REPRESENTATIVES FOR PETITIONER:
Jeffrey Bennett and Bradley Hasler, Bingham Greenbaum Doll LLP

REPRESENTATIVES FOR RESPONDENT:
Mark GiaQuinta, Melanie Farr, Sarah Schreiber, and Andrew Teel, Haller & Colvin P.C.

BEFORE THE
INDIANA BOARD OF TAX REVIEW

VERIZON DATA SERVICES, LLC,	)	
	)	Petition Nos.: 02-073-08-1-7-00041
Petitioner,	)	02-073-09-1-7-00066
	)	02-073-10-1-7-00002
v.	)	
	)	Parcel No.: Personal Property located
ALLEN COUNTY ASSESSOR,	)	6430 Oakbrook Parkway Fort Wayne, IN
	)	Business Personal Property 02-073-0000590
Respondent.	)	
	)	County: Allen
	)	
	)	Township: Washington
	)	
	)	Assessment Years: 2008-2010

January 20, 2016

FINAL DETERMINATION

I. INTRODUCTION

1. Verizon Data Services, LLC believes that 50 IAC 4.2—the Department of Local Government Finance's regulation for assessing business personal property—violates both the Indiana and United States Constitutions. According to Verizon, the violation stems from the fact that the regulation does not allow it to rely on independent market-based evidence to show that the value yielded by applying the regulation exceeds the real world value of its property. We have no authority to give Verizon relief on its constitutional claims. And we disagree with Verizon's claim that it has the statutory right to rely on its market appraisals regardless of what the regulation provides. The Assessor has sought

summary disposition of this matter. Having found that Verizon is not entitled to relief as a matter of law and no material fact is in dispute, we therefore issue our final determination denying Verizon relief on its petitions.

II. PROCEDURAL HISTORY

2. Verizon filed business personal property tax returns for the 2008 through 2010 assessment years. For each year, Verizon calculated the assessment for property located at its data center in accordance with the personal property regulation. It then claimed a substantial adjustment to reduce its reported true tax value to the amount reflected in "Asset Valuation Source" appraisal reports for each year. Local officials (the parties do not specify which officials) rejected Verizon's reliance on the appraisal reports and increased its assessment for each year.

3. Verizon responded by seeking review with the Allen County Property Tax Assessment Board of Appeals ("PTABOA"), which issued determinations upholding the assessments. Verizon timely filed Form 131 petitions with the Board.

4. The Allen County Assessor filed a motion to dismiss Verizon's appeals, to which Verizon responded. On April 29, 2015, our designated senior administrative law judge, David Pardo, held a hearing on the Assessor's motion.

III. DISCUSSION

5. The Assessor asks us to dismiss Verizon's petitions under Rule (12)(B)(1) and (6) of the Indiana Rules of Trial Procedure, contending that we lack subject matter jurisdiction and that Verizon has not stated a claim on which we may grant relief. To address the Assessor's motion, we must first examine Verizon's claims.

A. Verizon's claims

6. According to Verizon, it maintains electronic information processing equipment, some of which uses decades-old technology. Verizon asserts that computer equipment depreciates far more quickly than does equipment in other industries. Depending on

when new technology is introduced, computer and electronic equipment may be obsolete even when purchased new. Verizon therefore claims that its equipment tends to depreciate in the "real world" far more quickly than the personal property regulation recognizes. *Form 131 petitions, Petitioner's PTABOA Hearing Brief (2009) at 1*.

7. Verizon commissioned the appraisal reports to determine the market value of its machinery and equipment. According to Verizon, the reports were prepared in conformance with the Uniform Standards of Professional Appraisal Practice ("USPAP") and the American Society of Appraisers' Principles of Appraisal Practice and Code of Ethics. Had Verizon prepared its returns without relying on the reports, the resulting assessment would have been between 125% and 286% higher, depending on the year. *Verizon's Response, at 2-3; Form 131 petitions (PTABOA Hearing Briefs, at 2).*

8. As explained in its response to the Assessor's motion, Verizon makes the following substantive claims:

    - Verizon reported the property's "just value" on its returns for each year. Allen County officials increased the assessments to amounts significantly above the property's "just value."

    - "Since 2002, Indiana's real property assessment system has been based on fair market value . . . . Where different classes of property are assessed differently, the property classification must be based on differences naturally inhering in the different classes of property, and the assessments must nonetheless be uniform and equal. . . . There are no differences naturally inhering between real and personal property whereby [a] taxpayer[] may use market-based evidence to ensure a just valuation of that taxpayer's real property under applicable assessment regulations, but may not use market-based evidence to ensure a just valuation of that taxpayer's personal property under applicable assessment regulations."

    - "'Just value' has the same meaning under Indiana Code § 6-1.1-2-2 with respect to personal property as it has for real property." The personal property regulation violates Article 10, Section 1 of the Indiana Constitution and is unconstitutional as applied to Verizon because it fails to secure a just value for Verizon's personal property. The regulation violates Ind. Code § 6-1.1-2-2 for the same reason.

    - The regulation's imposition of a minimum value of 30% of original cost for "virtually all" personal property fails to secure a just valuation because: (1) no such minimum value exists for real property assessments, and (2) taxpayers cannot offer evidence to show that "the actual property wealth of a business

personal property asset would require more depreciation than what is permitted under [the regulation]."

- Similarly, allowing obsolescence adjustments only for "abnormal obsolescence" fails to secure a just value for personal property because (1) no such limitation exists for real property, and (2) taxpayers cannot offer evidence that a business personal property asset's actual property wealth is less than the value arrived at through applying only normal obsolescence.

- The assessment system established by the personal property regulation violates Article 10, Section 1 because it "lacks meaningful reference to property wealth and results in significant deviations from substantial uniformity and equality."

Verizon Response, at 15-16. In briefs attached to its Form 131 petitions, Verizon also claimed that it was denied due process and equal protection under the Fourteenth Amendment to the United States Constitution and equal privileges and immunities under Article 1, Section 23 of the Indiana Constitution. *Form 131 petitions (PTABOA Hearing Briefs at 16-20).*

B. We have subject matter jurisdiction

9. The Assessor first claims we lack subject matter jurisdiction over Verizon's petitions. Subject matter jurisdiction refers only to the power of a court (or in this case, an administrative tribunal) "to hear and decide a particular class of cases." *Marion County Auditor v. State*, 33 N.E.3d 398, 400 (Ind. Tax Ct. 2015) (quoting *Pivarnik v. Northern Indiana Pub. Serv. Co.*, 636 N.E.2d 131, 137 (Ind. 1994). The only relevant inquiry is "'whether the kind of claim which the plaintiff advances falls within the general scope of the authority conferred upon such court by the constitution or by statute.'" *Id*.

10. The Board is a creature of the legislature and therefore has only those powers conferred by statute. *See Matonovich v. State Bd. of Tax Comm'rs*, 705 N.E.2d 1093, 1096 (Ind. Tax Ct. 1999) (addressing the authority of the Board's predecessor agency, the State Board of Tax Commissioners). The appeals at hand fall squarely within the class of appeals our enabling statute outlines. *See* I.C. § 6-1.5-4-1 (directing the Board to review appeals of "assessed valuation of tangible property" made from a determination of a county PTABOA to the Board under "any law").

11. The Assessor nonetheless argues we lack jurisdiction because Verizon asks us to determine whether the personal property regulation is facially constitutional. She further argues that, while litigants must normally exhaust administrative remedies before proceeding in court, exhaustion is unnecessary where "the character of the question presented is beyond the pale of the agency's competency, expertise, and authority." *Respondent's Memorandum in Support of Motion to Dismis*s *at 11* (quoting *Bielski v. Zorn*, 627 N.E.2d 880, 887 (Ind. Tax Ct. 1994).

12. Determining whether an Indiana tax statute is unconstitutional is within the Tax Court's "exclusive purview." *Marion County Auditor*, 33 N.E.3d at 403. But the Tax Court, which is also a creature of statute, only has jurisdiction over original tax appeals. An original tax appeal (for purposes relevant here), is statutorily defined as a "case that arises under the tax laws of Indiana and that is an initial appeal of a final determination made by . . . the Indiana Board of Tax Review." *See* I.C. § 33-26-3-1. Thus, a property tax appeal generally must go through the administrative process first, even where it raises a constitutional issue that may only be resolved at the Tax Court level. *State Bd. of Tax Comm'rs v. Montgomery,* 730 N.E.2d 680, 686 (Ind. 2000). The requirement assures that an adequate record is developed and that "nonconstitutional issues that may moot the constitutional challenge will be considered." *Id*.

13. We need not decide whether Verizon *could have* sought redress in the Tax Court without first exhausting its administrative remedies. It did not choose that route. We have subject matter jurisdiction to hear Verizon's appeals.

14. The fact we possess subject matter jurisdiction, however, does not necessarily mean we may grant Verizon any of the relief it seeks or that we need to hold an evidentiary hearing to determine that question. With that in mind, we turn to the Assessor's second ground for its motion: that Verizon has not alleged claims for which we may grant relief.

C. We do not have the authority to give Verizon the relief it seeks

15. Verizon's claims are intimately connected with Article 10, Section 1 of the Indiana Constitution ("Property Taxation Clause"), its statutory codification at Ind. Code § 6-1.1-2-2, and our assessment system's relationship, or lack thereof, to fair market value. We therefore begin by reciting the constitutional and statutory provisions at issue and summarizing both the historic *Town of St. John* litigation and changes (or lack thereof) to relevant statutes and administrative regulations in the aftermath of that litigation.

1. Background

a. Basic constitutional and statutory provisions

16. The Property Taxation Clause provides:

> Subject to this section, the General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal.

Ind. Const. Art. 10, § 1(a). The legislature codified that clause, providing "All tangible property which is subject to assessment shall be assessed on a just valuation basis and in a uniform and equal manner." I.C. § 6-1.1-2-2(a).

17. Indiana assesses real and personal property based on an assigned value, which is statutorily termed "true tax value." I.C. § 6-1.1-31-5; *see also, Boehm v. State Bd. of Tax Comm'rs (Town of St. John II)*, 675 N.E. 2d 318, 320 n.2 (Ind. 1996). Except in a few instances, such as the assessment of residential rental properties,[1] riverboat casinos,[2] low-income rental properties,[3] and golf courses,[4] the legislature has neither defined true tax value nor prescribed how it should be determined. Instead, it has delegated that function to the DLGF (and previously, to the State Board of Tax Commissioners) as follows: "Subject to this article, the rules adopted by the department of local government finance are the basis for determining the true tax value of tangible property." I.C. § 6-1.1-31-5(a). The only specific guidance from the legislature to DLGF in defining true tax value

[1] I.C. § 6-1.1-4-39
[2] I.C. § 6-1.1-4-39.5
[3] I.C. § 6-1.1-4-41
[4] I.C. § 6-1.1-4-42

is that "true tax value *does not mean* fair market value." I.C. § 6-1.1-31-6(c) and -7(d) (emphasis added). Assessing officials must comply with the DLGF's rules, bulletins, and directives, and may only use additional factors if the DLGF first approves them. I.C. § 6-1.1-31-5. Those provisions largely read as they did before and during the *Town of St. John* litigation.[5]

b. *Town of St. John* litigation

18. We turn now to that litigation. Taxpayers from Marion and Lake counties and government officials from the Town of St. John filed appeals contesting the constitutionality of Indiana's real property assessment system. The Tax Court consolidated the appeals and addressed whether that system—under which a property's true tax value was the figure produced by applying the "mechanical rules and formulas" set forth in the State Board's real property regulations and evidence of an improvement's actual construction cost or the actual market value of land was therefore irrelevant—violated the Property Taxation Clause. *Town of St. John v. State Bd. of Tax Comm'rs*, 665 N.E.2d 965, 968 (Ind. Tax Ct. 1996) *(St. John I)*.

19. After examining the historical debate surrounding the Property Taxation Clause's adoption, case law interpreting the clause, and earlier legislative interpretations, the Tax Court held that "just value" meant market value. *Id*. at 969-74. The Court further concluded that, in order to meet the constitutional directive that property be taxed uniformly and equally based on the property wealth it represents, Indiana's statutory system had to use market value as the measure of uniformity and equality. *Id*. at 974. Consequently, the Court found that Ind. Code § 6-1.1-31-6(c) and the State Board's real property regulations were unconstitutional. *Id*. The ruling was prospective only. The Court gave the legislature and the State Board until March 1, 1998, to bring the system into compliance with the Property Taxation Clause and ordered that interim assessments be governed by existing law. *Id* at 975.

[5] The phrase "subject to this article" was amended into the relevant sections the same year the legislature added Ind. Code § 6-1.1-4-39 defining true tax value for multi-unit apartment buildings and making the gross rent preferred method for valuing mobile homes. *See, e.g.*, 2004 Ind. Acts 1, § 221; 2004 Ind. Acts 23, § 44; 2004 Ind. Acts 1, § 8; 2004 Ind. Acts 23, § 9.

20. The Indiana Supreme Court affirmed the Tax Court's decision in part and reversed in part. *Boehm v. State Bd. of Tax Comm'rs*, 675 N.E.2d 318 (Ind. 1996) *(St. John II)*. The Supreme Court rejected the State Board's claim that the Property Taxation Clause imposes no judicially manageable standards for review of the state's legislatively designed system. *Id*. at 321-24. But it held the Tax Court erred in concluding that the clause mandated a system based solely on market value, explaining:

> While a careful and accurate fair market value assessment may well be the system closest to our constitution's requirements for uniform and equal rates of assessment and taxation and for just valuation, a system based solely upon strict fair market value is not expressly required either by the text of the constitution, by the purpose and intent of its framers, or by the subsequent case law. We do not agree with the Tax Court's conclusion that decisions since the adoption of Article 10, Section 1, "implicitly acknowledge that the terms [just value and market value] are equivalent." Seeking to ensure that each taxpayer's property wealth bear its proportion of the overall property tax burden, the Indiana Constitution requires that our property tax system achieve substantially uniform and equal rates of property assessment and taxation and authorizes the legislature to allow a variety of methods to secure such just valuation.

Id. at 327 (internal citations omitted).

21. To the extent the Tax Court found that the Indiana Constitution required "an exclusive, comprehensive, absolute, and precise fair market value system," the Supreme Court disagreed and vacated the Tax Court's declaration that Indiana's real property assessment system was unconstitutional. But it affirmed the Tax Court's finding that the legislature must provide for a uniform and equal rate of assessment and taxation based on property wealth, and explained that, to the extent components of the system were found on remand to violate those requirements, they could not stand. *Id*. at 328.

22. On remand, the Tax Court found that Ind. Code § 6-1.1-31-6(c) and the State Board's real property regulations violated the Property Taxation Clause as well as Article 1 § 12 (guaranteeing remedies for injuries by due course of law). *Town of St. John v. State Bd. of Tax Comm'rs*, 690 N.E.2d 370, 398 (Ind. Tax Ct. 1997) *(St. John III)*. In the Court's view, uniformity and equality required a system (1) that was based on "objectively verifiable data," and (2) that ensured taxpayers the means to evaluate taxing authorities' assessments. *Id*. at 376. It found that the system's use of separate cost schedules for

different categories of property, without allowing assessments to be compared to objective data, failed to meet those requirements. *Id*. at 377-78. Instead, "by setting up a system whereby assessments are based on unchallengeable cost schedules[,]" the State Board had "implemented a system of valuation by fiat." *Id*. at 377-78.

23. The Court recognized that a valuation system based on highest and best use was not required. But it found no way to measure property wealth "other than with reference to market factors," explaining that there were three recognized methods of determining value using market data: the comparable sales, income capitalization, and reproduction cost minus depreciation approaches. *Id*. at 379. In the Court's eyes, the State Board's claim that the system measured value-in-use, or that it used *any* method to measure property wealth, was a fiction. *Id*. at 381-82. The Court also found that the system denied taxpayers due course of law because it deprived them of the "right to introduce real world, objective evidence to challenge their assessments." *Id*. at 388.[6]

24. The Court ordered the State Board to make future assessments under a system incorporating objective reality and gave it a reasonable period to implement new regulations that would measure property wealth uniformly and equally. Once again, the Court ordered that interim assessments be made under the then-existing system and that any challenges to assessments be based on that system. *Id*. at 398-99. It followed up with an order for the State Board to consider all competent "real world" evidence offered by taxpayers filing appeals on or after May 11, 1999. *Town of St. John v. State Bd. of Tax Comm'rs*, 691 N.E.2d 1387, 1390 (Ind. Tax Ct. 1998) *(St. John IV).*

25. The Indiana Supreme Court granted review, once again affirming the Tax Court in part and reversing in part. *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034 (Ind. 1998) *(St. John V).* Among other things, the State Board argued that the Tax Court had erred (1) by declaring Ind. Code § 6-1.1-31-6(c) and the State Board's cost schedules unconstitutional, and (2) by ordering it to consider all competent evidence of property wealth in appeals after the cut-off date from *St. John IV*. *Id*. at 1036.

[6] The Court found that the system did not violate the due process or equal protection clauses of the Fourteenth Amendment. *St. John III*, 690 N.E.2d at 388-98.

26. The Supreme Court construed Ind. Code § 6-1.1-31-6(c) to mean that true tax value is not exclusively or necessarily identical to market value, but not to prohibit the State Board from promulgating regulations under which true tax value was based in whole or in part on property wealth. *Id*. at 1038. It therefore found that the statute was constitutional. It affirmed the Tax Court's determination that the cost schedules violated the Property Taxation Clause because they lacked meaningful reference to property wealth, which resulted in significant deviations from substantial uniformity and equality. *Id*. at 1043.

27. While the Supreme Court agreed that the Property Taxation Clause required a *system* characterized by uniformity, equality, and just valuation based on property wealth, it held that the clause did not create a substantive right to individual assessments evaluating property wealth. *Id*. at 1040, 1043. The Court therefore rejected much of Tax Court's holding and discussion concerning market value and the requirement that evidence of property wealth be considered in individual assessments and appeals:

> However, the [Property Taxation] Clause does not require the consideration of all property wealth evidence in individual assessments or appeals therefrom. It does not mandate the use of strict market value or the use of its three measurement standards. It does not prohibit the use of different assessment methodologies for differing property classifications, or assessment based on value in use, provided that the result is substantial uniformity and equality based on property wealth across all property classifications.

Id. at 1043. In light of those holdings, the Supreme Court reversed the Tax Court's order that the State Board had to consider individual property wealth evidence in assessment appeals. *Id*.[7] Likewise, the legislature specifically declined to adopt a strict market value definition, and the statutes specifically state that "true tax value *does not mean* fair market value." I.C. § 6-1.1-31-6(c) and -7(d) (emphasis added).

c. Statutory and regulatory system following the *Town of St. John* litigation

28. The basic statutory framework of Indiana's assessment system remained the same following the *Town of St. John* decisions. The State Board, however, adopted new

[7] The Supreme Court also explained that its holding nullified the Tax Court's finding that the system violated the Due Course of Law Clause. *St. John V*, 702 N.E.2d 1040 n.8.

regulations governing real property assessments. *See* 50 IAC 2.3 (repealed effective March 2, 2010); *see also,* 50 IAC 2.4 (applying to assessments after February 28, 2011). Those regulations, including the 2002 Real Property Assessment Manual and Real Property Assessment Guidelines for 2002 – Version A, allowed real property to be assessed based on a mass-appraisal version of the cost approach. *See* 50 IAC 2.3 (adopting 2002 Guidelines and Manual); *see also,* REAL PROPERTY ASSESSMENT GUIDELINES FOR 2002 – VERSION A at 1-2. Similar to the old regulations, that approach involved determining the replacement cost for improvements as depreciated according to schedules. *See* 2002 GUIDELINES, generally. But for the first time, the regulations defined true tax value as "the market value-in-use of a property for its current use, as reflected by the utility received by the owner or a similar user, from the property." 2002 REAL PROPERTY ASSESSMENT MANUAL 2.[8] And they expressly contemplated parties offering market-based evidence in assessment appeals. 2002 MANUAL at 5 (allowing taxpayers to offer appraisals, sales information for the property under appeal or comparable properties, and other information complied in accordance with generally accepted appraisal principles in assessment appeals). The current real property regulations do the same. *See* 2011 REAL PROPERTY ASSESSMENT MANUAL 2-3 (explaining that the cost, sales-comparison, and income approaches are appropriate for determining true tax value and that any relevant evidence, including fee appraisals, may be offered in an appeal).

29. The State Board did not similarly change its rules for assessing business personal property. Although it adopted a new regulation (50 IAC 4.3) at the end of 2001, that regulation was similar to its predecessor (50 IAC 4.2) in many respects. Neither contained a definition of true tax value corresponding to the definition in the real property manuals. Instead, each regulation provided that true tax value was the amount determined by applying the various rules constituting the regulation. In each case, true tax value was largely determined by depreciating the property's actual acquisition cost (with certain adjustments), although the regulations used different rates of depreciation. *Compare* 50 IAC 4.2-4-7 with 50 IAC 4.3-4-8. Similarly, both regulations permitted

[8] The 2011 Real Property Assessment Manual provides a nearly identical definition for true tax value: "The market value-in-use of a property for its current use, as reflected by the utility received by the owner or by a similar user, from the property." 2011 REAL PROPERTY ASSESSMENT MANUAL 2 (incorporated by reference at 50 IAC 2.4-1-2).

adjustments for abnormal obsolescence, but denied adjustments for normal obsolescence. 50 IAC 4.2-4-7 and -8; 50 IAC 4.3-4-8 and -9. As Verizon points out, 50 IAC 4.3 eliminated the 30% floor. But it still imposed a minimum value, albeit a much lower one.[9]

30. In any case, the legislature reinstated 50 IAC 4.2 for assessment dates starting in 2003, declaring 50 IAC 4.3, and any other rule to the extent it conflicts with 50 IAC 4.2, void. I.C. § 6-1.1-3-22. It also expressly prohibited the DLGF from repealing or amending various sections of 50 IAC 4.2, including 50 IAC 4.2-4-7 and -9, as they existed on January 1, 2001. *See* I.C. § 6-1.1-3-22(f)(2) and -(3).[10] The first section is at the heart of the regulation—it provides that true tax value is computed by multiplying the adjusted cost of each year's acquisitions in the appropriate asset-life pool by the percentage factor set forth for that pool. 50 IAC 4.2-4-7(a). It also explains that those percentage factors automatically reflect all adjustments for Indiana property tax purposes, except abnormal obsolescence. *Id*. The second section establishes the 30% floor about which Verizon complains. 50 IAC 4.2-4-9.[11]

31. With the foregoing in mind, we turn to Verizon's claims.

2. Verizon's constitutional challenges

32. We lack the power to declare a statute unconstitutional on its face. *See Bielski,* 627 N.E.2d 880, 887-88 (Ind. Tax Ct. 1994) ("[T]he State Board and its subordinate local officers and agencies have no authority whatsoever to determine the constitutionality of a statute."). Although Verizon purports to challenge the DLGF's personal property regulation rather than a statute, we reach the same conclusion. First, in challenging 50 IAC 4.2, Verizon also necessarily challenges Ind. Code § 6-1.1-3-22, which orders the reinstatement of that regulation. Indeed that statute expressly forbids the DLGF from

[9] Verizon speculates that eliminating the 30% floor likely reflected a belief that it did not pass constitutional muster under the *Town of St. John* decisions. *Form 131 petitions* (*Petitioner's PTABOA Hearing Briefs at 11).*
[10] The legislature added Ind. Code § 6-1.1-3-22 in the 2002 special session. 2002(ss) Ind. Acts 192, § 28. It incorporated 50 IAC 4.2 by reference. In 2003, the statute was amended to "reinstate" 50 IAC 4.2 as a rule. 2003 Ind. Acts 245, § 2. The 2003 amendment added subsection (f) with its specific prohibitions on repealing or amending various portions of 50 IAC 4.2. *Id.*
[11] Similar provisions regarding leased property are set forth in 50 IAC 4.2-8-9, which Ind. Code § 6-1.1-3-22(f)(8) also prohibits the DLGF from repealing or amending.

repealing or amending two of the provisions (50 IAC 4.2-4-7 and -9) underlying Verizon's claim that the regulation is unconstitutional.

33. Second, the legislature expressly delegated the DLGF exclusive authority to prescribe the basis for determining true tax value. Verizon does not suggest that the DLGF acted beyond the scope of its authority or that it failed to follow the procedures for adopting administrative rules. The regulation therefore has the force of law. *See Western Select Properties, LP v. State Bd. of Tax Comm'rs,* 639 N.E.2d 1068, (Ind. Tax Ct. 1994) ("State Board regulations 'have the force of law[.]'") (quoting *C & C Oil Co. v. Indiana Dep't of State Revenue,* 570 N.E.2d 1376, 1381 (Ind. Tax Ct. 1991)).

34. Even if we were to find the regulation (or portions of it) unconstitutional, we could not provide the relief Verizon seeks. Again, the legislature delegated the authority to prescribe the basis for determining true tax value to the DLGF, not to the Board. Simply invalidating the regulation does not make fee appraisals or other independent market value evidence dispositive of, or even relevant to, the true tax value of Verizon's personal property.

35. Such evidence is now relevant to appeals of *real property* assessments. But that is because the DLGF's new regulations for real property make it so. The DLGF did not similarly amend its *personal property* regulation. Like the old real property system described in the *Town of St. John* litigation, true tax value for personal property continues to be determined by applying "mechanical rules and formulas." As explained above, taxpayers must segregate their personal property into pools based upon each item's useful life and then depreciate the cost (or in the case of leased property, the "base year value") for each acquisition year according to schedules. 50 IAC 4.2-4-7; 50 IAC 4.2-8-9. The resulting figure, with limited exceptions, must be at least 30% of the adjusted cost for all of a taxpayer's personal property in the same taxing district and may be adjusted only for abnormal obsolescence. 50 IAC 4.2-4-7 through -9; 50 IAC 4.2-8-8 and -9.

36. That does not necessarily mean the regulation lacks reference to objectively verifiable measures of property wealth.[12] But it does mean that the methods for determining true tax value and for contesting an assessment's accuracy are circumscribed by the regulation and do not permit the same type of general reference to the market that the DLGF's real property regulations allow. To the extent the Indiana Constitution requires the type of changes to the system Verizon seeks, the legislature or the DLGF—not this Board—must make them.

37. While we lack the authority to address facial challenges, Verizon argues we may address claims that a statute or regulation is unconstitutional as applied to a specific taxpayer. According to Verizon, its claims include an "as applied constitutional challenge, based on evidence [it] has developed concerning the market value of its property . . . ." *Verizon Response at 12*.

38. But that does not functionally differ from Verizon's facial challenge. Verizon does not claim local officials applied the personal property regulation differently to Verizon than to other taxpayers. To the contrary, Verizon's complaint stems from the fact that the regulation is applied uniformly without exceptions for taxpayers, like Verizon, whose property (Verizon alleges) depreciates at a greater rate than the DLGF's depreciation pools and 30% floor recognize. The problem lies in the fact that the regulation does not necessarily measure what Verizon wants it to measure—market value. That purported shortcoming is precisely what Verizon's facial challenges address. For the reasons explained above, even if Verizon is correct, we would still lack the authority to grant Verizon the relief it seeks. The legislature gave the DLGF exclusive authority to establish the methods for assessing personal property. If those methods are invalid, whether on their face or as applied, we are not free to substitute a different method of our own choosing.

39. For these reasons, as a matter of law, we cannot grant the relief sought by Verizon on its constitutional claims, and the Assessor is entitled to judgment on this issue.

[12] For example, the regulation is based largely on the property's actual cost, or in the case of leased property, "the amount, measured in money, that a willing buyer in an arm's length transaction would pay to acquire the item . . . subject to the lease under consideration at the time the lease or bailment was first consummated." 50 IAC 4.2-4-2; 50 IAC 4.2-8-7(b).

3. Verizon's statutory claim

40. Verizon asserts what it claims is an alternative statutory ground for relief. Indiana Code § 6-1.1-2-2(a) codifies the Property Taxation Clause. Thus, argues Verizon, the DLGF's personal property regulation violates that statute as well as the Indiana Constitution. And we need not adhere to a regulation that is inconsistent with a statute. *Verizon Response at 12* (citing *Indiana St. Bd. of Health v. B&H Packing Co*., 391 N.E.2d 620, 622 (Ind. Ct. App. 1981)). As explained above, however, the legislature statutorily reinstated the personal property regulation and prohibited the DLGF from amending the very portions that Verizon highlights as infirm. So the regulation can hardly be said to conflict with a statute.

41. In any case, as we explained in discussing Verizon's constitutional challenges, we could not give Verizon the relief it seeks even if we were to find the regulation invalid. Simply invalidating the DLGF's regulation does not make fee appraisals or other independent market value evidence relevant to the true tax value of Verizon's personal property.

42. According to Verizon, Ind. Code § 6-1.1-2-2's requirement that all tangible property (including personal property) to be assessed "on a just valuation basis" makes such evidence relevant. For support, Verizon points to states with constitutional provisions similar to Indiana's where courts have recognized that "just valuation" is "legally synonymous with 'fair market value.'" *Verizon Response at 13* (citing *District School Bd. of Lee County v. Askew*, 278 So.2d 272, 274 (Fla. 1973) and *Shawmut Inn v. Kennebunkport*, 428 A.2d 384, 389 (Me. 1981)). Verizon also points out that taxpayers may offer specific market-based evidence in real property assessment appeals, and to an extent, in appeals of the DLGF's assessment of utility companies' distributable property. While there are some natural differences inhering between the classes of property, Verizon argues those differences should not allow utility companies and real property owners to prove a "just value" when necessary, but deny the same opportunity to owners of business personal property. *Verizon Response at 13*.

43. Once again, Verizon premises its argument on what we view as a misunderstanding of the Indiana Supreme Court's holdings in the *Town of St. John* litigation and the structure of Indiana's assessment system. Regardless of what other states' courts have found, the Indiana Supreme Court rejected the notion that "just valuation" necessarily means market value. *St. John II*, 675 N.E.2d at 327; *St. John V*, 702 N.E.2d at 1043. The statutory codification of the Property Taxation Clause—Ind. Code § 6-1.1-2-2(a)—requires assessments to be based on property wealth, but it does not explicitly prescribe how that wealth may be determined. The legislature largely delegated that decision to the DLGF with the express direction that true tax value does not mean fair market value. *See* I.C. § 6-1.1-31-5(a); *see also*, I.C. § 6-1.1-31-6 and -7.

44. Thus, evidence of a property's market value is relevant in real property assessment appeals because the DLGF's new regulations make it so, not directly because of I.C. § 6-1.1-2-2(a). That statute existed in substantially the same form before and during the *Town of St. John* litigation as it does now. Yet when the State Board of Tax Commissioners' regulations determined the true tax value of real property solely through "mechanical rules and formulas," independent market value evidence was largely irrelevant. *See St. John I*, 665 N.E.2d at 968.[13]

45. As already explained, the DLGF did not make changes to its personal property regulation mirroring the changes to its real property regulations. Instead, the personal property regulation is still based on mechanical rules and formulas. With limited exceptions, it does not permit taxpayers, assessing officials, or us to consider independent market value evidence, such as appraisals.

46. Verizon also points to Ind. Code § 6-1.1-8-26. *Verizon response at 13*. That statute directs the DLGF to determine the "just value" of a public utility company's property,

[13] There were narrow circumstances, such as in quantifying obsolescence or negative influence factors, where the State Board's regulations allowed parties to offer market-based evidence. *See Canal Square Ltd. P'ship v. State Bd. of Tax Comm'rs*, 694 N.E.2d 801, 806 (Ind. Tax Ct. 1998) ("[t]he State Board's regulations … require the recognition of obsolescence and ties its definition of obsolescence directly to that applied by professional appraisers under the cost approach."); *Phelps Dodge v. State Bd. of Tax Comm'rs*, 705 N.E.2d 1099, 1106 n. 14 (Ind. Tax Ct. 1999) (explaining that using market concepts to quantify influence factors did not run afoul of Ind. Code § 6-1.1-31-6(c) because the regulations describing land orders and influence factors specifically referred to market concepts). Unlike 50 IAC 4.2, the real property regulations did not distinguish between "normal" and "abnormal" obsolescence or prohibit adjustments for normal obsolescence. *Western Select Properties*, 639 N.E.2d at 1073.

which is made up of fixed property assessed by township or county assessors, and distributable property assessed by the DLGF. I.C. § 6-1.1-8-26(a); *see also*, I.C. § 6-1.1-8-24 and -25. The value of a utility's distributable property (other than the distributable property of a railroad car company) equals the utility's unit value minus the value of its fixed property. I.C. § 6-1.1-8-26(a). As Verizon points out, in determining a utility's unit value, the DLGF may consider various factors, including "statistics and reports prepared or filed by the company" and "statistics and reports prepared by . . . a private organization if the organization is considered reliable by investors and investment dealers." I.C. § 6-1.1-8-26(b)(6) and (7). Verizon points to *Thorntown Telephone Co. v. State Bd. of Tax Comm'rs*, 629 N.E.2d 962 (Ind. Tax Ct. 1995), an assessment appeal by two utilities (telephone companies). According to Verizon, the Tax Court rejected the type of "one size fits all, blanket approach" to quantifying depreciation and obsolescence reflected in the personal property regulation and allowed the utilities to present evidence similar to the appraisal reports on which Verizon seeks to rely. *Form 131 petitions, Petitioner's PTABOA Hearing Brief (2009) at 14*.

47. Although Verizon does not highlight it, the utility statute directs the DLGF to promulgate rules to provide for equal treatment of utilities within each classification and mandates that the DLGF cannot prohibit adjustments from being made where the rules "would result in an assessment that would be unfair" to the state or the utility. I.C. § 6-1.1-8-42(a). Accordingly, the DLGF's utility regulation allows it to use factors other than those normally used to determine a utility's value as a going concern only where doing so is necessary to: "(1) ensure equal and nondiscriminatory treatment of all public utility companies within the same classification; or (2) provide for a unit value that is not clearly unreasonable or unfair to the state or the public utility company." 50 IAC 5.1-5-2.

48. Thus, the legislature chose a different scheme for assessing utility company property. Most importantly, it did not define either a utility's unit value or the value of its distributable property as the amount determined by applying the DLGF's regulations. To the contrary, the DLGF must consider other factors where necessary to assure fair assessments.

49. In deciding the *Thorntown* appeals, the Tax Court relied on the predecessors to the utility statutes and regulations highlighted above—not on Ind. Code § 6-1.1-2-2(a). In *Thorntown Tel. Co. v. State Bd. of Tax Comm'rs*, 588 N.E.2d 613 (Ind. Tax Ct. 1992) *(Thorntown I),* two telephone companies sought an order for the State Board to determine their assessments by applying economic obsolescence. *Thorntown I*, 588 N.E.2d at 614. The State Board had adopted a regulation incorporating economic obsolescence in its methodology for assessing railroad property, but not in its methodology for assessing property owned by other types of utilities. *Id*. at 615. The State Board used a specific schedule to do so, which it based on data from the railroad industry. The Tax Court held that the State Board's decision not to apply the economic obsolescence adjustment from the railroad schedule to the telephone companies' property was neither arbitrary nor unconstitutional. *Id*. at 617.

50. But that begged the question whether it needed to consider some other type of adjustment for economic obsolescence. According to the Court, to give effect to the legislature's intent that the State Board make adjustments where its regulations would otherwise result in an unfair assessment, it at least needed to consider whether an adjustment for economic obsolescence was necessary. *Id.* at 618. On appeal after remand, the Tax Court found that the State Board's use of accelerated federal tax depreciation to account for economic obsolescence (pursuant to the Board's regulations) failed to account for the studies offered by the telephone companies, which were based in part on enumerated factors—statistics and reports—that the Board was statutorily authorized to consider. *Thorntown II*, 629 N.E.at 965-66 (Ind. Tax Ct. 1995).

51. We recognize that the scheme for assessing utilities is not completely divorced from the scheme for assessing business personal property. The DLGF's current regulation for assessing utilities (50 IAC 5.1) is similar to its personal property regulation in many respects. Like the personal property regulation, it prohibits adjustments for normal obsolescence and imposes a 30% floor for distributable depreciable property. 50 IAC 5.1-6-9; 50 IAC 5.1-6-11. Indeed, when the DLGF adopted a new rule for assessing utilities (50 IAC 5.2), the legislature ordered 50 IAC 5.1 reinstated just as it did with 50

IAC 4.1. I.C. § 6-1.1-8-44. But that does not change the fundamental differences between the two schemes.

52. For these reasons, as a matter of law, we find that the Assessor's calculation of the assessment pursuant to DLGF regulations and without consideration of market-based evidence is correct, and Verizon is not entitled to relief.

4. The Assessor is entitled to summary dismissal because Verizon's claims must be denied as a matter of law and there are no issues remaining before the Board.

53. Even if we cannot give Verizon the relief it seeks, Verizon asks us to hold a hearing so it may develop a record concerning the market value of its property. The Assessor argues that a hearing would result in the substantial expense of hiring experts to litigate the precise market value of Verizon's property on the chance that the DLGF's regulations (1) will ultimately be adjudicated invalid, and (2) will be replaced by regulations (or statutory scheme) adopting market value as the method for determining the true tax value of business personal property. We agree with the Assessor that holding an evidentiary hearing to develop the precise market value is both unnecessary and would result in a significant expense to the Assessor. But the Board need not decide on these grounds.

54. The posture of this matter is one of summary dismissal. The Assessor filed a motion entitled "Respondent's Motion to Dismiss," and it referenced TR 12(B)(1) and 12(B)(6).[14] The motion also designated materials in support. Our agency rules provide for discretionary incorporation of the Trial Rules:

> The Indiana Rules of Trial Procedure *may* be applied to the extent that trial rules do not conflict with statutes governing property tax appeals or this title.

52 IAC 2-1-2.1 (emphasis added). Accordingly, we look to the Trial Rules for guidance but are not bound by them. Our agency rules specifically contemplate dismissal for "failure to state a claim on which relief can be granted" if raised by motion of a party or *sua sponte* by the Board. 52 IAC 2-10-2(a)(1); (b). Our agency rules also specifically contemplate motions for summary judgment pursuant to the Trial Rules. 52 IAC 2-6-8.

[14] The Assessor also referenced 52 IAC 2-8-5 which addresses the general procedures for filing motions with the Board.

Statutorily, the Board does not have pleadings other than the forms used to initiate an appeal. The Board's rules do not require specific pleadings nor responsive pleadings. Thus, it is not clear that TR 12(B) motions should procedurally apply to an appeal before the Board.

55. We find that the Assessor's references to TR 12(B)(1) and 12(B)(6) are shorthand for seeking dismissal on the grounds of lack of subject matter jurisdiction and a failure to state a claim. Those issues were briefed by the parties and argued at hearing. As discussed above, we find in favor of the Assessor as a matter of law and that Verizon is not entitled to relief. The only question remaining is whether the appeals should be dismissed as final determinations appealable to the Tax Court. 52 IAC 1-10-2-2(c).

56. Verizon asks us to hold a hearing so it may develop a record concerning the market value of its property. This is basically a claim that a material fact must be resolved. "A genuine issue of material fact exists when facts concerning an issue which would dispose of the case are in dispute." *Lake County Assessor v. Amoco Sulfur Recovery Corp*., 930 N.E.2d 1248, 1250 n.4 (Ind. Tax Ct. 2010). The Assessor concedes that Verizon's assessments would be "substantially reduced by a change to a market value approach." *Memorandum in Support of Allen County Assessor's Motion to Dismiss at 9*. A record establishing that Verizon's appraisers believe the "just value" to be $18.5M for 2008, $33.6M for 2009, and $45.9M for 2010 would not in any way dispose of the case because we find as a matter of law the Assessor properly relied on the DLGF regulations. Verizon fails to assert in its brief any other grounds for the Board to adjust the assessment.[15] There are no material issues of law or fact remaining before the Board and dismissal would be proper at this junction by motion or *sua sponte*.

57. We find that we have subject matter jurisdiction over these appeals. We cannot grant relief on Verizon's constitutional claims, and consequently the Assessor is entitled to

[15] Verizon's counsel indicated at oral argument that, while Verizon did not claim abnormal obsolescence "below," it had not yet finally decided whether it will do so. A hearing on the calculation of abnormal obsolescence would not necessarily include evidence of market value. In any event, we find that Verizon waived its claim for abnormal obsolescence by failing to raise the issue in response to the Assessor's motion to dismiss for failure to state a claim. The very purpose of a motion to dismiss for failure to state a claim is to require a petitioner to articulate the specific legal grounds on which relief is sought. We think 8 years is long enough for Verizon to settle on its theory of the case.

judgment on that issue. On Verizon's statutory claims, we find the regulations issued by DLGF are consistent with the statutes, the Assessor correctly relied on the regulations, and consequently the Assessor is entitled to judgment on that issue. As there are no other material questions of law or fact, we issue our final determination denying Verizon's Form 131 petitions.

ISSUED: _____

_____
Chairman, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

_____
Commissioner, Indiana Board of Tax Review

- APPEAL RIGHTS -

You may petition for judicial review of this final determination under the provisions of Indiana Code § 6-1.1-15-5 and the Indiana Tax Court's rules. To initiate a proceeding for judicial review you must take the action required not later than forty-five (45) days after the date of this notice. The Indiana Code is available on the Internet at <http://www.in.gov/legislative/ic/code>. The Indiana Tax Court's rules are available at <http://www.in.gov/judiciary/rules/tax/index.html>.