegraph companies, under § 41, subject to valuation by the Commissioner under § 39.

Newton. On the basis of these facts, the Board inferred that the letter and list of valuations, while dated on the statutory deadline of Saturday, May 15th, were more probably mailed or sent out on or after the next business day, which was Monday, May 17th. On June 15, 1999, RCN-BecoCom filed a petition with the Board appealing the Commissioner's refusal to classify, consider or treat the Company as a telephone or telegraph company under § 39 and to centrally value its § 39 property. On the basis of these facts and for the reasons set forth in the Opinion below, the Board found that it had jurisdiction, under G.L. c. 59, § 39 and G.L. c. 58, § 2, over RCN-BecoCom's appeal of the Commissioner's refusal to classify it as a telephone or telegraph company and centrally value its § 39 property. On March 6, 2000, the Board allowed the City of Newton's motion to intervene in this appeal.

On March 31, 1999, pursuant to G.L. c. 59, § 29, RCN-BecoCom submitted a Form of List for fiscal year 2000 to the Assessors. Information on the form indicated that "[m]achinery, poles, underground conduits, wires and pipes returned under Chapter 59, Section 41, need not be included in this list." G.L. c. 59, § 41 provides in pertinent part that: "property returned to the commissioner as herein provided need not be included in the list required to be

filed by a telephone or telegraph company under section twenty-nine." RCN-BecoCom listed zero values for the § 39 property for which the Company had sought central valuation. On May 21, 1999, having received the Commissioner's letter refusing to classify the Company as a telephone company and centrally value its § 39 property, RCN-BecoCom forwarded an amended Form of List with values for all of its personal property in Newton for fiscal year 2000 to the Assessors. Based on the values contained in the Form of List, the Assessors assessed personal property taxes in the amount of $76,526.85, which RCN-BecoCom timely paid in quarterly installments. On February 1, 2000, RCN-BecoCom timely filed an application for abatement with the Assessors, which was denied on March 20, 2000. On June 20, 2000, RCN-BecoCom then seasonably filed its petition appealing the Assessors' denial with this Board. On the basis of these facts, the Board found that it had jurisdiction, under G.L. c. 59, §§ 64 and 65, over RCN-BecoCom's appeal of the Assessors' valuation of its personal property in Newton.

By Order dated September 27, 2000, the Board consolidated these two related appeals but bifurcated their trial addressing first the issue of whether RCN-BecoCom was entitled to have its "machinery, poles, wires and

underground conduits, wires and pipes" centrally valued by the Commissioner pursuant to his obligation under G.L. c. 59, § 39 to value such property for "all telephone and telegraph companies." The second portion of the trial addressed the issues relating to the valuation, assessment, and taxation of RCN-BecoCom's personal property located in Newton.

Standard of Review

The Commissioner contended that the Board was not empowered to conduct a *de novo* review of his determination that RCN-BecoCom was not a telephone or telegraph company under § 39. Instead the Commissioner maintained that the Board should uphold his determination if the Board found that it was reasonable. For the reasons set forth in the Opinion below, the Board found that it was authorized to conduct a *de novo* review of the Commissioner's determination or classification under § 39.

Burden of Proof

The Assessors contended that RCN-BecoCom bore a special burden under § 39, which they compared to exemption statutes, to demonstrate that it was a telephone or telegraph company. The Board found that their comparison was misplaced because § 39 more closely resembles a remedial and not an exemption statute. The statute was

enacted to alleviate inconsistent valuations by the various local boards of assessors of certain property of telephone and telegraph companies; it was not enacted to exempt the companies' property from taxation. Accordingly, and for the reasons set forth in the Opinion below, the Board found that RCN-BecoCom did not bear a special burden to prove that it was a telephone or telegraph company under § 39.

Classification

For fiscal year 2000, the Company owned or used property consistent with telephone company status under § 39. Its Mega-Pop facility in South Boston supported all three services that the Company offered through both dedicated and shared equipment and property. The Mega-Pop facility used a Lucent Technology 5ESS 2000 telephone switch to create dial tone, to receive incoming telephonic signals, and to route and terminate those signals. It was similar to the telephone switch that other competitors of the Company used. This switch, which occupied five bays of interconnected electronic equipment, was by far the most expensive piece of equipment maintained at the Mega-Pop facility. The Mega-Pop also contained significant other property dedicated solely to telephone service.

After the Internet, telephony or cable signal had been processed at the Mega-Pop, it was transported across the

fiber optic backbone to the Company's Hubs that were located in each community where it provided on-net service.[5] The Company did not own the backbone. It was owned by one of the members of RCN-BecoCom, BecoCom, Inc. The Company's sixty-year right to use the fiber optic backbone was governed by the terms of an agreement between the Company and BecoCom, Inc., called "The Construction and Indefeasible Right to Use Agreement." At the Hub, video and telephonic equipment combined the signals for distribution along the local portion of the backbone to optical receivers that then transformed the signal to travel on coaxial cable. The optical receivers were located on telephone poles within 900 feet of all homes. The signals were then sent to customers over line drops that connected from the telephone pole to a Residential Service Unit ("RSU") located on the outside of customers' homes or businesses. At the RSU, the telephone line was separated out on twisted copper lines. The Company owned the equipment in the Mega-Pop, the equipment in the Hubs, the optical nodes on the lines, and the coaxial lines, equipment and other property used to deliver its services from the point of the line drop on the telephone pole to

[5] Telephone, cable television, and Internet data signals were transported along separate fiber-optic strands within the same fiber optic cable.

the customers' equipment (i.e. their telephone, television, or computer).

RCN-BecoCom used electricity at the MegaPop facility to manipulate incoming and outgoing data between the fiber-optic cable and the satellite. The Company also used electricity to run many of its components. RCN-BecoCom owned the back-up electrical generation equipment that was attached to its Hub in Newton.

At all material times, RCN-BecoCom was a CLEC. As a CLEC, RCN-BecoCom entered into an interconnection agreement with New England Telephone and Telegraph (now Verizon), which provided the Company with access to the worldwide telephony network. By connecting its system to Verizon's and using its competitors' telephony networks and by purchasing service in bulk from competitors and then reselling it to its customers, the Company offered its customers worldwide telephone service in addition to its other services. RCN-BecoCom's competitors who were classified as telephone and telegraph companies by the Commissioner were either providing or seeking to provide the same basic services as the Company.

Neither § 39 nor its related sections contain a definition for "telephone" or "telegraph" companies. According to the American Heritage Dictionary of the

English Language, the word "telephone" is derived from the combination of the Greek words *tele-* meaning "afar, far off" and *–phone* meaning "sound, voice." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). The word was used for an "acoustic apparatus" until 1876 when Alexander Graham Bell used the word for his invention. ***Id.*** The American Heritage Dictionary, Second College Edition defines a "telephone" as "[a]n instrument that directly modulates carrier waves with voice or other acoustic source signals to be transmitted to remote locations and that directly reconverts received waves into audible signals." AMERICAN HERITAGE DICTIONARY (2nd college ed. 1982). Ballentine's Law Dictionary describes a "telephone" as "[a]n instrument for transmitting or receiving articulate speech electronically" or "[a]n apparatus for the transmission of human speech or other sounds over distances greater than the ordinary limits of audibility." BALLENTINE'S LAW DICTIONARY (3rd ed. 1969). It defines a "telephone company" as a "company . . . engaged in the business of furnishing for compensation the means of communication by telephone and rendering services allied with such communication business." ***Id.***

The word "telegraph" is derived from the Greek *tele-* meaning "far" and *–graphein* meaning "to write." Telegraph.

ENCYCLOPEDIA BRITANNICA 2003 <http://www.Britannica.com>. The term was first used at the end of the eighteenth century to describe an optical semaphore system developed in France. The telegraph has evolved over the years and currently describes the electric telegraph developed in the nineteenth century. *See* ***id.*** The telegraph allows transmission over distance via wire of information by coded signal. *See* ***id.***

The term "telephone" has been used and described in other Massachusetts statutes and administrative promulgations. Under G.L. c. 166, § 15B, a telephone company is organized "for the transmission of intelligence by electricity or by telephone, whether by electricity or otherwise." DTE includes, in its annual return form, the statutory description of a telephone or telegraph company as "every person, partnership, association and corporation engaged in the business of the transmission of intelligence by electricity." G.L. c. 166, § 11.

According to the plain meaning and common usage of the term "telephone" and "telephone company," and notwithstanding RCN-BecoCom's use of some property for several services and other property for only cable television services, the Board found that the Company owned

or used property consistent with classification as a telephone company under § 39.

From a regulatory standpoint, the Company submitted filings and was granted rights as a telephone company. For example, the Company filed an operating Tariff with DTE. Telephone and telegraph companies operating in Massachusetts were required to file Tariffs with DTE. The Tariff filed by the Company identified all of the telephone services that it offered in the Commonwealth. Under the Tariff, the Company was required to offer 411 or directory assistance, 911 or emergency service, operator service, and other such services customarily provided by telephone companies. Any revisions to the Tariff had to be approved by DTE. The Company also submitted Annual Telephone Returns to DTE in accordance with G.L. c. 166, § 11.[6] In addition to telephone service, the Company was authorized by the FCC to offer cable television service to its customers. As a cable television service provider, it submitted cable-related filings to DTE. The Board found that notwithstanding the Company's filings with cable

[6] At all relevant times, G.L. c. 166, § 11 required telephone and telegraph companies doing business in Massachusetts to file annual returns. "[E]very person, partnership, association and corporation engaged in the business of the transmission of intelligence by electricity" were considered telephone and telegraph companies for these purposes.

television regulators, its filings with telephone regulators was consistent with classification as a telephone company under § 39.

Quantitative analyses of the revenues generated, connections, and resources allocated to the three basic services offered by the Company in Massachusetts -- telephone, cable television, and Internet access -- supported a determination that the Company was, at least substantially, a telephone company under § 39. With respect to revenue, the Company's total revenues in Massachusetts for 1998, the relevant tax year for the January 1, 1999 assessment date for fiscal year 2000, were $16,443,760. Cable revenue accounted for only $1,788,300 or slightly less than eleven percent of that. Telephony revenue, including off net Internet service provided through telephone line access,[7] accounted for $14,630,578 or almost eighty-nine percent of the revenue for 1998. If the off net Internet service were excluded from telephony revenue, telephone service still accounted for almost sixty-five percent of total revenue.

For 1999, the Company's total revenue was $28,637,746. Of that amount, $4,281,674 or almost fifteen percent was

[7] As RCN-BecoCom analogized in its brief, dial-up Internet access is essentially equivalent to the transmission of information via a facsimile machine and therefore appropriately included in telephone service.

attributable to cable revenue while $23,465,849 or almost eighty-two percent was telephony revenue, including dial-up Internet. If the off net Internet service were excluded from telephony revenue, telephone service still constituted over fifty-eight percent of total revenue.

For 1998, the Company had 59,210 total subscriber connections. Of these, 8,249 or approximately fourteen percent were cable connections and 50,524 or slightly over eighty-five percent were telephony connections, including residential off net Internet connections. If the off net Internet service were excluded from telephony connections, telephone connections still accounted for thirty-five percent of the Company's total connections. For 1999, cable connections accounted for twenty percent of the total subscriber connections while telephony connections accounted for seventy-five percent. If the off net Internet service were excluded from telephone connections, the connections still accounted for approximately twenty-eight percent of the Company's total connections.

The Company's allocation of its employees and company property to the three basic services that it provided also supported the classification of the Company as a telephone company under § 39. As of January 1, 1999, the Company employed a total of 192 individuals. Of those, only six

were dedicated exclusively to cable television services, while twenty-four worked exclusively on telephone service. The total number of employees who worked at least to some extent on telephone service was ninety-five percent of the total number of the Company's employees. The Company's telephone service employees performed all of the customary functions of telephone service employees.[8]

With respect to the Company's use of its property, most of it, including the Mega-Pop facility, the backbone,[9] and the Hubs, was shared by the three basic services that the Company offered. Of the property that was not shared, more property, in terms of quantity and value, was dedicated exclusively to telephone service than to cable television service. The equipment contained in the Mega-Pop facility was an example of this distinction. Evidence indicated that the value of the Company's equipment statewide dedicated to cable television and to telephone service was $7,417,919 and $13,317,474, respectively. Moreover, over eighty percent of the Company's overall property was used to some extent in the provision of telephone service.

[8] Those duties included, among others, responding to customer complaints about service interruptions, fielding billing inquiries from customers, processing directory assistance and emergency calls, servicing problems with the physical network, and responding to governmental authorities' requests for wiretaps or regulatory submissions.
[9] The Company owned a sixty-year indefeasible right to use the backbone.

The Assessors contended that because RCN-BecoCom did not operate like a traditional telephone company and did not utilize traditional telephone technology, it was not a telephone or telegraph company under § 39. The Board found, however, that RCN-BecoCom was substantially a telephone company under § 39, whether including its dial-up Internet access or not. Therefore, the fact that RCN-BecoCom offered other services and utilized new technology to provide its telephone services was not determinative.

On the basis of these facts, the Board found that the Company used property, provided services, submitted regulatory filings, was granted rights, generated revenue, maintained connections, and allocated resources consistent with classification as a telephone company under § 39. The mere fact that the Company provided other services and used progressive technology did not defeat its status as a telephone company under § 39 where its telephone service constituted a substantial part of its business. Accordingly, and for the reasons set forth in the Opinion below, the Board found that, for fiscal year 2000, the Company was a telephone company and entitled to central valuation under § 39.

Valuation, Assessment and Taxation

As an LLC, RCN-BecoCom was treated as a partnership for federal income tax purposes, and for calendar year 1998, it filed a U.S. Partnership Return of Income. It also filed a 1998 Massachusetts Department of Revenue Form 3 "Partnership Return of Income."

RCN-BecoCom submitted lists of property to the Commissioner and to the Assessors indicating its valuation for its property in Newton in the amount of $3,572,516.72 for fiscal year 2000. The Assessors valued and assessed the Company for personal property in Newton in the amount of $3,331,600 for fiscal year 2000. Pursuant to the Board's Order under Rule 1.33,[10] the parties agreed that the value of the Company's personal property in Newton for fiscal year 2000 was the assessed amount, $3,331,600. That amount included machinery valued at $3,267,788, wires valued at $10,520, underground conduits valued at $22,947, and a gas-fired generator, located at the Hub in Newton to provide back-up power to the facility, valued at $30,345. The parties also agreed that the term "shared property" referred to property used to support telephone service, cable television (video) service, and Internet access. Because of its architecture and the nature of fiber optics,

[10] 831 CMR 1.33.

much of the system used by RCN-BecoCom could not be segregated into discrete functions. The parties valued the shared property in Newton (not including the back-up generator) at $2,836,793 for fiscal year 2000. They also valued the property dedicated solely to telephone service at $28,963, the property dedicated solely to cable television/video service at $189,811, and the property used solely for Internet access at $245,688.

Historically, when centrally valuing the § 39 property of telephone and telegraph companies, the Commissioner used a very simple mechanical process. As part of that process, the Commissioner centrally valued only the generators as "machinery used in manufacture" of telephone companies. The Commissioner applied the corporate exemption of G.L. c. 59, § 5, clause 16, ¶ 1, irrespective of how the business entity was organized or held.[11] In February 2001, following the initial hearing at the Board on the Company's status as a telephone company under § 39, the Commissioner promulgated Form 5941 for telephone and telegraph companies to use as their return for fiscal year 2002 under § 39. This form formalized the information required for a return,

[11] Clause 16, ¶ 1 exempts all property owned by most corporations except: "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water."

and it requested, for the first time, information on how a business entity was organized and held.

On the basis of these facts and for the reasons set forth in the Opinion below, the Board found that the Company was entitled to central valuation under § 39 for its dedicated telephone service property and for its so-called "shared property" used for telephone, cable television, and Internet access, and including all wires laid in or erected upon public or private ways. The Board also found that the "shared property," while multifunctional and high capacity, was still necessary for the Company's telephone service functionality. Contrary to the Commissioner's prior practice, the Board found that RCN-BecoCom, as an LLC, was not entitled to the corporate exemption under G.L. c. 59, § 5, clause 16, ¶ 1.

The Board further found that the Company was subject to property tax for fiscal year 2000 on all its tangible personal property situated in Newton, pursuant to G.L.c. 59, § 18, clause 1. The Company's property that should have been centrally valued and certified by the Commissioner to the Assessors was subject to assessment of tax by the Assessors for fiscal year 2000 pursuant to

G.L. c. 59, §§ 18 and 39.[12] The portion of the Company's tangible personal property situated in Newton that was not subject to central valuation by the Commissioner was nevertheless subject to valuation by the Assessors for fiscal year 2000 pursuant to G.L. c. 59, §§ 29 and 38 and to assessment of tax under § 18. Based on the parties' agreement that the total value for all of the Company's personal property located in Newton for fiscal year 2000 was $3,331,600, the Board found that the Company was not entitled to abatement nor was it subject to an additional assessment of tax under § 39.

[12] G.L. c. 59, § 39 provides in pertinent part:

> The board of assessors shall assess the machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies as certified and at the value determined by the commissioner of revenue under this section; provided, however, that in the event of a final decision by the appellate tax board or of the supreme judicial court under the preceding paragraph establishing a different valuation, the assessors shall grant an abatement, or assess and commit to the collector with their warrant for collection an additional tax, as the case may be, to conform with the valuation so established by such final decision. Assessment pursuant to this paragraph shall be deemed to be a full compliance with the oath of office of each assessor and a full performance of his official duty with relation to the assessment of such property, except as provided in the following section.

OPINION

Jurisdiction

G.L. c. 58A, § 6 grants the Board "jurisdiction to decide appeals under the provisions of" several sections and chapters of the Massachusetts General Laws including § 39 of chapter 59.[13] Under § 39, the Board has jurisdiction over appeals relating to the Commissioner's central valuation of certain telephone and telegraph property. Section 39 provides in pertinent part:

> The valuation at which the machinery, poles, wires and underground conduits, wires and pipes of all telephone and telegraph companies shall be assessed by the assessors of the respective cities and towns where such property is subject to taxation shall be determined annually by the commissioner of revenue, subject to appeal to the appellate tax board, as hereinafter provided.

Section 39 goes on to provide that "[e]very owner and board of assessors to whom any such valuation shall have been so certified may, on or before the fifteenth day of June then

[13] G.L. c. 58A, § 6 provides in pertinent part:

> The board shall have jurisdiction to decide appeals under the provisions of: section 42E of chapter 40; sections 2 and 14 of chapter 58; clauses Seventeenth and Twenty-second of section 5 of chapter 59; sections 7, 7A, 39, 64, 65, 65B, 73 and 81 of said chapter 59; section 2 of chapter 60A, section 14 of chapter 61B, sections 39, 67 and 68 of chapter 62C; section 2 of chapter 63; section 26 of chapter 65; section 4 of chapter 65A; any other provision of law wherein such jurisdiction is or may be expressly conferred.

next ensuing, appeal to the appellate tax board from such valuation."

Under G.L. c. 59, § 41, telephone and telegraph companies are required to submit their returns to the Commissioner by March 1st. Under § 39, the Commissioner is required to determine and certify values for the property to the companies and affected local assessors by May 15th. The companies and assessors have until June 15th to appeal to the Board.

In the present matter, the Commissioner and the Assessors contended that the Board did not have jurisdiction, under § 39, to hear appeals from the Commissioner's failure to classify, consider, or treat a company as a telephone or telegraph company for purposes of § 39. They argued that the Board's jurisdictional grant under § 39 is limited to disputes over valuation. Accordingly, because the Commissioner did not value RCN-BecoCom's property, but instead failed to classify, consider or treat it as a telephone or telegraph company, they contended that the Board did not have jurisdiction.

The plain language of § 6 of chapter 58A and § 39 of chapter 59, particularly when read together, supports the Board's jurisdiction over RCN-BecoCom's appeal against the Commissioner. Statutes, and in particular taxing statutes,

should be construed according to their plain meaning. ***Commissioner of Revenue v. AMIWoodbroke, Inc.***, 418 Mass. 92, 94 (1994). Under § 6, the Board is granted a general right of jurisdiction for appeals under § 39. Section 6 provides in pertinent part that the "board shall have jurisdiction to decide appeals under the provisions of . . . section thirty-nine . . . of . . . chapter fifty-nine." There is nothing in § 6 which restricts the issues that the Board may consider in an appeal arising under § 39. Moreover, § 39 mandates the Commissioner to value certain property of "all" telephone companies "subject to appeal to the appellate tax board." This provision does not contain any limitations on the type of issues arising from the Commissioner's administration of § 39 that may be appealed to the Board, nor does it contain a grant of jurisdiction concerning any issue to a court or tribunal other than the Board.

Furthermore, if § 39 were limited to just appeals of valuation as the Commissioner and Assessors contend, then appeals from the Commissioner's failure to classify, consider or treat a company as a telephone or telegraph company presumably would have to be filed in the courts. The Board does not believe that the Legislature intended to create such an anomalous and fractured result, particularly

where § 39 was adopted to remedy the inconsistent valuations that local assessors placed on § 39 property and to provide necessary consistency and uniformity. *See* ***Assessors of Springfield v. New England Telephone & Telegraph Company***, 330 Mass. 198, 202 (1953) and ***Commissioner of Corporations & Taxation v. Assessors of Springfield***, 330 Mass. 433, 436 (1953). A remedial statute should be liberally construed to effectuate its purpose. *See* ***Walter Kidde & Company, Inc. v. Commissioner of Revenue***, 1 Mass. App. Tax Bd. Rep. 208, 211 (1982), *aff'd*, 389 Mass. 577 (1983). There is no indication that §§ 39-41 were enacted to alter the basic statutory appeal structure which is discussed in detail below. The ability to challenge value under § 39 must of necessity include the ability to challenge the Commissioner's failure to centrally value, particularly where § 39 does not provide for a separate and distinct appeal to another forum for such failure.

The Board's interpretation here also furthers the overall statutory scheme under which the Commissioner values § 39 property, subject to appeal to this Board, and the local assessors value the remaining personal property and then assess a tax on all of the property, subject to appeal to this Board. In this context, appeals of

valuation and assessment issues are clearly and indisputably brought before this Board under § 39 and §§ 64 and 65. Logic, therefore, dictates that the Legislature intended that the Board have jurisdiction over *any* appeals relating to personal property valuation, classification, and taxation by the Commissioner or the Assessors. This approach is consistent with the Legislature's desire to have local property tax issues adjudicated in one forum, which possesses particular expertise in that area. *See* ***French v. Board of Assessors of Boston***, 383 Mass. 481, 482 (1981) ("[w]e have long recognized the board's expertise in tax matters"); ***Koch v. Commissioner of Revenue***, 416 Mass. 540, 555 (1993) ("[i]n reviewing mixed questions of fact and law, the board's expertise in tax matters must be recognized"). Accordingly, § 39 provides the Board with an unconditional grant of jurisdiction to hear and decide appeals under § 39 including those relating to the Commissioner's failure to classify, consider, or treat a company as a telephone or telegraph company for purposes of that section and central valuation.

In addition, the Legislature has recognized in other statutory sections, including G.L. c. 58, § 2, that the Board is the appropriate forum to review the Commissioner's classifications for purposes relating to taxing statutes.

Under G.L. c. 58, § 2, "*any* person aggrieved by *any* classification made by the commissioner under *any* provision of chapter[] fifty-nine" may "on or before April thirtieth of said year or the thirtieth day after such list is sent out by the commissioner, whichever is later" appeal to the Board (emphasis supplied). This general and unconditional grant of jurisdiction over appeals from "any classification" or decision made by the Commissioner under chapter 59 clearly embraces appeals from the Commissioner's failure to classify, consider, or treat a company as a telephone and telegraph company under § 39. While the Commissioner argued that the May 15th deadline for the Commissioner's determination and certification of values for certain property of telephone and telegraph companies under § 39 does not comport with the April 30th date for appeals under § 2 of chapter 58, the additional language extending that § 2 appeal deadline to the "thirtieth day after such list is sent out by the commissioner" does comport.

In addition, the Commissioner's hyper-technical argument that he is not statutorily "classifying" companies as telephone and telegraph companies under § 39 of chapter 59, but merely characterizing or designating them as such for valuation purposes, is a distinction without meaning

for § 2 appeal purposes. The term "any classification" as used in § 2 has a broader and less technical meaning than that proposed by the Commissioner. "'A statute's words must be accorded their plain and ordinary meaning.'" ***Tesson v. Commissioner of Transitional Assistance***, 41 Mass. App. Ct. 479, 482 (1996) (quoting ***A. Belanger & Sons v. Joseph Concannon Corp.***, 333 Mass. 22, 25 (1955)).

Under § 2, the Company had thirty days from the time the Commissioner "sent out" the list and letter under § 39 to appeal to the Board. The list and the letter were both dated May 15th, a Saturday and the statutory deadline. The Board found that these documents were more likely mailed or "sent out" on the next business day, which was Monday, May 17th. The Commissioner offered no evidence as to the actual date of mailing, and there was nothing in the record to suggest that the list and letter were mailed on a date when the government office presumably was closed. Accordingly, the Board found and ruled that the relevant appeal was timely filed under § 2 on June 15th.

The Commissioner and Assessors also argued that the "return" that RCN-BecoCom filed with the Commissioner under § 41 of chapter 59 was insufficient and untimely and therefore deprived the Board of jurisdiction over RCN-BecoCom's appeal against the Commissioner. The Board

disagreed. Under § 41 of chapter 59, the telephone and telegraph company whose property is being centrally valued in accordance with § 39 "shall annually, on or before . . . March first, make a return to the commissioner . . . . The return shall be in the form and detail prescribed by the commissioner and shall contain all information which he shall consider necessary to enable him to make valuations required by section thirty-nine."

There is no dispute that the Commissioner had neither prescribed a form nor promulgated regulations nor issued formal guidelines for complying with § 41. The Commissioner merely notified companies whose property previously had been centrally valued to provide information for the upcoming year. In the instant matter, RCN-BecoCom belatedly received such notification from the Commissioner and only after contacting the Commissioner with a timely inquiry. The Commissioner granted RCN-BecoCom a written extension of time to submit information under § 41. The Company then provided relevant information in a reasonably timely manner. In addition, RCN-BecoCom promptly provided further responses to requests from the Commissioner for additional information. Accordingly, RCN-BecoCom's initial filing was, under the circumstances, both sufficient and

timely, and its subsequent supplementations related back to the original filing.

Lastly, the Board noted that G.L. c. 59, § 42 ("§ 42") provides that in the event a telephone or telegraph company "fail[s] to make the return required by [§ 41] the commissioner shall estimate the value of the property of the [company] according to his best information and belief." In other words, the Commissioner has an affirmative duty to value telephone or telegraph companies' § 39 property even if the return is inadequate for the Commissioner's purposes.

On the basis of these facts and analyses, the Board found and ruled that it had jurisdiction over these consolidated appeals.

Standard of Review

The Commissioner contended that the Board was not empowered to conduct a *de novo* review of his determination that RCN-BecoCom's was not a telephone or telegraph company under § 39, and, therefore, was not entitled to have its "machinery, poles, wires and underground conduits, wires and pipes" centrally valued. Instead the Commissioner maintained that the Board should uphold his determination if the Board simply found that it was reasonable. The Board disagreed.

By statute, taxpayers aggrieved by determinations, assessments, or other actions by the Commissioner may appeal to the Board. *See, e.g.,* G.L. c. 58, § 2; G.L. c. 58A, § 6; and *cf.* G.L. c. 62C, § 39. As authorized by statutory language and precedent, the Board conducts a *de novo* review of the Commissioner's actions and the issues raised in the appeal. As articulated in ***Commissioner of Corporations and Taxation v. J.G. McCrory Company***, 280 Mass. 273 (1932):

> The jurisdiction of the Board is to "decide appeals" permissible under numerous provisions of the tax laws . . . . The word "appeal" in our statutes usually has been interpreted to mean a full new trial or an entire rehearing upon all matters of fact and questions of law. It is used in contrast to the word "review" which signifies a reexamination of proceedings already had . . . . It follows that the board was authorized to retry every issue raised by the petition and answer filed with it.

Id. at 277; *see also* ***Commissioner of Revenue v. Exxon Corporation***, 407 Mass. 17 (1990); ***Liberty Life Assurance Company of Boston v. State Tax Commission***, 374 Mass. 25 (1977). Accordingly, unless statutorily directed otherwise, the Board is not bound by the Commissioner's actions or a taxpayer's prior administrative pleadings. ***Exxon Corp.***, 407 Mass. at 19-21.

The Commissioner essentially relied on two cases, ***Board of Assessors of Sandwich v. Commissioner of Revenue***,

393 Mass. 580 (1984) (***"Sandwich II"***) and ***Commissioner of Revenue v. Board of Assessors of Sandwich***, 405 Mass. 307 (1989) (***"Sandwich III"***), to support his contention that a *de novo* review of his determination regarding RCN-BecoCom's status under § 39 was inappropriate.[14] ***Sandwich II and III*** involved appeals under G.L. c. 58, §§ 13 and 14 where the Commissioner valued state-owned lands for reimbursements in lieu of taxes to the communities where the land was located. In those two cases, the Court held that the particular language in § 14 required the Board to defer to the Commissioner's valuation, unless it first found that the Commissioner failed to comply with § 13.

Similarly, under language in § 39 here, the Board in *valuation appeals* must first find that "the value of the [property] is substantially higher or substantially lower" than the Commissioner's determination, before it can substitute its determination of value for the Commissioner's. *See* ***Sandwich II***, 393 Mass. at 586. The statutory language, however, does not extend this requirement to *classification appeals* under § 39, and there is no such limitation contained in the language in

[14] These two cases are designated ***Sandwich II*** and ***Sandwich III*** in deference to ***Assessors of Sandwich v. Commissioner of Revenue***, 382 Mass. 689 (1981), which the Supreme Judicial Court refers to as ***Sandwich I*** (in ***Sandwich II*** above). ***Sandwich I*** was not cited by the Commissioner here.

G.L. c. 58, § 2. Accordingly, the Board found that, absent specific statutory or Court directive, this exception to the general rule of *de novo* review did not apply to classification or failure-to-centrally-value appeals brought under either of these sections.

Burden of Proof

The Assessors also contended that RCN-BecoCom bore a special burden under § 39, as in exemption statutes, to prove that it was a telephone or telegraph company. Once again, the Board disagreed.

As the Board found, § 39 more closely resembles a remedial and not an exemption statute. The statute was enacted to eliminate inconsistent valuations of telephone and telegraph companies' § 39 property; it was not enacted to exempt this property from taxation. *See* ***Assessors of Springfield v. New England Telephone & Telegraph Co.***, 330 Mass. at 202 (1953) ("It cannot be doubted that [§ 39] was intended to adopt the recommendation of the tax commissioner" to centrally value certain property of telephone and telegraph companies to rectify "'inequality in standards of valuation'").[15] Remedial statutes should be fairly applied to achieve their goals. "The statutory

[15] The Court was referring to the 1916 Report of the Tax Commissioner, pages 43-44.

implementation of such a legislative purpose should be liberally construed in order that the legislature's goal will come to fruition." ***Walter Kidde & Company***, 1 Mass. App. Tax Bd. Rep. 208, 211, *aff'd,* 389 Mass. 577 (1982) (citations omitted). Accordingly, the Board ruled that RCN-BecoCom did not have a special burden to demonstrate that it was entitled to classification as a telephone or telegraph company under § 39. Notwithstanding this ruling, the Board also found and ruled that even if such a burden existed in these appeals, RCN-BecoCom met it. Given the Board's findings regarding the substantiality of RCN-BecoCom's telephone services and its treatment as a telephone company by regulators and the public, it would be unreasonable to deny the Company status as a telephone company under § 39.

Classification

Prior to the adoption of Section 39, local assessors were responsible for valuing all of the personal property of telephone and telegraph companies. In the Tax Commissioner's view, the assessors "appli[ed] as many standards of judgment as there were cities or towns" resulting in no "fair value of the property." 1916 Report of the Tax Commissioner 43-44. Section 39 was adopted to remedy the inconsistent valuations that local assessors

placed on, what is now, § 39 property and to provide necessary consistency and uniformity. *See* ***Assessors of Springfield v. New England Telephone & Telegraph Company***, 330 Mass. at 202 and ***Commissioner of Corporations & Taxation v. Assessors of Springfield***, 330 Mass. 433, 436 (1953). Accordingly, § 39 is remedial in nature and should be construed broadly to provide redress for the evils that it was enacted to remedy. *See* ***Walter Kidde***, 1 Mass. App. Tax Bd. Rep. at 211, *aff'd*, 389 Mass. 577 (1982).

Section 39 provides in pertinent part:

> The valuation at which the machinery, poles, wires and underground conduits, wires and pipes of ***all*** telephone and telegraph companies shall be assessed by the assessors of the respective cities and towns where such property is subject to taxation shall be determined annually by the commissioner of revenue, subject to appeal to the appellate tax board, as hereinafter provided. (Emphasis added.)

While the statute does not contain a definition for telephone and telegraph companies, it does mandate that *all* such companies be centrally valued. What constitutes a telephone or telegraph company is ascertained by considering the ordinary meaning of those terms. G.L. c. 4, § 6, clause Third ("[w]ords and phrases shall be construed according to common and approved usage of the language"); *see* ***Cargill, Inc. v. Commissioner of Revenue***, 22 Mass. App. Tax Bd. Rep. 91, 92 (1997), *aff'd sub nom.,*

Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79 (1999). The Board's findings that the Company used considerable property, provided services, submitted regulatory filings, was granted rights, generated substantial revenue, maintained significant connections, and allocated extensive resources for its telephone service was enough to qualify the Company as a telephone company for fiscal year 2000 under § 39 as that term is ordinarily and customarily understood.

The mere fact that the Company provided other services and used advanced technology does not defeat its classification as a telephone company under § 39 where, during the relevant time period, its telephone services constituted a substantial part of its business. *Cf.* Board's Final Order in ***New York Cellular Geographic Service Area, Inc. v. Commissioner of Revenue***, ATB Docket No. 190799, Fiscal Year 1992 (November 18, 1991) (ruling that cellular companies "provide two-way, electronic, mobile communication through switching stations interconnected to the public switched telephone network" and are, as a result, properly treated as "'telephone companies' for purposes of M.G.L. c. 59, § 39"). Under the circumstances, RCN-BecoCom clearly fits within the category of telephone company as that term is used in § 39.

The Commissioner and Assessors' assertion that the term "telephone and telegraph companies" as used in § 39 should be limited to those companies that are exclusively engaged in telephone and telegraph activities using dated technology is simply not supported by the clear and unambiguous language contained in the statute. The statute is devoid of any such limiting and exclusive language. Rather, the statute speaks to "***all*** telephone and telegraph companies," not just to those companies that are *exclusively* engaged in telephone or telegraph activities using traditional technologies. Taxing statutes are to be construed according to their plain meaning. ***AMIWoodbroke, Inc.***, 418 Mass. at 94. According to the plain meaning of § 39, RCN-BecoCom, despite its use of advanced technology and multiple or bundled service offerings, was, at all relevant times, a telephone company.

In several analogous tax cases, the Supreme Judicial Court has rejected the Commissioner's attempt to add conditions or limitations to the language of a statute. *See, e.g.* ***Electronics Corporation of America v. Commissioner of Revenue***, 402 Mass. 672, 675-76 (1988) (rejecting the Commissioner's attempt to add conditions and limitations to the language of G.L. c. 62C, § 37, which sets forth the procedure for filing abatement claims);

Cargill, Inc., 429 Mass. at 82 (upholding the Board's rejection of conditions and limitations that the Commissioner attempted to apply to the statutory language authorizing an investment tax credit for corporations engaged in agriculture). As the Court stated in ***Cargill, Inc.***: "[if] the Legislature intended to [create] limit[s] . . . in the manner advocated by the commissioner, it easily could have done so." ***Id.***

Classification cases and regulations pertaining to manufacturing corporations under G.L. c. 59, § 5, cl. 16 ("clause 16") and G.L. c. 63, §§ 38C and 42B support the substantiality approach taken by the Board here. Classification as a manufacturing corporation provides an exemption from property tax under clause 16 and investment tax credits under G.L. c. 63, § 31A.

In ***Fernandes Super Market, Inc. v. State Tax Commission***, 371 Mass. 318 (1976), the Court discussed the considerations for determining "manufacturing corporation" status when "a corporation conducts both manufacturing and non-manufacturing activities" and "the applicable statutes . . . do not specify what degree of manufacturing activity is required to classify a corporation as a 'manufacturing corporation.'" ***Id.*** at 320-21. In general terms, the company's "entire operations" are reviewed to determine

whether the manufacturing activities are "substantial" or "merely trivial or incidental to the main business." ***Id.*** at 322. More specifically, the extent of the manufacturing activities is considered:

> with respect to the financial receipts they bring to the corporation, or the proportion of the entire corporate income that they comprise, or the percentage of the entire capital which is invested in them, or the number of persons employed in them as compared with the total number of employees of the corporation, or the ratio to the entire business activities of the corporation.

Id. at 322-23 (quoting ***Commissioner of Corporations & Taxation v. Assessors of Boston***, 321 Mass. 90, 97 (1947). The Court in ***Fernandes Super Markets*** found that that company's activities were not substantial enough to support classification as a manufacturing corporation where only 2.79% of the company's income was derived from manufacturing and only 12.6% of its employees were involved with manufacturing. In other cases, the Court found substantiality where just twenty percent of a company's activities were part of the manufacturing process based on receipts generated or property or employees involved. *See, e.g.,* ***Commissioner of Corporations & Taxation v. Board of Assessors of Boston***, 324 Mass. 32, 38-39 (1949). The Courts and the Board have also used the substantiality approach in determining whether a corporation involved in

multiple activities should be classified as a "utility corporation" and therefore taxed under G.L. c. 63, § 52A. ***Tenneco, Inc. v. Commissioner of Revenue***, 401 Mass. 380 (1987), *affirming,* 8 Mass. App. Tax Bd. Rep. 1 (1986).

The Commissioner's own regulations also sanction the substantiality test for manufacturing corporation classification. *See* 830 CMR 58.2.1(6)(d). Under the regulations, the particular "facts and circumstances" are reviewed to ascertain manufacturing corporation status. The regulations also set forth quantitative safe harbors for manufacturing corporation status, including: when twenty-five percent of the company's gross receipts are derived from manufacturing; when twenty-five percent of the company's payroll is for employees engaged in manufacturing and fifteen percent of the gross receipts are from manufacturing; when twenty-five percent of the company's tangible personal property is used in manufacturing and fifteen percent of the gross receipts is derived from manufacturing; and when at least thirty-five percent of the tangible personal property is used in manufacturing. *See* 830 CMR 58.2.1(6)(d) and (e).

The Board ruled that the substantiality test applies to the classification of "telephone and telegraph companies" under § 39. The Board further found and ruled

that RCN-BecoCom surpassed both qualitative and quantitative measures for determining its status as a telephone company under § 39.

Valuation, Assessment and Taxation

The general rule in Massachusetts is that "all property, real and personal situated within the commonwealth, and all personal property of the inhabitants of the commonwealth wherever situated, unless expressly exempt, shall be subject to taxation." G.L. c. 59, § 2. However, "no property can lawfully be taxed unless the statutes further define the place where and the person to whom it is to be assessed." P. NICHOLS, TAXATION IN MASSACHUSETTS 228 (3rd ed. 1938); see ***Squantum Gardens, Inc. v. Assessors of Quincy***, 335 Mass. 440, 446-48 (1957). "The statutory provisions that appear only to define the place of assessment and the person to be assessed do, in fact, determine what property is taxable." ***Warner Amex Cable Communications, Inc. v. Board of Assessors of Everett***, 396 Mass. 239, 240 (1985).

G.L. c. 59, § 18, provides for the place of assessment and the person to be assessed for various categories of personal property and owners. The initial paragraph of § 18 provides that: "[a]ll taxable personal estate within or without the commonwealth shall be assessed to the owner

in the town where he is an inhabitant on January first, except as provided in chapter sixty-three and in the following [seven] clauses of this section." This provision authorizes the taxation of personal property where the owner of the property resides, which is essentially a restatement of the doctrine of *mobilia requuntur personam* used locally since the settlement of the Massachusetts Bay Colony. *See* NICHOLS at 276. This doctrine, however, has been largely eviscerated by the seven succeeding clauses in § 18. ***Id.***

The First clause of § 18 states:

> First, All tangible personal property, including that of persons not inhabitants of the commonwealth, except ships and vessels, shall, unless exempted by section five [of chapter 59], be taxed to the owner in the town where it is situated on January first. Ships and vessels, except those used in or designated for use in carrying trade or commercial fishing, shall be taxed to the owner as of July first in the town where it is habitually moored or docked, otherwise where it is principally situated during the calendar year.

This clause provides general authorization for the taxation of property where it is located as opposed to where the owner resides. The Second clause of § 18 similarly affects certain manufacturing machinery, business machinery of corporations, and leased tangible personal property; the Third clause relates to personal property of deceased

persons; the Fourth clause concerns personal property of joint tenants or tenants in common; the Fifth clause involves certain property of corporations; and the Sixth and Seventh clauses relate to tangible personal property and ships and vessels belonging to partnerships. All of these clauses provide that the jurisdiction in which property is located, as opposed to the domicile of the owner, has the power to assess a property tax.

At all relevant times, RCN-BecoCom was an LLC formed under the Massachusetts Limited Liability Company Act ("LLC Act"), added by St. 1995, c. 281, § 18, effective as of January 1, 1996. *See* G.L. c. 156C, § 1 *et. seq.* The LLC Act authorizes the formation of an unincorporated business organization known as a limited liability company. *See* ***id.*** at § 2(5) (defining an LLC, at all relevant times, as an "unincorporated organization formed under this chapter and having two or more members"). As an LLC, RCN-BecoCom's members are protected from liability from the Company's debts to the same extent that shareholders in a corporation are protected from liability from the corporation's debt. At the same time, the company and its members are afforded the opportunity to elect partnership tax treatment for federal and state income tax purposes. Since January 1, 1997, federal tax regulations have allowed LLCs to elect to

be treated as either partnerships or corporations for federal income tax purposes. *See* 26 CFR §§ 301.7701-2 and 301.7701-3. For all relevant times, RCN-BecoCom elected partnership treatment for federal and state income tax purposes.

Under G.L. c. 62, § 17, "[a] limited liability company . . . shall be deemed to be a partnership if it is classified for the taxable year as a partnership for federal income tax purposes." Based on this statutory language in § 17, the Assessors argued that RCN-BecoCom should be treated as a partnership under Massachusetts tax law for local property tax purposes, including those specified under § 18, clause Sixth. The Board disagreed.

Chapter 62 deals with state income tax, not property tax treated under chapter 59; and it is not a universal taxing provision. As RCN-BecoCom pointed out in its brief, both the chronological history of the term "partnership" for property tax and income tax purposes and the lack of a statutory cross-reference bridging these two chapters or the relevant sections within them scuttle the Assessors' argument in this regard. Section 18, clause Sixth applies to general and limited partnerships. *See* ***Nashoba Communications Limited Partnership v. Board of Assessors of Danvers***, 23 Mass. App. Tax Bd. Rep. 153, 154 (1997)

("Clause Sixth . . . provides the place of assessment and the person to be assessed where the property at issue is owned by a partnership"), *aff'd*, 429 Mass. 126 (1999). By its plain language, clause Sixth does not apply to LLCs. "[T]ax laws are to be strictly construed. The right to tax must be plainly conferred by statute. It is not to be implied. Doubts are to be resolved in favor of the taxpayer." ***Squantum Gardens, Inc.,*** at 447-48 (quoting ***Cabot v. Commissioner of Corporations & Taxation***, 267 Mass. 338, 340 (1929). Accordingly, the Board ruled that LLCs are not taxable under clause Sixth. Because the Company was an LLC, the Board also ruled that RCN-BecoCom was not subject to taxation under clauses Third (personal property of deceased persons), Fourth (personal property of joint tenants or tenants in common), Fifth (certain property of corporations), and Seventh (ships or vessels of partnerships).

With respect to clause Second ("[m]achinery employed in any branch of manufacture . . . or, in the case of . . . corporations . . . , machinery used in the conduct of the business"), RCN-BecoCom contended that this clause controlled the taxation of any and all machinery, and because the Company was not a corporation, its property was subject to property tax only under the first part of this

clause and not the latter. Accordingly, RCN-BecoCom asserted that it was liable only for the tax assessed against the value of its one generator located in Newton as of January 1, 1999. As a provider of telephone service, Internet access, and cable television service, the Company contended, and the Board agreed, that it was not generally involved in manufacturing. *See* ***Assessors of Springfield v. Commissioner of Corporations and Taxation***, 321 Mass. 186, 190-92 (1947) (upholding the Board's finding that the machinery associated with a telephone system is not machinery employed in manufacturing). Because RCN-BecoCom was an LLC, none of § 18's succeeding clauses applied. Because of RCN-BecoCom's organization and continued operation as an LLC, the Board also ruled that the latter part of the Second clause, taxing a corporation's non-manufacturing machinery, was not applicable to RCN-BecoCom either. While the initial part of the Second clause relating to manufacturing machinery arguably may have been applicable to RCN-BecoCom's back-up generator, the Board ruled that it was not necessary to rely on that provision for assessment and taxation purposes because clause First of § 18 provided the Assessors with the right to tax all of RCN-BecoCom's personal property located in Newton.

Clause First provides that "all tangible personal property . . . shall . . . be taxed to the owner in the town where it is situated." This clause, which renders all tangible property taxable where located, was originally enacted in 1918, well after the Second clause, which originated in 1830. Consequently, clause First "deprived [clause Second] of much of its importance." NICHOLS at 280. Clause Second, as applied to non-corporations, only "differentiates the classes of property to which it relates from other tangible personal property by making the property to which it relates taxable to the person in possession rather than to the owner, if the assessors so elect." NICHOLS at 280-81. Clause Second retains importance only with respect to the taxation of corporations. *See* NICHOLS at 281. Accordingly, the Board ruled that all of RCN-BecoCom's personal property, and not just its generator, which the Company conceded was taxable under the first part of clause Second, were subject to tax under clause First. Because of its history, § 18 and the clauses contained within it must be viewed as a coherent whole and not in the exclusive and myopic fashion suggested by RCN-BecoCom. Statutes should be construed as "'a consistent and harmonious whole, capable of producing a rational result consonant with common sense and sound judgment.'"

EMC Corp. v. Commissioner of Revenue, 433 Mass. 568, 574 (2001) (*quoting* ***Haines v. Town Manager of Mansfield***, 320 Mass. 140, 142 (1946).

Clause First previously has been applied to justify the assessment of tax on the owners of personal property where the property is located. *See* ***Brush v. City of New Bedford***, 250 Mass. 543, 546 (1925). More recently, the Court has recognized this clause's continuing vitality by noting in ***Nashoba Communications Limited Partnership***, 429 Mass. 126 that "as in ***Warner Amex Cable Communications, Inc. v. Assessors of Everett***, 396 Mass. 239, 240 n.2 (1985), neither the board nor the assessors have relied on the introductory language of § 18 or on § 18, First, to justify the assessors' right to assess the property at issue in this case." ***Nashoba Communications Limited Partnership***, 429 Mass. at 127 n.1. The Board considered the Court's two recent footnotes as invitations for the Board to consider whether clause First justified the assessment of tax in appeals like the present ones where a taxpayer or its property does not fall within the other six clauses of § 18.

RCN-BecoCom relied on ***Assessors of Springfield***, 321 Mass. 186, for the proposition that only its manufacturing machinery (consisting of a back-up generator)

was taxable under § 18. In the ***Assessors of Springfield*** case, additional machinery was not taxable as machinery used in manufacture under clause Second because telephone service is not manufacturing. The Springfield assessors' alternate argument for taxability in that case was that the machinery was used in the conduct of the business of a corporation and was, therefore, taxable under the second part of clause Second. The Court rejected this theory because the statutory definition of domestic and foreign corporations excluded telephone companies. Unlike the instant appeals, however, taxability under clause First of § 18 was not raised. In addition, the results in the ***Assessors of Springfield*** case are further attenuated from the circumstances here because, at all relevant times, RCN-BecoCom was an LLC, and not a corporation like the company in the ***Assessors of Springfield*** case, and RCN-BecoCom's "machinery employed in any branch of manufacture" was a mere back-up generator.

Under these circumstances, the Board ruled that all of RCN-BecoCom's personal property was subject to taxation under clause First of § 18, including its back-up generator, which arguably may have been taxable under the first part of clause Second, as well. The Board further ruled that even though RCN-BecoCom's non-manufacturing

property was not taxable under the second part of § 18's clause Second, it was nevertheless personal property under G.L. c. 59, § 2 and, as such, subject to a determination of whether or not it was subject to taxation under any other clause in § 18.

In addition, the Board found and ruled that the Commissioner's historical practice, when centrally valuing the § 39 property of telephone and telegraph companies, of applying the corporate exemption of G.L. c. 59, § 5, clause 16, ¶ 1,[16] irrespective of how the business entity was organized or held, was improper and did not preclude taxation in these appeals. By its plain and unambiguous language, the exemption applies to corporations, not to partnerships or to LLCs, like RCN-BecoCom. Exemptions to tax are narrowly construed. "An exemption is a matter of special favor or grace and to be recognized only where the property falls clearly and unmistakably within the express words of a legislative command." ***Southeastern Sand & Gravel, Inc. v. Commissioner of Revenue***, 384 Mass. 794, 796 (1981) (quoting ***Children's Hospital Medical Center v. Assessors of Boston***, 353 Mass. 35, 43 (1967). When a taxpayer voluntarily adopts a form of ownership that is not

[16] Clause 16, ¶ 1 exempts all property owned by most corporations except: "real estate, poles, underground conduits, wires and pipes, and machinery used in manufacture or in supplying or distributing water."

in technical compliance with the exemption requirements, the Court has held that the exemption does not apply. *See* ***Kirby v. Board of Assessors of Medford***, 350 Mass. 386, 390-91 (1966).

Relying on ***Commissioner of Revenue v. Baybank Middlesex***, 421 Mass. 736 (1996), RCN-BecoCom argued that the Commissioner's historical practice of granting the corporate exemption under § 5, clause 16, ¶ 1, to telephone companies, irrespective of how the business entity was organized or held, bound the Commissioner here. The Board disagreed.

Administrative agencies must abide by their own internally promulgated policies. ***Baybank Middlesex***, 421 Mass. at 739. "Undue weight, of course, is not to be given to administrative interpretations of statutes which are not ambiguous." ***Board of Assessors of Holyoke v. State Tax Commission***, 355 Mass. 223, 243 (1969). "Departmental practice, if established contemporaneously with the enactment of a statute and long continued, is entitled to weight in interpreting an ambiguous statutory provision." ***Eaton Financial Corporation v. Commissioner of Revenue***, 26 Mass. App. Tax Bd. Rep. 86, 91 (2000).

In the present appeals, the Board found that G.L. § 5, clause 16, ¶ 1 was not ambiguous. By its terms, it simply

applied to corporations, not LLCs. Accordingly, the Board ruled that there was no need to defer to the Commissioner's interpretation or application of this statutory provision. *See* ***Board of Assessors of Holyoke***, 355 Mass. at 243. In addition, there was no evidence that the Commissioner's practice of granting the corporate exemption under this statutory provision to telephone companies, irrespective of how the business entity was organized or held, was established contemporaneous to the enactment of the relevant statutes. Unlike the situation in ***Baybank Middlesex***, which involved an ambiguous statutory provision, the Commissioner here did not promulgate or issue any written instructions or guidelines to taxpayers or the Company itself regarding his practice. Furthermore, the Commissioner has published numerous Opinion letters to various municipalities' assessors questioning the applicability of the corporate exemption to other entities. Moreover, under § 39, the Assessors have an independent right to challenge the Commissioner's central valuation. Neither ***Baybank Middlesex*** nor other cases relied upon by RCN-BecoCom to bind the Commissioner here involved a third party with its own right of appeal of the valuation who would be harmed by the application of the Commissioner's past practice. Finally, and most significantly, the

Commissioner's action, in the present circumstances, of granting the corporate exemption under § 5, clause 16, ¶ 1, to telephone companies, irrespective of how the business entity was organized or held, was clearly erroneous and beyond the scope of the statute. Under these circumstances, the Commissioner's actions are not entitled to deference. *See* ***Board of Assessors of Holyoke v. State Tax Commission***, 355 Mass. at 243. For these reasons, the Board found that ***Baybank Middlesex*** was inapposite to these appeals and ruled that the corporate exemption under § 5, clause 16, ¶ 1 did not apply to RCN-BecoCom for fiscal year 2000.

The Board also found and ruled that the Company's so-called "shared property," along with its dedicated telephone service property, was subject to central valuation by the Commissioner under § 39. Section 39 requires the Commissioner to centrally value the "machinery, poles, wires and underground conduits, wires and pipes" of all telephone and telegraph companies. This statutory section does not contain any limitations pertaining to shared or multi-purpose property of telephone companies. "Words of a statute . . . are the 'prime indicator' of the statute's meaning." ***Cargill, Inc.***, 22 Mass. App. Tax Bd. Rep. at 93 (citations omitted).

Remedial statutes are liberally construed. *See* ***Walter Kidde & Company, Inc.***, 1 Mass. App. Tax Bd. Rep. at 211 ("the statutory implementation of such a legislative purpose should be liberally construed in order that the legislature's goal will come to fruition"). Accordingly, the Board ruled that any of RCN-BecoCom's § 39 property that was used for the delivery of its telephone services and supported the Company's status as a telephone company was subject to central valuation under § 39, but the property that was dedicated solely to cable television or Internet access was not subject to central valuation because it was property used by RCN-BecoCom exclusively for its status as a cable television or Internet access provider, and not for its status as a telephone company.

This interpretation comports with the statutory reporting framework under chapter 59 whereby property not returned to the Commissioner under § 41 for valuation under § 39 is returned to the local assessors under § 29 for valuation and assessment under §§ 18 and 38. The Court impliedly recognized this dual reporting and valuation system in ***Assessors of Springfield v. New England Telephone & Telegraph***, 330 Mass. at 203. Moreover, this approach is consonant with the legislative purpose behind the enactment of §§ 39-41 to centrally value certain property of

telephone companies, discussed *supra*, and the Legislature's later enactment of G.L. c. 166A to administer cable television without any provision for central valuation. Statutes should be construed as "a consistent and harmonious whole, capable of producing a rational result consonant with common sense and sound judgment." ***EMC Corp.***, 433 Mass. at 574 (quoting ***Haines***, 320 Mass. at 142).

Based on the Board's ruling in ***Cargill, Inc.***, that a corporation "primarily engaged in agriculture" under G.L. c. 63, § 31A was entitled to an investment tax credit for all of its property under that section, even if the property was not used for agricultural purposes, ***id.*** at 586, RCN-BecoCom argued that by analogy all of RCN-BecoCom's "machinery, poles, wires and underground conduits, wires and pipes" should be centrally valued by the Commissioner regardless of the properties' functions. The Board, however, found that ***Cargill, Inc.*** was distinguishable because the statutory provision, legislative intent, and type of company involved in that case, did not correspond to those factors here. At the time § 39 was enacted, there was little or no question about what constituted a telephone and telegraph company and how its property was used. It was not necessary to

determine if a company was "primarily [or substantially] engaged in" telephone service or the extent to which its property was used for telephone services. Telephone companies now have evolved into multi-purpose entities that deliver multiple and bundled services through shared property. They are not only telephone companies, but cable television companies and Internet service provider companies, as well. The clear implication under § 39, supported by its legislative history and interaction with other statutory provisions, is that the § 39 property that renders a company a telephone company is what should be centrally valued; the property that is exclusively used for a different, and likely uncontemplated, function should not be. Accordingly, the Board ruled that the circumstances associated with ***Cargill, Inc.*** were simply not analogous to the circumstances associated with these appeals, and, therefore, the Board's rulings in ***Cargill, Inc.*** were not controlling here.

Finally, the Company also argued that federal law, in particular the Supremacy Clause of the United States Constitution and the Telecommunications Act of 1996, prohibited taxing its non-manufacturing machinery where the same property of its competitors was not taxed. The Board found and ruled that, under the circumstances present in

these appeals, neither the Supremacy Clause nor the Telecommunications Act of 1996 was violated by taxing the Company's non-manufacturing machinery. Quite simply, RCN-BecoCom elected to do business in Massachusetts as an LLC and not a corporation. If it had been a corporation, it would have been treated like its corporate competitors. However, for it own reasons, it voluntarily elected to do business in Massachusetts as an LLC, and as such, rendered itself ineligible for the corporate exemption under § 5, clause 16, ¶ 1. The record contained no evidence demonstrating that any other telephone or telegraph company, organized and doing business as an LLC, was treated any differently than the tax treatment accorded RCN-BecoCom here. Under the circumstances, nothing in the Supremacy Clause or the Telecommunications Act of 1996 prohibits taxing RCN-BecoCom's non-manufacturing machinery in fiscal year 2000 even if its competitors' like property went untaxed because of their business form or structure. Accordingly, the Board found and ruled that taxing RCN-BecoCom's non-manufacturing property did not violate federal law. *See* ***Nashoba Communications Limited Partnership***, 429 Mass. at 129 ("if any [tax] inequalities exists in this treatment, it can be avoided because it is the taxpayer's option to operate as a partnership or to do

business as a corporation"); ***AT&T Communications of the Southwest, Inc. v. City of Dallas***, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998) ("being competitively neutral does not require [authorities] to treat all providers identically and to ignore significant distinctions among them").

Conclusion

The Board found and ruled that, under G.L. c. 59, § 39 and G.L. c. 58, § 2, it had jurisdiction to hear and decide RCN-BecoCom's appeal of the Commissioner's failure to classify the Company as a telephone company and to centrally value its "machinery, poles and wires and underground conduits, wires and pipes" under § 39. The Board also found and ruled that, under G.L. c. 59, §§ 64 and 65, it had jurisdiction over RCN-BecoCom's appeal of the Assessors' failure to abate their personal property tax assessment on the Company's personal property located in Newton.

In addition, the Board found and ruled that it was empowered to conduct a *de novo* review of the Commissioner's determination that RCN-BecoCom was not a telephone or telegraph company under § 39, and, therefore, was not entitled to have its "machinery, poles, wires and underground conduits, wires and pipes" centrally valued. The Board also found and ruled that RCN-BecoCom bore no

special burden to demonstrate that it was entitled to classification as a telephone or telegraph company under § 39.

After considering all of the relevant evidence the Board further found and ruled that:

(1) The appellant was subject to property tax on all its tangible personal property situated in Newton on January 1, 1999, pursuant to G.L. c. 59, § 18, clause 1; and because it was an LLC, the corporate exemption under § 5, clause 16, ¶ 1 did not apply to the appellant for fiscal year 2000;

(2) The appellant was entitled to have its "machinery, poles and wires and underground conduits, wires and pipes" valued by the appellee Commissioner pursuant to his obligation under G.L. c. 59, § 39 to value such property for "all telephone and telegraph companies;"

(3) Under G.L. c. 59, § 39, the appellant, as a telephone company, was entitled to central valuation for all such property which it used for telephone service, including so-called "shared property" used for telephone, cable television, and Internet and including all wires laid in or erected upon public ways or private property;

(4) The remainder of appellant's tangible personal property situated in Newton was subject to valuation and assessment of tax by the appellee Assessors pursuant to G.L. c. 59, §§ 18, 29 and 38; and

(5) Based on the parties' Statement of Agreed Facts – RE: Valuation and in accordance with the parties' agreement that the total valuation for all appellant's personal property located in Newton was in the amount of $3,331,600 as was assessed by the appellee Assessors, the appellant was not entitled to an abatement of tax nor was it subject to an additional assessment of tax under G.L. c. 59, § 39.

Finally, the Board found and ruled that, under the circumstances present in these appeals, federal law, in particular the Supremacy Clause of the United States Constitution and the Telecommunications Act of 1996, did not prohibit taxing RCN-BecoCom's non-manufacturing machinery.

APPELLATE TAX BOARD

By: _____
Abigail A. Burns, Chairman

A true copy:

Attest: _____
Clerk of the Board