STATE OF MINNESOTA | TAX COURT

COUNTY OF RAMSEY | REGULAR DIVISION

CenterPoint Energy Resources Corp.,

Appellant,

vs.

Commissioner of Revenue,

Appellee.

ORDER GRANTING CENTERPOINT'S MOTION TO ACCEPT SUPPLEMENTAL EVIDENCE AND DENYING THE COMMISSIONER'S MOTION FOR SUMMARY JUDGMENT

File No. 8763-R

Filed: October 14, 2016

This matter came before The Honorable Bradford S. Delapena, Judge of the Minnesota Tax Court, on appellee Commissioner of Revenue's motion for summary judgment, and on appellant CenterPoint's motion to accept supplemental evidence. We grant CenterPoint's motion and deny the Commissioner's motion.

Paul B. Kilgore, Fryberger, Buchanan, Smith & Frederick, P.A., represented appellant CenterPoint Energy Resources Corporation.

Sara L. Bruggeman, Assistant Minnesota Attorney General, represented appellee Commissioner of Revenue.

CenterPoint appeals an order of the Commissioner which valued as a single economic unit all of the personal property constituting CenterPoint's gas transmission pipeline, and based on which the Commissioner furnished to numerous local taxing districts values for CenterPoint's operating property lying within those districts. In preparation for trial, CenterPoint obtained a fee appraisal indicating a unit value approximately twenty percent lower than the valuation underlying the Commissioner's assessment.

A fee appraisal indicating that a taxing authority's assessment is excessive defeats the prima facie validity of the assessment and creates a triable issue of fact concerning the subject property's market value. Rather than acknowledging this well-settled rule, the Commissioner instead moves for summary judgment proposing a legal theory: (1) that would render unbearable a taxpayer's burden to overcome the prima facie validity of a utility assessment; (2) under which CenterPoint could not carry that burden; and (3) in accordance with which we would be compelled to affirm the Commissioner's (possibly excessive) assessment rather than determining the market value of CenterPoint's pipeline. Urging us to adopt her theory, the Commissioner requests summary judgment on the ground that CenterPoint "cannot meet its burden to rebut the prima facie validity of the Commissioner's" assessment.[1] CenterPoint opposes summary judgment and also moves the court to accept as supplemental evidence a document that it requested from the Commissioner during discovery, but that the Commissioner willfully withheld until *after* we heard oral argument on her summary judgment motion.

Agreeing with CenterPoint that the Commissioner wrongfully withheld documents fatal to her theory of summary judgment, we grant CenterPoint's motion to accept supplemental evidence. And, concluding that the Commissioner's theory of prima facie validity is unsupported by law—and, indeed, that it would defeat legistlatively conferred rights to contest the Commissioner's utility valuations—we deny the Commissioner's motion for summary judgment.

The court, upon all the files, records, and proceedings herein, now makes the following:

ORDER

1. CenterPoint's motion to accept supplemental evidence is granted.

2. The Commissioner's motion for summary judgment is denied.

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[1] Comm'r's Mem. Supp. Summ. J. 12 (emphasis omitted).

3. Within 30 days of the date of this order, the parties shall jointly contact the tax court administrator to schedule trial in this matter.

IT IS SO ORDERED.

BY THE COURT,

Bradford S. Delapena, Judge
MINNESOTA TAX COURT

DATED: October 14, 2016

MEMORANDUM

I. BACKGROUND

Under Minnesota law, "[a]ll property shall be valued at its market value." Minn. Stat. § 273.11, subd. 1 (2014). This case involves the market value of the personal property constituting CenterPoint's gas transmission pipeline.

A. Utility Assessment Generally

Normally, local authorities estimate the value of the taxable personal and real property lying within their jurisdictions. *See* Minn. Stat. §§ 273.062 (personal property), 273.17 (real property) (2014). The legislature has determined, however, that "[t]he personal property, consisting of the pipeline system …, of pipeline companies … shall be listed with and assessed by the commissioner of revenue and the values provided to the city or county assessor by order." Minn. Stat. § 273.33, subd. 2 (2014).

Pursuant to her rulemaking authority, *see* Minn. Stat. § 270C.06 (2014), the Commissioner has adopted an administrative rule for estimating the market value of gas transmission pipelines

and other utilities. *See generally* Minn. R. 8100 (2015). The Rule employs a unitary valuation method that "value[s] an integrated group of assets which function as a single economic unit without reference to the value of the independent component parts." [2] Although the Rule relies principally upon the cost and income approaches to value, Minn. R. 8100.0300, subps. 3 & 4, giving those approaches dominant weighting, *id.*, subp. 5, it also authorizes limited use of the market approach, *id.*, subps. 4a & 5.

Under the Rule, the Commissioner: (1) "establishes an estimate of the unit value for each utility company;" (2) allocates a fair share of that value "to each state in which the utility company operates;" (3) deducts exempt and locally assessed property from Minnesota's allocation; and (4) apportions a fair share of Minnesota's allocation "to the various taxing districts within the state" in which the utility operates. *See* Minn. R. 8100.0200. If necessary, the values furnished to local authorities may be "equalized based on sales/assessment ratios." *Id.*; Minn. R. 8100.0700.

Although Rule 8100 sets forth a default method for estimating unit values, *see* Minn. R. 8100.0300, it nevertheless authorizes the Commissioner "to exercise discretion whenever the circumstances of a valuation estimate dictate the need for it." Minn. R. 8100.0200. The Commissioner's discretion to deviate from the Rule's default method may be used, *inter alia*, "to ensure that a reasonable estimate of market value is derived." *Id.* Thus, Notwithstanding the Rule's specification of a default valuation method, market value remains the governing legal standard. Minn. Stat. § 273.11, subd. 1.

The Legislature has created three separate avenues for appealing the Commissioner's Rule 8100 assessments. *See* Minn. Stat. § 273.372, subd. 1(b) (2014) ("This section governs

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[2] Affidavit of Holly Soderbeck, Ex. 1 at DOR 3706 (filed Apr. 29, 2016) ("Soderbeck Aff.").

administrative appeals and appeals to court of a claim that utility ... operating property has been partially, unfairly, or unequally assessed, or assessed at a valuation greater than its real or actual value ...."). First, a taxpayer can file an administrative appeal with the Commissioner. *Id.*, subd. 4(a). A taxpayer who remains aggrieved after an administrative appeal may appeal to court. *Id.* Second, a taxpayer can challenge the Commissioner's assessment by filing an appeal under Minnesota Statutes chapter 271. *Id.*, subd. 2(b). Finally, a taxpayer can challenge a local taxing authority's implementation of the Commissioner's assessment by filing an appeal under chapter 278. *Id.*, subd. 2(c).

B. Assessment and Appeal

In accordance with the foregoing provisions, the Commissioner estimated a system unit value of $729,225,900 for CenterPoint's pipeline as of the January 2, 2014 valuation date.[3] Based in part on this unit value, the Commissioner determined that Minnesota's apportionable market value was $636,254,800 and, by order, furnished apportioned values to local assessors.[4] Dissatisfied with the Commissioner's unit valuation, CenterPoint appealed to this court.[5]

C. Pertinent Action on Discovery

During the pendency of this appeal, each party obtained a fee appraisal of CenterPoint's pipeline. CenterPoint's appraiser, Mr. Thomas K. Tegarden, MAI, CAE, estimated a unit value of

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[3] Soderbeck Aff., Ex. 1, at DOR 167.

[4] Soderbeck Aff., Ex. 1, at DOR 165-67; *id.*, Ex. 5.

[5] CenterPoint challenges only the Commissioner's unit valuation. It does not dispute the manner in which the Commissioner allocated value to states, deducted exempt property from Minnesota's allocation, or apportioned Minnesota's allocation to local taxing districts. CenterPoint's Mem. Opp'n Summ. J. 12 n.15.

$580,000,000[6]—approximately $150,000,000 or 20 percent below the unit-value estimate upon which the Commissioner based her assessment.[7]

The parties also engaged in written discovery and conducted depositions. CenterPoint's August 2014 written discovery included: (1) an interrogatory asking the Commissioner to identify all appraisals prepared for her; (2) a document request asking the Commissioner to produce "[a]ll documents referred to in any response to the above interrogatories;" and (3) a definition specifiying that *documents* means, among other things, "reports" and "drafts of any of the foregoing." [8]

After the parties exchanged written appraisal reports, CenterPoint deposed the Commissioner's expert appraiser, Mr. Brent Eyre, ASA.[9] During that deposition on February 17, 2016, CenterPoint asked Eyre whether he had furnished a draft of his appraisal report (the "Eyre Draft") to "the Department of Revenue or the Attorney General's Office." [10] After Eyre responded in the affirmative, CenterPoint asked whether any changes had been made "from that draft to the final appraisal." [11] Eyre replied: "If there would have been changes, they would have been cosmetic in nature, proofreading-type changes." [12]

CenterPoint next asked the Commissioner's counsel to furnish it with a copy of the Eyre Draft. Counsel did not object to this request on any ground, but instead responded, "[i]f I have it,

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[6] Affidavit of Sara L. Bruggeman, Ex. 2, at 1472, 1493 ("Bruggeman Aff.") (filed Apr. 29, 2016).

[7] Soderbeck Aff., Ex. 1, at DOR 165-67.

[8] Affidavit of Paul B. Kilgore ("Kilgore Aff.") (filed May 25, 2016), Ex. F, at 2-3, 6, 7 (discovery dated August 11, 2014).

[9] Kilgore Aff., Ex. P; Supplemental Affidavit of Paul B. Kilgore ("Suppl. Kilgore Aff.") (filed June 16, 2016), Exs. A-B.

[10] Suppl. Kilgore Aff., Ex. A, Dep. pp. 8-9.

[11] Suppl. Kilgore Aff., Ex. A, Dep. p. 9.

[12] Suppl. Kilgore Aff., Ex. A, Dep. p. 9.

yes." [13] Following up on this response by counsel, CenterPoint asked Mr. Eyre: "Do you remember, did you provide that draft to the Attroney General's Office or to the Department of Revenue?" [14] Eyre replied: "It would have been to counsel." [15]

During the balance of the deposition, Mr. Eyre testified, among other things: (1) that the Commissioner's counsel had instructed him "to perform a Rule 8100 compliant opinion of value" rather than to produce "my own independent opinion of value," as the Commissioner had instructed in another recent case;[16] (2) that specified portions of the Rule's default method for the market approach had *not* prevented him from achieving "a valid market indicator value;" [17] (3) that in writing his appraisal report, he had *not* invoked a Jurisdictional Exception under the Uniform Standards of Professional Appraisal Practice;[18] and (4) that his appraisal arrived at market value.[19]

On March 25, 2016, approximately one month after deposing Mr. Eyre, CenterPoint wrote to the Commissioner's counsel reminding her "of the requests [CenterPoint] made in the written discovery and then again during Mr. Eyre's February 17 deposition" for a copy of the Eyre Draft, and again requesting production.[20] Approximately two months later, on May 20, 2016,

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[13] Suppl. Kilgore Aff., Ex. A, Dep. p. 9.

[14] Suppl. Kilgore Aff., Ex. A, Dep. p. 9.

[15] Suppl. Kilgore Aff., Ex. A, Dep. p. 9.

[16] Suppl. Kilgore Aff., Ex. B, Dep. pp. 46-47. The recent case is *Minnesota Energy Resources Corp. v. Commissioner of Revenue*, No. 8041 et al., 2014 WL 4953754 (Minn. T.C. Sept. 29, 2014), *amended*, 2015 WL 213779 (Minn. T.C. Jan. 9, 2015) [hereinafter *MERC*], *cert. granted*, (Minn. Mar. 9, 2015) (Nos. A15-0422 & A15-0438).

[17] Suppl. Kilgore Aff., Ex. B, Dep. p. 48.

[18] Suppl. Kilgore Aff., Ex. B, Dep. p. 38.

[19] Suppl. Kilgore Aff., Ex. B, Dep. pp. 39-40.

[20] Kilgore Aff., Ex. H.

CenterPoint again wrote to the Commissioner's counsel complaining that the Commissioner had not, to date, "disclosed the draft appraisal;" citing relevant portions of CenterPoint's written discovery requests; reminding counsel that she had "committed on the record to provide" the Eyre Draft; and again demanding production.[21]

D. The Parties' Motions

On April 29, 2016, approximately one month after CenterPoint's first follow-up letter pursuing the Eyre Draft, the Commissioner filed her motion for summary judgment.[22] The accompanying memorandum of law contended that CenterPoint "cannot meet its burden to rebut the prima facie validity of the Commissioner's" assessment.[23] Specifically, the Commissioner argued, among other things, that CenterPoint lacked evidence: (1) "showing the Commissioner's valuation using Rule 8100 does not reflect the market value of [CenterPoint's] gas distribution system;" (2) "showing that Rule 8100 incorrectly determines market value;" or (3) "explain[ing] why departure from Rule 8100 is necessary to determine the market value of [CenterPoint's] gas distribution system." [24]

On May 25, 2016, approximately five days after sending the Commissioner the second follow-up letter pursuing the Eyre Draft, CenterPoint filed a memorandum opposing summary judgment on the ground that Mr. Tegarden's fee appraisal defeated the prima facie validity of the Commissioner's assessment, and that the case involved numerous genuine issues of material fact

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[21] Kilgore Aff., Ex. I.

[22] Comm'r's Not. Mot. & Mot. Summ. J.

[23] Comm'r's Mem. Supp. Summ. J. 12 (emphasis omitted).

[24] Comm'r's Mem. Supp. Summ. J. 2.

including, most importantly, market value.[25] CenterPoint also noted that the Commissioner had not yet disclosed the Eyre Draft.[26] We heard oral argument on June 3, 2016, during which CenterPoint again complained that—contrary to the February 17 oral assurance by the Commissioner's counsel that she would produce the Eyre Draft, and in spite of CenterPoint's two follow-up letters pursuing the matter—the Commissioner had never furnished CenterPoint with that document.[27]

On June 3, 2016, soon after appearing to argue the Commissioner's summary judgment motion, the Commissioner's original counsel filed a Notice of Withdrawal.[28] Shortly thereafter, by correspondence dated June 9, 2016, the Commissioner's substitute counsel provided to CenterPoint previously unproduced documents, including a copy of the Eyre Draft.[29]

Approximately one week later, on June 16, 2016, CenterPoint filed a motion asking the court to accept the Eyre Draft as newly discovered evidence.[30] That draft included the following statements by Mr. Eyre that did *not* appear in his final appraisal report previously disclosed to CenterPoint:

- In my opinioin, the provisions of [Rule 8100] regarding the income approach do not give the appraiser the flexibility to select an income approach that reflects the characteristics of the subject property and thus, will more than likely, not allow the appraiser to achieve market value. This

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[25] CenterPoint's Mem. Opp'n Summ. J. 3-8 (enumerating 24 separate material fact questions in dispute).

[26] CenterPoint's Mem. Opp'n Summ. J. 7 n.8.

[27] Tr. (June 3, 2016) 30-33.

[28] Withdrawal of Counsel (filed June 3, 2016). Thus, as of June 3, 2016, Assistant Minnesota Attorney General Jennifer A. Kitchak became counsel of record for the Commissioner. In this memorandum, we refer to Ms. Kitchak as "substitute counsel."

[29] Suppl. Kilgore Aff. ¶ 5.

[30] CenterPoint's Not. Mot. & Mot. Accept Suppl. Aff. & Mem.

is the primary reason that I am invoking a Jurisdictional Exception under [Uniform Standards of Professional Appraisal Practice] provisions.[31]

- The Rule's restrictions on how much reliance can be given the stock & debt [market] approach is also another reason for my invoking of a Jurisdictional Exception.[32]

In an accompanying memorandum, CenterPoint argued that the Eyre Draft fatally undermined the Commissioner's theory of summary judgment by furinshing evidence that the Rule's default method likely prevented the Commissioner from accurately estimating the market value of CenterPoint's pipeline.[33]

The Commissioner opposed CenterPoint's motion arguing, among other things, that the interests of justice did not favor acceptance of the Eyre Draft and that it did not create a genuine issue of material fact in any event.[34] Notably, the Commissioner did *not* submit with her memorandum any evidence: (1) contradicting Mr. Eyre's sworn testimony that he had previously provided the Eyre Draft to the Commissioner's original counsel;[35] (2) indicating that the Commissioner's original counsel did not possess a copy of the Eyre Draft throughout the relevant time period; or (3) otherwise explaining the Commissioner's failure to promptly furnish CenterPoint the document after the Feburary 17 Eyre deposition.[36]

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[31] Suppl. Kilgore Aff., Exhibit C, at EYRE 0426.

[32] Suppl. Kilgore Aff., Exhibit C, at EYRE 0426.

[33] CenterPoint's Mem. Regarding Newly Discovered Evid. 4.

[34] Comm'r's Resp. Mot. Accept Supp. Aff. & Mem. 2-10.

[35] Suppl. Kilgore Aff., Ex. A, Dep. pp. 8-9.

[36] *See* Tr. (Aug. 3, 2016) at 11, 12, 18.

II. RULING ON CENTERPOINT'S MOTION

CenterPoint frames its motion to accept the Eyre Draft as a request to relax the time limit for submitting evidence in opposition to the Commissioner's motion for summary judgment on the ground that the Eyre Draft qualifies as newly discovered evidence.[37] *See* Minn. R. 8610.0070, subp. 9 (2015) (authorizing the court to "waive or modify the time limits" governing motion practice "[i]f irreparable harm will result without immediate action by the court, or if the interests of justice otherwise require").

We agree with CenterPoint that the Eyre Draft is newly discovered evidence. Minnesota law is consistent "regarding the nature of [newly discovered evidence] and the efforts which the party makes prior to and during the trial to discover evidence." 2A David F. Herr & Roger S. Haydock, Minnesota Practice, *Civil Rules Annotated* § 60.21 (5th ed.) (updated May 2016). Proffered evidence must be material; it "must be such as to have a probable effect upon the result ...." *Gruenhagen v. Larson*, 310 Minn. 454, 459, 246 N.W.2d 565, 569 (1976); *see also Cut Price Super Markets v. Kingpin Foods, Inc.*, 256 Minn. 339, 358, 98 N.W.2d 257, 270 (1959). Due diligence in initially obtaining evidence asserted to be newly discovered "requires the use of available discovery tools as well as reasonable investigation efforts." *Regents of Univ. of Minnesota v. Med. Inc.*, 405 N.W.2d 474, 479 (Minn. App. 1987) (citing *Brown v. Bertrand*, 254 Minn. 175, 184-85, 94 N.W.2d 543, 550 (1959)).

We conclude that the Eyre Draft is material because it creates a genuine issue of material fact concerning whether the Commissioner's use of Rule 8100's default method allowed the Commissioner to accurately estimate the market value of CenterPoint's pipeline. *See infra* § VI.B. We further conclude that CenterPoint was diligent in pursuing the Eyre Draft. Fairly construed,

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[37] CenterPoint's Mem. Supp. Accept Suppl. Docs. 1.

CenterPoint's August 2014 written discovery requested draft appraisal reports.[38] On February 17, 2016, the Commissioner's original counsel affirmatively undertook on the record to provide the Eyre Draft.[39] CenterPoint subsequently sent the Commissioner's original counsel two follow-up letters (dated March 25, 2016, and May 20, 2016, respectively) asserting that the document fell within the scope of CenterPoint's written discovery, and reminding counsel of her promise to provide the document.[40] The Commissioner's original counsel neither objected to CenterPoint's oral request for the document (during the Eyre deposition) nor ever subsequently argued that it fell outside the scope of CenterPoint's written discovery.[41] Under these circumstances, and particularly in light of counsel's affirmative on-the-record undertaking to provide CenterPoint with the Eyre Draft, we conclude that due diligence did *not* require CenterPoint to file a motion to compel. *Cf. Am. Family Serv. Corp. v. Michelfelder*, 968 F.2d 667, 674 (8th Cir. 1992) ("If ... adverse parties cannot rely on [a] lawyer's representations, then the lawyer's benefit to the client diminishes ....").

We also agree with CenterPoint that the interests of justice require acceptance of the Eyre Draft.[42] Minn. R. 8610.0070, subp. 9. Mr. Eyre testified under oath that he had provided the draft to the Commissioner's original counsel.[43] In opposing CenterPoint's motion, however, the

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[38] Kilgore Aff., Ex. F, at 2-3, 6, 7.

[39] Suppl. Kilgore Aff., Ex. A, Dep. p. 9.

[40] Kilgore Aff., Exs. H & I.

[41] Although the Commissioner now interposes a scope objection, Comm'r's Resp. Mot. Accept Suppl. Aff. & Mem. 3, we conclude that the Commissioner's original counsel waived this objection, and that it is meritless in any event, Tr. (Aug. 3, 2016) at 15.

[42] Tr. (Aug. 3, 2016) at 4-5, 18.

[43] Suppl. Kilgore Aff., Ex. A, Dep. pp. 8-9.

Commissioner did not submit any evidence either contradicting Eyre's sworn testimony[44] or otherwise explaining the Commissioner's failure to promptly disclose the draft.[45] Notably, on April 20, 2016, approximately one month after CenterPoint's first follow-up letter, the Commissioner orally opposed a request by CenterPoint to extend the scheduling order in this case arguing, in part, that she intended "to bring a summary judgment motion because [CenterPoint] has not provided sufficient evidence to rebut the prima facie validity of the Commissioner's valuation under Rule 8100."[46] The Commissioner would file that motion approximately one week later; would ignore CenterPoint's second follow-up letter; and would argue her motion on June 3, 2016, all without furnishing CenterPoint the Eyre Draft. On this record, we conclude that the Commissioner's original counsel willfully failed to disclose the Eyre Draft. Consequently, late acceptance is required by the interests of justice, and we grant CenterPoint's motion to accept the Eyre Draft into the summary judgment record.

III. PRINCIPLES GOVERNING THE COMMISSIONER'S MOTION

A. Prima Facie Validity

CenterPoint filed an appeal under Minnesota Statutes chapter 271 challenging the Commissioner's assessment as excessive. By statute, "the order of the commissioner ... in every case shall be prima facie valid." Minn. Stat. § 271.06, subd. 6 (2014). The central issue raised by the Commissioner's summary judgment motion is whether, in opposing that motion, CenterPoint has identified evidence sufficient to defeat the prima facie validity of the Commissioner's assessment.

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[44] Suppl. Kilgore Aff., Ex. A, Dep. pp. 8-9.

[45] *See* Tr. (Aug. 3, 2016) at 11, 12, 18.

[46] Tr. (Apr. 20, 2016) at 6; *see also id.* at 7 ("I ask that we go forward with the summary judgment motion without waiting for a decision in *MERC*.").

The Minnesota Supreme Court has explained that the statutory presumption of validity confers upon each property assessment the status of a prima facie case. *S. Minn. Beet Sugar Coop v. Cty. of Renville*, 737 N.W.2d 545, 557 & n.11, 558 (Minn. 2007) [hereinafter *SMBSC*]. A prima facie case "simply means one that prevails in the absence of evidence invalidating it." *Id.* at 558 (internal quotation marks and citations omitted). The presumption is thus a purely procedural device that requires a court to affirm an assessment when the taxpayer fails to appear for trial with evidence that the assessment is excessive. *Id.* at 557-60. "In case no appellant shall appear the Tax Court shall enter its order affirming the order of the commissioner ... from which the appeal was taken." Minn. Stat. § 271.06, subd. 6.

The Minnesota Supreme Court long ago emphasized the purely procedural nature of a presumption:

> It is enough to point out that a presumption is merely a procedural device for controlling the burden of going forward with the evidence and that it has no additional function other than the limited one of dictating the decision where there is an entire lack of competent evidence to the contrary; the very moment substantial countervailing evidence appears from any source, it vanishes completely, and the case is to be decided by the trier of fact as if the presumption had never existed.

Shell Oil Co. v. Kapler, 235 Minn. 292, 300, 50 N.W.2d 707, 713 (1951); *see also* Minn. R. Evid. 301, comm. cmt. – 1977 ("Only the burden of producing evidence is affected by a presumption."). The court recently re-affirmed this view. *Jacobson v. $55,900 in U.S. Currency*, 728 N.W.2d 510, 521-22 (Minn. 2007).[47]

[47] This court, too, has long noted the purely procedural nature of the statutory presumption of validity. *See, e.g., Gubbins v. Cty. of Hennepin*, No. TC-1491, 1982 WL 1091, at *1-2 (Minn. T.C. May 20, 1982); *Belgarde v. Comm'r of Taxation*, No. 1658, 1973 WL 479, at *2 (Minn. T.C. Aug. 15, 1973); *Schroeder v. Comm'r of Taxation*, No. 1269, 1967 WL 8, at *3 (Minn. T.C. Jan. 12, 1967).

Consistent with the foregoing, the supreme court has explained the operation of prima facie validity in tax cases in particular. A taxpayer's mere appearance at trial does not defeat prima facie validity. *SMBSC*, 737 N.W.2d at 558. "Rather, the presumptive validity of the ... assessment remains, and the burden is on the party appealing that assessment to show that it is excessive." *Id.* Presumptive validity thus "imposes on the taxpayer the burden of going forward with evidence to rebut or meet the presumption." *Conga Corp. v. Comm'r of Revenue*, 868 N.W.2d 41, 53 (Minn. 2015) (citing *SMBSC*, 737 N.W.2d at 558).

A taxpayer carries this burden by presenting "substantial evidence." *Id.* at 53; *see also Shell Oil Co.*, 235 Minn. at 300, 50 N.W.2d at 713 (so holding); *Guardian Energy, LLC v. Cty. of Waseca*, 868 N.W.2d 253, 258 n.6 (Minn. 2015) (noting that a presumptively valid assessment "may be successfully challenged with credible evidence that the assessor's estimated market value is incorrect"). "When a taxpayer presents substantial evidence that the Commissioner's assessment order is invalid or incorrect, the presumption of validity is overcome, and the case is decided by the trier of fact the same as if the presumption had never existed." *Conga*, 868 N.W.2d at 53 (internal quotation marks and citation omitted). That is, the court must then decide the case based on the evidence presented by both parties, *Conga*, 868 N.W.2d at 53; *Oliver Iron Mining Co. v. Comm'r of Taxation*, 247 Minn. 6, 21, 76 N.W.2d 107, 117 (1956), bearing in mind that the taxpayer retains the ultimate burden of proof at trial by a preponderance of the evidence, *SMBSC*, 737 N.W.2d at 558 ("the taxpayer has the burden of proof at trial"); *Red Owl Stores, Inc. v. Comm'r of Taxation*, 264 Minn. 1, 8, 117 N.W.2d 401, 407 (1962) (holding that this burden is proof by a preponderance of the evidence).

A taxpayer can defeat the prima facie validity of an assessment in either of two ways. First, the taxpayer "can present affirmative evidence—such as a fee appraisal—demonstrating that the

market value of the subject property is lower than the assessed value." *Ford Motor Co. v. Cty. of Ramsey*, No. C5-07-4696 et al., 2014 WL 3888226, at *13 (Minn. T.C. Aug. 5, 2014), *amended*, 2014 WL 7277775 (Minn. T.C. Dec. 16, 2014). This approach "both overcomes the prima facie validity of the assessed value and helps to meet the taxpayer's ultimate burden to prove market value." *More, Inc. v. Comm'r of Revenue*, No. 8395-R, 2016 WL 715004, at *14 (Minn. T.C. Feb. 19, 2016); *see also Ford Motor Co.*, 2014 WL 3888226, at *13 (noting that a fee appraisal "performs double duty"). Second, the taxpayer can "challeng[e] the methodology by which the [Commissioner] arrived at the assessment." *More*, 2016 WL 715004, at *14; *see also Guardian Energy*, 868 N.W.2d at 258 n.6 (noting that evidence sufficient to invalidate an assessment as excessive is conceptually distinct from evidence sufficient to establish an alternative value). Once the taxpayer offers evidence sufficient to show that the assessment is excessive, the court may affirm the assessment only if there is "independent support in the record." *SMBSC*, 737 N.W.2d at 559.

B. Summary Judgment

This case requires us to consider the role of prima facie validity in the summary judgment context. As previously indicated, the statutory presumption of validity confers upon each order of the Commissioner the status of a prima facie case. *SMBSC*, 737 N.W.2d at 557 & n.11, 558. A prima facie case alone, however, does not entitle a party to summary judgment. *See, e.g.*, *Vill. of New Brighton Resolution 862 v. Vill. of New Brighton*, 293 Minn. 356, 359, 199 N.W.2d 435, 437 (1972) (noting that the assessment constituted "prima facie proof" of the amount by which the property was benefitted, but noting that it "was not conclusive proof, and if there was evidence to the contrary, a question of fact was presented for determination by the trial judge"). "The party moving for summary judgment under Rule 56, Minn. R. Civ. P., must [also] demonstrate no genuine issue of material fact exists." *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

"[W]hen the moving party makes out a prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party." *Id.* at 583. To survive summary judgment, the nonmoving party "must do more than rest on mere averments" or present evidence "which merely creates a metaphysical doubt as to a factual issue." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). Instead, the nonmoving party must point to specific evidence sufficient to permit reasonable persons to draw different conclusions. *Schroeder v. St. Louis Cty.*, 708 N.W.2d 497, 507 (Minn. 2006); *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). As the Minnesota Supreme Court recently reiterated, "[a] genuine issue of material fact must be established by substantial evidence." *Eng'g & Constr. Innovations, Inc. v. L.H. Bolduc Co.*, 825 N.W.2d 695, 704 (Minn. 2013) (internal quotation marks and citations omitted).

Thus, "substantial evidence"—evidence sufficient to permit reasonable persons to draw different conclusions concerning a material fact—simultaneously defeats prima facie validity and forecloses summary judgment. Naturally, the court must view the evidence in the light most favorable to the nonmoving party, *State ex rel. Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994), and must resolve all doubts and factual inferences against the movant and in favor of the party opposing the motion, *City of Shakopee v. Kopp & Assocs., Inc.*, 280 Minn. 511, 513, 159 N.W.2d 901, 903 (1968). Likewise, the court must resolve any doubt as to whether a dispute of material fact exists in favor of trial. *Harvet v. Unity Medical Ctr., Inc.*, 428 N.W.2d 574, 578 (Minn. App. 1988); *Rathbun v. W. T. Grant Co.*, 300 Minn. 223, 230, 219 N.W.2d 641, 646 (1974).

IV. ANALYSIS OF THE COMMISSIONER'S MOTION

Market value is a question of fact. *See, e.g.*, *SMBSC*, 737 N.W.2d at 561 (characterizing market value as an "essential finding[] of fact"); *Johnson v. Johnson*, 277 N.W.2d 208, 210–11 (Minn. 1979) (noting challenge to "the trial court's finding of fact that certain real property ... had

a fair market value of $24,000" and holding that "the trial court's determination of a market value ... was not clearly erroneous"). Constituent components of the traditional approaches to value—components such as market rent and expenses; capitalization and vacancy rates; the comparability of properties used as sale, lease, or capitalization-rate comparables; replacement and reproduction costs; and various forms of depreciation—likewise present questions of fact.[48] Finally, the relative weights to be assigned the value approaches themselves presents a question of fact. *Nw. Racquet Swim & Health Clubs, Inc. v. Cty. of Dakota*, 557 N.W.2d 582, 58 (Minn. 1997) ("We conclude that the tax court did not commit clear error by rejecting the income allocation approach and relying entirely on the cost approach."). We conclude that CenterPoint has identified sufficient evidence to overcome the prima facie validity of the Commissioner's assessment and to avoid summary judgment on the factual question of market value.

As a preliminary matter, we reject the Commissioner's unsupported suggestion that prima facie validity somehow involves *substantive deference* to the Commissioner's discretionary appraisal judgments.[49] As previously indicated, the presumption is a purely procedural device that

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[48] *See, e.g., Kohl's Dep't Stores, Inc. v. Cty. of Washington*, 834 N.W.2d 731, 736 (Minn. 2013) (affirming tax court's findings concerning capitalization rate and market rent used in the income approach); *Cont'l Retail, LLC v. Cty. of Hennepin*, 801 N.W.2d 395, 403 (Minn. 2011) ("The tax court's determination that Stoerzinger's conclusions regarding the income approach were reasonable finds support in the record."); *Nw. Racquet Swim & Health Clubs, Inc. v. Cty. of Dakota*, 557 N.W.2d 582, 58 (Minn. 1997) (holding that tax court's finding on economic obsolescence for the cost approach "cannot be said to have been clearly erroneous"); *Lamping v. Freeborn Cty.*, 374 N.W.2d 169, 176 (Minn. 1985) (concluding that the tax court's finding concerning the comparability of parcels used as sales comparables in the sales comparison approach was not clearly erroneous).

[49] Comm'r's Mem. Supp. Summ. J. 16 (arguing not simply that an *assessment* is prima facie valid, but that "the Commissioner's use of discretion under Rule 8100 retains the presumption that the Commissioner properly applied Rule 8100 to derive ... market value"); *id.* at 23 (arguing that "[b]ecause the determination of a capitalization rate involves the Commissioner's exercise of judgment in a technical area," the rate itself—rather than just the Commissioner's assessment—"is entitled to the presumption of correctness").

affects only the burden of production. *See supra* § III.A. Accordingly, it does *not* involve any substantive deference to the Commissioner's discretionary appraisal judgments. To the contrary, the literal meaning of "prima facie"—"[a]t first sight; before closer inspection," *Prima Facie, American Heritage College Dictionary* (3rd ed. 1997)—excludes any notion of substantive embrace or endorsement. Accordingly, if a taxpayer appears for trial with substantial evidence "the case is to be tried de novo." *SMBSC*, 737 N.W.2d at 558 (citing *Oliver Iron Mining Co. v. Comm'r of Taxation*, 247 Minn. 6, 21, 76 N.W.2d 107, 117 (1956)). As has the Minnesota Supreme Court, we reject the Commissioner's attempt to convert prima facie validity into something more than a procedural device for shifting the burden of production: "A decision of the commissioner comes to the [court] with prima facie validity and no more." *Red Owl Stores*, 264 Minn. at 5, 117 N.W.2d at 405; *Shell Oil*, 235 Minn. at 300, 50 N.W.2d at 713 (emphasizing that the presumption "has no additional function other than the limited one of dictating the decision where there is an entire lack of competent evidence to the contrary").[50]

There can be no question that Mr. Tegarden's fee appraisal qualifies as "substantial evidence" that the Commissioner's assessment is excessive. Courts have long recognized that the

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[50] In support of the Commissioner's contention that prima facie validity involves substantive deference to her appraisal judgment, the Commissioner quotes *In re Excess Surplus Status of Blue Cross & Blue Shield of Minnesota*, 624 N.W.2d 264 (Minn. 2001), for the proposition that "deference should be shown by courts to the agencies' expertise and their special knowledge in the field of their technical training, education, and experience." *Id.* at 278 (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 824 (Minn. 1977)). *BCBSM*, however, is a certiorari appeal applying highly deferential standards of judicial review—rooted in the separation of powers—to an executive agency's quasi-legislative policy judgments. *Id.* at 277-78 & n.12. We fail to see how *BCBSM* could be considered pertinent to this executive branch court's review of a sister agency's quasi-judicial determinations, where such review—by statute—is de novo. Minn. Stat. § 271.06, subd. 6; *Conga*, 868 N.W.2d at 46-48, 53.

testimony of a property owner *alone* can defeat the prima facie validity of an assessment.[51] Mr. Tegarden's summary of Professional Qualifications, appended to his written appraisal report, indicates that he is an eminently qualified utility appraiser. Simply by way of example, Tegarden has been a certified appraiser for more than forty years.[52] He has long been a member of the Appraisal Institute and the International Association of Assessing Officers.[53] He has numerous publications, many of which pertain to utility valuation in particular.[54]

Mr. Tegarden's written appraisal report indicates that he undertook "to estimate the market value of the operating natural gas distribution properties of CenterPoint Energy," and that he had "inspected and analyzed the financial records, gathered the necessary data, and made certain analyses that ... enabled [him] to form an opinion of market value." [55] In addition, Tegarden certified that his appraisal report was "prepared in accordance with Standards Rule 10-2, *Uniform Standards of Professional Appraisal Practice*." [56] The report estimates a unit value of

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[51] *See, e.g., Vreeman v. Davis*, 348 N.W.2d 756, 757 (Minn. 1984) ("An owner is competent to express an opinion on the market value of his or her property, and ordinarily any weakness in the foundation for that opinion goes to its weight, not its admissibility."); *Vill. of New Brighton Resolution 862*, 293 Minn. at 360, 199 N.W.2d at 437–38 ("Mr. Willmus as an owner was competent to express an opinion.... The prima facie case of the village was effectively met by the testimony of Mr. Willmus."); *David E. McNally Dev. Corp. v. City of Winona*, 686 N.W.2d 553, 559 (Minn. App. 2004) ("A property owner can overcome the presumption created by the assessment roll by identifying the maximum benefit and testifying that the assessment exceeded the benefit."); *Pauly v. Comm'r of Revenue*, No. 08634 R, 2015 WL 7889327, at *3 (Minn. T.C. Nov. 30, 2015); *Gubbins v. Cty. of Hennepin*, No. TC-1491, 1982 WL 1091, at *1 (Minn. T.C. May 20, 1982).

[52] Bruggeman Aff., Ex. 2, at bates 1566.

[53] Bruggeman Aff., Ex. 2, at bates 1566.

[54] Bruggeman Aff., Ex. 2, at bates 1567.

[55] Bruggeman Aff., Ex. 2, at bates 1472.

[56] Bruggeman Aff., Ex. 2, at bates 1476.

$580,000,000[57]—approximately $150,000,000 or 20 percent below the $729,225,900 estimate upon which the Commissioner based her assessment applying Rule 8100.[58] Although the scheduling order governing this matter authorized the parties to object "to the competency of an expert or to the admissibility of any portion of an expert report," [59] the Commissioner objected neither to Tegarden's competency nor to the admissibility of any portion of his fee appraisal.

Mr. Tegarden's fee appraisal is more than a mere averment or evidence creating only a metaphysical doubt concerning the Commissioner's market value estimate using Rule 8100. *See DLH*, 566 N.W.2d at 71. Instead, it is substantial evidence easily overcoming the prima facie validity of the Commissioner's assessment and creating a genuine issue of material fact concerning whether that assessment accurately determines the market value of CenterPoint's pipeline. *See More*, 2016 WL 715004, at *14.

V. SUMMARY OF THE COMMISSIONER'S PRINCIPAL CONTENTIONS

The foregoing analysis defines prima facie validity, details its operation in tax appeals, enumerates the methods for rebutting it, and rules that CenterPoint has carried its burden to rebut the prima facie validity of the Commissioner's assessment here. We now turn to, consider in detail, and reject the Commissioner's central contention: that CenterPoint "cannot meet its burden to rebut the prima facie validity of the Commissioner's" assessment.[60]

To support this contention, the Commissioner constructs a theory that would make it virtually impossible for a taxpayer to rebut the prima facie validity of a utility assessment. This theory is contrary to existing law and is unworkable in practice, because it would vitiate the two

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[57] Bruggeman Aff., Ex. 2, at 1472, 1493.

[58] *Compare* Bruggeman Aff., Ex. 2, at bates 1472, *with* Soderbeck Aff., Ex. 1, at DOR 167.

[59] Scheduling Order (filed Feb. 26, 2015) ¶ 9.

[60] Comm'r's Mem. Supp. Summ. J. 12 (emphasis omitted).

separate legislatively conferred rights to contest in this court the Commissioner's utility valuations. *See* Minn. Stat. § 273.372, subds. 2(b), 2(c) (each providing a distinct right of appeal to tax court). We reject the Commissioner's theory because it would transform a procedural device intended simply to allow affirmance where a taxpayer fails to appear in court with substantial evidence, into a bar effectively locking the courtroom door against all taxpayers by deeming their evidence *per se* insubstantial.

The Commissioner correctly observes that "[i]t is [the taxpayer's] burden to present evidence 'to show that [the assessment] does not reflect the true market value of the property.' "[61] As indicated above, a taxpayer can accomplish this either: (1) by "present[ing] affirmative evidence—such as a fee appraisal—demonstrating that the market value of the subject property is lower than the assessed value," or (2) "by attacking the assessment." *Ford Motor Co.*, 2014 WL 3888226, at *13. When a taxpayer succeeds in either of these ways, the parties' market value dispute must be settled by a de novo trial. *SMBSC*, 737 N.W.2d at 558. The Commissioner's theory, however, would make it virtually impossible for a taxpayer to rebut prima facie validity, and thereby advance the matter to trial.

A. No Challenge by Fee Appraisal

In arguing that CenterPoint cannot overcome prima facie validity, the Commissioner comments that CenterPoint "has presented no evidence, *other than its [fee] Appraisal* that does not follow Rule 8100, suggesting that the Commissioner's valuation is excessive."[62] In the Commissioner's view, "[a]n appraisal that arrives at a different market value using a different

[61] Comm'r's Mem. Supp. Summ. J. 12 (quoting *SMBSC*, 737 N.W.2d at 558).

[62] Comm'r's Mem. Supp. Summ. J. 13 (emphasis added).

method is insufficient to ... prove that the Commissioner's valuation is excessive."[63] Thus, according to the Commissioner, a fee appraisal based on generally accepted appraisal principles (rather than the default method set forth in Rule 8100) "does not provide sufficient evidence for the Tax Court to find that [CenterPoint] can meet its burden of proof."[64]

The Commissioner would deduce these consequences from Rule 8100's status as an administrative rule:

> Unlike other types of property tax valuation, where assessors and appraisals are not bound to determine valuations with reference to specific methods set forth in Minnesota law, the Commissioner must determine the value of utility properties ... in accordance with Rule 8100. Rule 8100 sets forth a standard method of calculating the cost indicator of value, the yield indicator of value, and reconciling the various indicators into a system value. As a validly promulgated rule, Rule 8100 has the force of law.... The Commissioner is bound by Rule 8100 and does not have discretion to disregard it.[65]

The Commissioner thus reasons that, because the Rule has the force of law and binds the Commissioner, it governs not only the method by which *she* assesses utility property, but also the manner in which *appraisers and courts* value utility property in subsequent court proceedings.

We note that the Commissioner's critical premise here is directly contrary to her position in *Minnesota Energy Resources Corp. v. Commissioner of Revenue*, No. 8041 et al., 2014 WL 4953754 (Minn. T.C. Sept. 29, 2014) [hereinafter *MERC*]. There, the Commissioner characterized Rule 8100 as a "mass appraisal" tool for estimating market value during the assessment process

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[63] Comm'r's Mem. Supp. Summ. J. 13.

[64] Comm'r's Mem. Supp. Summ. J. 2.

[65] Comm'r's Mem. Supp. Summ. J. 14-15 (citations and footnote omitted).

only,[66] and argued that fee appraisers are *not* bound by the Rule, but may instead rely on generally accepted appraisal practices.[67]

B. No Challenge by Attacking the Assessment

Beyond attempting to insulate her utility assessments against valid fee appraisals, the Commissioner would also make them immune to methodological criticism, the second alternative for overcoming the statutory presumption. In arguing that CenterPoint cannot overcome prima facie validity, the Commissioner complains that CenterPoint failed either to provide "evidence that the Commissioner did not properly follow Rule 8100" [68] or to "allege[] that the Commissioner should have exercised discretion" to deviate from the Rule's default method and "indicate[] in what manner." [69] Given that the Commissioner criticizes CenterPoint for *failing* to do these things, one might suppose that she conceives of such methodological criticisms as *capable* of defeating prima facie validity. Oddly, however, that is not her view. To the contrary, the Commissioner declares: "[A]ppraiser judgment alone is insufficient to invalidate the Commissioner's use of Rule 8100." [70] Thus, according to the Commissioner, a taxpayer cannot defeat prima facie validity by proffering the testimony of an expert appraiser that the Commissioner's assessment—whether applying or departing from the Rule's default method—fails to arrive at market value.

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[66] Comm'r's Post-Trial Mem. 8-11, *MERC*, 2014 WL 4953754 (No. 8041 et al.).

[67] Comm'r's Post-Trial Mem. 8, *MERC*, 2014 WL 4953754 (No. 8041 et al.); *see also infra* at § VII (further elaborating the Commissioner's position in *MERC*).

[68] Comm'r's Mem. Supp. Summ. J. 2; *see also id.* (alleging that CenterPoint failed to demonstrate "that the Commissioner improperly implemented Rule 8100").

[69] Comm'r's Mem. Supp. Summ. J. 16.

[70] Comm'r's Mem. Supp. Summ. J. 20; *see also id.* at 22 ("Appraiser judgment that fails to acknowledge Rule 8100 does not provide a legally sufficient evidentiary basis to determine that Rule 8100 does not properly determine market value.").

VI. REJECTION OF THE COMMISSIONER'S CONTENTIONS

We conclude that Rule 8100 was intended to govern only market value estimates made by the Commissioner during the assessment process. Consequently, the Rule does not constrain appraisers or courts when determining the market value of utility property in subsequent court proceedings. This understanding accords with the rationale justifying the Commissioner's adoption of a utility assessment formula, and is virtually compelled by the text of the Rule. It also harmonizes the Rule with statutes and judicial precedent commanding that property be valued at market value. A fee appraisal based on generally accepted appraisal practices is competent evidence of market value sufficient to rebut the prima facie validity of the Commissioner's utility assessments.

We further conclude that expert testimony creating a material dispute concerning the Commissioner's appraisal judgment in either applying or departing from the Rule's default method is also sufficient to overcome prima facie validity. In addition to complying with existing law, these conclusions preserve—rather than defeat—a taxpayer's statutory rights to obtain *de novo* review of the Commissioner's utility valuations. *See* Minn. Stat. §§ 271.06, subd. 6; 273.372, subds. 2(b), 2(c).

A. Challenge by Fee Appraisal

We reject the Commissioner's contention that a fee appraisal "that arrives at a different market value using a different method [than that specified in Rule 8100] is insufficient to ... prove that the Commissioner's valuation is excessive."[71] This contention is contrary to existing law. It is also contrary to a proper understanding of the Rule and the statutes governing property valuation.

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[71] Comm'r's Mem. Supp. Summ. J. 13.

1. Existing Law

We recently applied in *MERC* the standard set forth above for overcoming the prima facie validity of an assessment. Applying Rule 8100, the Commissioner assessed MERC's natural gas distribution pipeline, and MERC appealed. *MERC*, 2014 WL 4953754, at *3-4. MERC's fee appraiser valued the subject property for each year in issue at an amount far lower than the Commissioner's assessed value. *Id.* at *4.

We recognized that "[t]he Commissioner's estimated market value is prima facie valid." *Id.* at *5. We continued: "Appellant may overcome the presumption of validity by introducing evidence that the Commissioner's estimated market value is excessive." *Id.* (citing *SMBSC*, 737 N.W.2d at 558). Noting in part that "MERC's expert appraiser ... presented evidence that the Commissioner over-valued the subject property as of each valuation date," *id.*, we ruled that "MERC has overcome the presumption of validity for each valuation date." *Id.* Our decision in *MERC* thus applied the settled standard for defeating prima facie validity directly to a Rule 8100 utility assessment, and thus belies the Commissioner's present assertion that a fee appraisal cannot overcome the presumptive validity of a Rule 8100 assessment.

Although each party in *MERC* appealed some portion of our decision, the Commissioner did *not* appeal our ruling that MERC's fee appraisal defeated the prima facie validity of her assessment.[72] Thus, our Regular Division decision in *MERC*—applying well-settled principles for overcoming prima facie validity to a Rule 8100 utility assessment—is precedential in this court. *Cf.* Minn. Stat. § 271.21, subd. 8 (2014) (providing that judgments in the Minnesota Tax Court's

[72] Principal Br. of Cross-Appellant Comm'r of Revenue at i-iii, *Minn. Energy Res. Corp. v. Comm'r of Revenue*, Nos. A15-0422 & A15-0438 (Minn. filed May 20, 2015).

Small Claims Division "shall not be considered as judicial precedent and shall have no force or effect in any other case, hearing, or proceeding").[73]

2. Scope of Rule 8100

The Minnesota Supreme Court long ago explained why taxing authorities use formulas to estimate the market value of utility properties. *Indep. Sch. Dist. No. 99 v. Comm'r of Taxation*, 297 Minn. 378, 381 & n.3, 211 N.W.2d 886, 888 & n.3 (1973). The court found "no disagreement that some type of formula is normally employed by taxing authorities throughout the United States for valuation for tax purposes of utility properties." *Id.* at 381, 211 N.W.2d at 888. It then explained the rationale for this widespread use of valuation formulas:

> Apart from the fact of the uniqueness of the real and personal property and the utility's status as a regulated monopoly, the primary reason and justification for the use of a formula is that neither the local authorities nor the staff of the commissioner is adequate or always qualified to make periodic, personal, on-the-spot appraisals of each article or description of property.

Id. at 381 n.3, 211 N.W.2d at 888 n.3. Adopting a valuation formula for utility properties simplifies an inherently difficult (and annually recurring) appraisal problem, and thus permits the taxing authority to generate with relative ease and efficiency the numerous market value estimates

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[73] The Minnesota Supreme Court has emphasized that, to foster confidence in the State's tax system, the Commissioner of Revenue and the tax court must be consistent in applying the law. *Mauer v. Comm'r of Revenue*, 829 N.W.2d 59, 76 n.2 (Minn. 2013). The precedential effect of Regular Division decisions in subsequent tax court cases materially advances this objective. We are aware of the supreme court's holding that decisions of this executive branch court "do not qualify as the type of 'precedent' on which litigants may rely *for retroactivity purposes*." *Kmart Corp. v. Cty. of Stearns*, 710 N.W.2d 761, 769 (Minn. 2006) (emphasis added). We are also aware that such precedential effect as our decisions possess does not "apply to orders 'which are in conflict with the express provisions of statutory law,' " and that a prior tax court decision "is nonbinding if it directly contradicts a previous holding of" the supreme court, and can have "no binding effect on [that] court when [it is] ultimately called on to interpret a statute." *Id.* at 770.

annually required of it.[74] We thus agree with the Commissioner's statement in *MERC* analogizing Rule 8100 to a mass appraisal tool.[75]

The text of Rule 8100 indicates throughout that the Rule was adopted solely to govern the Commissioner's assessment process, rather than to prescribe the manner in which appraisers and courts value utility property in court proceedings. The Rule's "Introduction" contains several provisions reflecting this limited purpose. It begins: "The commissioner of revenue establishes an estimate of the unit value for each utility company operating within the state." Minn. R. 8100.0200. It continues: "The data used in the valuation ... is drawn from reports submitted to the Department of Revenue by the utility companies," and further provides that "[p]eriodic examinations of the supporting data for these reports are made by the Department of Revenue." *Id.* These provisions, like others discussed below, expressly reference and structure an internal agency process. They neither address, nor purport to govern, the subsequent adjudication of value by this court.

The second paragraph of the Introduction verifies that the Rule is addressed solely to the Commissioner's internal assessment process:

> The commissioner of revenue reserves the right to exercise discretion whenever the circumstances of a valuation estimate dictate the need for it. Discretion may be used to ensure a balance between a prescriptive rule and sound appraisal judgment; to ensure that all relevant data pertaining to value is considered;

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[74] In a 2005 report evaluating Rule 8100 immediately before its most recent revision, Mr. Brent Eyre (then acting as a consultant for the Commissioner) commented that, owing to the use of a utility valuation formula, "[a]ssessment administration is more streamlined and less time consuming." *A Review of MN Rules Chapter 8100*, prepared by Brent Eyre, at 74 (dated Jan. 1, 2005).

[75] Comm'r's Post-Trial Mem. 8, *MERC*, 2014 WL 4953754 (No. 8041 et al.). Although the Rule is not technically a mass appraisal tool, *see Mass Appraisal*, Appraisal Institute, *Dictionary of Real Estate Appraisal* 123 (5th ed. 2010) (providing in part that a mass appraisal is a valuation process "using ... common data, and allowing for statistical testing"), it serves the principal purpose of such a tool: streamlining the annual production of a large number of market value estimates.

> to ensure that a reasonable estimate of market value is derived; to address concerns of predictability and stability in estimations of market value; and to ensure that utility valuation is easily understood and administered.

Id. The meaning of the first sentence could not be more plain: in promulgating Rule 8100, the Commissioner reserved *to herself* substantial discretion in assessing utilities—in "establish[ing] an estimate of the unit value for each utility company operating within the state." *Id.* She then enumerated the purposes she might pursue through the exercise of that reserved discretion. *Id.* This paragraph—with its express reservation of discretion to the Commissioner *qua assessor* to depart from the Rule's default method when specified administrative objectives justify such departure—virtually compels the conclusion that the Rule was intended solely to structure the administrative task of annually assessing utility properties.[76]

Other provisions confirm that the Rule is directed exclusively to the Commissioner in her role as assessor. In discussing the cost approach, the Rule provides that "[f]or rate-regulated companies, the commissioner must use the same type of cost that is used in the rate base calculation." Minn. R. 8100.0300, subp. 3.A. In discussing leased operating property as to which original cost information is unavailable, the Rule provides that "the commissioner shall make an estimate of the cost by capitalizing the lease payments." *Id.*, subp. 3.B. These substantive valuation provisions are expressly directed to the Commissioner, and to no one else.

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[76] The Commissioner asserts that "Rule 8100 authorizes the Commissioner to exercise discretion *where she deems it necessary*," Comm'r's Mem. Supp. Summ. J. 16 (emphasis added), and contends that "appraiser judgment alone [i.e., the judgment of a taxpayer's expert appraiser] is insufficient to invalidate the Commissioner's use of Rule 8100," *id.* at 20. These statements appear to acknowledge—and indeed insist—that the discretion the Rule expressly grants to the Commissioner *is granted to her alone*. To the extent the Commissioner suggests that such discretion is *unreviewable*, however, she is mistaken. *See Cty. of Aitkin v. Blandin Paper Co.*, No. A15-1666, slip. op. at 26, 883 N.W.2d 803, ___ (Minn. Aug. 17, 2016) ("We conclude that when an assessor exercises his or her discretion under [a specified statute] ... that decision is reviewable by the tax court ....").

The cost-approach provision further provides that "[i]f a conflict of opinion exists regarding the character of specific property, whether it is operating or nonoperating property, assessors or utility companies may request a determination by the commissioner." *Id.*, subp. 3.C. This provision contemplating "a determination by the commissioner" could have no possible application during post-assessment adjudicatory processes in which the Commissioner is herself a litigant. The same is true of the following income-approach provision: "Utilities may request the removal of nonrecurring items of income or expense. The commissioner must determine if removal of the item is appropriate." *Id.*, subp. 4.

The Rule's provision concerning indicators of value beyond the cost and income approaches is similarly directed expressly and exclusively to the Commissioner:

> Subp. 4a. **Additional indicators of value.** Additional indicators of value ... may exist in some situations.... [T]he commissioner has the discretion to use these additional indicators in computing the unit value of a utility....
>
> A. If the commissioner determines that the market indicator can be quantified, is reliable, and is indicative of value ..., the commissioner has the discretion to adjust the weightings of the cost and income indicators to give weight to the market indicator ....
>
> B. If the commissioner finds that economic or other forms of obsolescence exists, the commissioner has the discretion to adjust the weightings in the correlation process described in subpart 5 or make other adjustments in its methodology consistent with these rules and applicable statutes.
>
> C. If the commissioner uses additional indicators of value, the commissioner must state in writing the findings that necessitate deviation from the default weightings of 50 percent for cost indicator and 50 percent for income indicator, as described in subpart 5.

Minn. R. 8100.0300, subp. 4a. Again, because the Rule contemplates determinations and findings by the Commissioner, it simply cannot have been intended to govern post-assessment adjudicatory proceedings in which the Commissioner appears as a party. In sum, numerous Rule provisions indicate that the Rule governs the Commissioner's internal assessment process only.

The Commissioner simply *asserts* that the Rule governs fee appraisers and courts (not just her own assessment process), rather than analyzing the Rule's text to support her claim. As the foregoing analysis indicates, however, the Rule's text is incompatible with the Commissioner's theory of general applicability. That theory, moreover, would require the Rule's numerous references to "the Commissioner" to be interpreted as meaning "anyone valuing a utility," such as: "If the original cost of leased operating property is not available, [anyone valuing a utility] shall make an estimate of the cost by capitalizing the lease payments." Minn. R. 8100.0300, subp. 3.B. Such substitutions would be highly problematic in numerous instances, like this one: "If a conflict of opinion exists regarding the character of specific property, whether it is operating or nonoperating property, assessors or utility companies may request a determination by [anyone valuing a utility]." *Id.*, subp. 3.C. Is an assessor, then, entitled to request "a determination" by a taxpayer's fee appraiser?

We conclude that the interpretive practice required by the Commissioner's theory of general applicability is unsound. In addition, we note that the Commissioner knows how to adopt rules of general application that are phrased as such, *see, e.g.*, Minn. R. 8001.0300 (2015) (pertaining to residency and domicile), rather than as directives to the Commissioner herself, as in Rule 8100. We hold that Rule 8100 governs the Commissioner's assessment process only.

3. Statutory Market Value Standard

Interpreting Rule 8100 solely as an assessment tool to assist the Commissioner in annually generating a large number of market value estimates for utility properties, rather than as one that binds appraisers and courts valuing such properties in court proceedings, is also consistent with the larger statutory framework governing property valuation.

The Legislature has determined, with exceptions not applicable here, that "all property shall be valued at its market value." Minn. Stat. § 273.11, subd. 1. The use of alternative measures

of value is expressly prohibited. *Id.* ("the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation"); *see also* Minn. Stat. § 272.03, subd. 8 (2014) (defining "market value"). The supreme court has long held that the ultimate issue in a utility valuation tax appeal is market value. *Indep. School Dist. No. 99*, 297 Minn. at 383, 211 N.W.2d at 889.

When a taxpayer receives a utility assessment it considers excessive, the taxpayer has two separate rights to appeal to tax court. *See* Minn. Stat. §273.372 (setting forth appeal rights). A taxpayer exercising either of these rights is entitled to a de novo determination of market value. Minn. Stat. §§ 271.05 (2014) ("The Tax Court shall have power to review and redetermine orders ... of the commissioner of revenue upon appeal therefrom ...."); 271.06, subd. 6 ("The Tax Court shall hear, consider, and determine ... every appeal de novo."); *SMBSC*, 737 N.W.2d at 558 (citing authorities). The prima facie validity legislatively conferred upon the Commissioner's utility assessments allows this court—as in other property tax matters—to affirm the government's *estimate* of market value should the taxpayer fail to proffer substantial evidence that the assessment is excessive. *SMBSC*, 737 N.W.2d at 557-58. Affirmance is proper in such cases because, as the supreme court has repeatedly stated, "a prima facie case simply means one that prevails in the absence of evidence invalidating it." *SMBSC*, 737 N.W.2d at 558 (internal quotation marks and citations omitted).

Summary affirmance is *improper*, in contrast, when a taxpayer appears with substantial evidence that the Commissioner's assessment is excessive. Because there is no "absence of evidence invalidating" the assessment in such instances, a de novo trial on the merits is warranted. *Conga*, 868 N.W.2d at 53; *SMBSC*, 737 N.W.2d at 558. "When a taxpayer presents substantial evidence that the Commissioner's assessment order is invalid or incorrect, the presumption of

validity is overcome, and the case is 'decided by the trier of fact the same as if the presumption had never existed.' " *Conga*, 868 N.W.2d at 53 (citations omitted).

In light of the foregoing, there is no merit to the Commissioner's argument that her adoption of a valuation formula transforms the issue in a utility valuation appeal *from* market value *to* compliance with that formula.[77] In *Independent School District No. 99*, for example, the supreme court criticized the tax court for focusing not on market value but, instead, on whether the Commissioner had used a lawfully adopted formula to estimate market value. 297 Minn. at 383-87, 211 N.W.2d at 889-91.

Independent School District No. 99 involved the valuation of utility property ("portions of the structures and machinery of the Thomson Hydroelectric Station"). *Id.* at 378, 211 N.W.2d at 887. In 1962, after careful study, the Commissioner announced a new formula for valuing such property ("the 1962 formula"). *Id.* at 381, 211 N.W.2d at 888. Local assessing authorities challenged the Commissioner's valuations using the 1962 formula and his resulting reductions of previously assessed values. *Id.* at 378, 382, 211 N.W.2d at 886, 889. The tax court affirmed the Commissioner's reductions finding, in relevant part, that "the Commissioner's 1962 formula is not arbitrary, capricious or unreasonable. Its adoption by the Commissioner in 1962 and its application as reflected in the Order of November 15, 1966, here challenged, is within the legal authority conferred on the Commissioner." *Id.* at 383, 211 N.W.2d at 889 (setting forth the tax court's conclusion that "[t]he Commissioner's formula, as adopted in 1962 and applied thereafter ... is within the legal authority conferred upon the Commissioner"). On further review, the supreme court reversed. *Id.* at 387, 211 N.W.2d at 891.

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[77] *E.g.*, Comm'r's Mem. Supp. Summ. J. 2 (arguing for summary judgment on the ground that CenterPoint cannot produce evidence "that the Commissioner did not properly follow Rule 8100").

Although the supreme court recited the tax court's finding and conclusion that the Commissioner had lawfully adopted and properly applied the 1962 formula, the supreme court plainly viewed these considerations as immaterial:

> As we interpret the findings and accompanying memorandum, the Tax Court did not ... determine de novo the market value of the property. Rather, it decided that the 1962 formula which the commissioner applied to reduce the assessed value was a reasonable formula .... Absent from the findings is a specific determination of market value even though the parties, as well as the memorandum of the Tax Court, acknowledge that the 'sole' or 'basic,' and in our view necessarily the ultimate, question presented was the 'market value' of the structures and machinery of the so-called Thomson plant.

Id. at 383, 211 N.W.2d at 889 (footnote omitted). The tax court thus erred *then* by doing precisely what the Commissioner urges us to do *now*: to rule that the Commissioner's use of a lawfully adopted valuation formula is dispositive. This we cannot do.

For all the foregoing reasons, we reject the Commissioner's contention that a fee appraisal "that arrives at a different market value using a different method [than that specified in Rule 8100] is insufficient to ... prove that the Commissioner's valuation is excessive." [78]

B. Challenge by Attacking the Assessment

We turn next to the Commissioner's attempt to insulate her utility assessments under Rule 8100 from methodological criticism directed to the assessments themselves. We reject the Commissioner's assertion that "appraiser judgment alone is insufficient to invalidate the Commissioner's use of Rule 8100." [79]

The Rule begins: "The commissioner of revenue establishes an estimate of the unit value for each utility company operating within the state." Minn. R. 8100.0200. It subsequently sets

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[78] Comm'r's Mem. Supp. Summ. J. 13.

[79] Comm'r's Mem. Supp. Summ. J. 20; *see also id.* at 22 (asserting that "[a]ppraiser judgment that fails to acknowledge Rule 8100 does not provide a legally sufficient evidentiary basis to determine that Rule 8100 does not properly determine market value").

forth a default method for the Commissioner's use. Minn. R. 8100.0300, subp. 1 ("the value of utility company property is estimated in the manner provided in this chapter"). In promulgating the Rule, however, the Commissioner "reserve[d] the right to exercise discretion whenever the circumstances of a valuation estimate [might] dictate the need for it." Minn. R. 8100.0200. According to the Rule, the Commissioner is authorized to use this reserved discretion, *inter alia*, "to ensure a balance between a prescriptive rule and sound appraisal judgment; to ensure that all relevant data pertaining to value is considered; [and] to ensure that a reasonable estimate of market value is derived ...." *Id.* Through this broad reservation of discretion—and under the plain meaning of other Rule provisions—the Commissioner possesses essentially unconstrained discretion:

- to use the Rule's default method, Minn. R. 8100.0200 & .0300, subp. 1;
- to depart from that method, Minn. R. 8100.0200;
- to consider "relevant data pertaining to value" beyond the data enumerated in the Rule, Minn. R. 8100.0200;
- to reduce otherwise allowable depreciation under the cost approach, Minn. R. 8100.0300, subp. 3.D;
- to use or disregard "[a]dditional indicators of value, other than the cost and income indicators," Minn. R. 8100.0200 & .0300, subp.4a;
- when considering additional indicators of value, "to adjust the weightings of the cost and income indicators to give weight to the market indicator in the unit value computation," Minn. R. 8100.0300, subp. 4a.A; and
- when having found "that economic or other forms of obsolescence exists," to "adjust the weightings in the correlation process ... or make other adjustments in its methodology consistent with these rules and applicable statutes," Minn. R. 8100.0300, subp. 4a.B.

Because the Rule expressly vests the Commissioner with such broad discretion to use appraisal judgment, it implicitly recognizes that property appraisal is a blend of art and science. *See, e.g.*, *Wilcox v. State Farm Fire & Cas. Co.*, 874 N.W.2d 780, 785 (Minn. 2016); *Montgomery Ward &*

Co. v. Cty. of Hennepin, 482 N.W.2d 785, 791 (Minn. 1992). Indeed, even a decision to use the Rule's default method—effectively, the decision *not to depart* from that method in any of the myriad permissible ways—inescapably involves an exercise of appraisal judgment by the Commissioner.[80]

The Commissioner's theory that "appraiser judgment alone is insufficient to invalidate the Commissioner's use of Rule 8100" [81] is contrary to precedent in at least two important respects.[82] First, the Minnesota Supreme Court has held that a taxpayer may overcome prima facie validity by presenting evidence attacking an assessment. In *SMBSC*, the taxpayer appeared for trial, "presented evidence during the trial[,] and argued that the county's assessment was invalid." *SMBSC*, 737 N.W.2d at 559. The county argued on appeal that the taxpayer had failed to rebut prima facie validity because it "did not meet its burden to prove another value." *Id.* at 557.

The supreme court rejected the county's contention that proof of another value was necessary, ruling instead that a taxpayer "need not necessarily put forth evidence that would allow the tax court to determine the market value of the subject property. Rather, [the taxpayer] need only put forth evidence to show that the county's assessed value 'does not reflect the true market

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[80] Comm'r's Mem. Supp. Summ. J. 16 ("[I]n the present case, the Commissioner determined that departure from the standard valuation method set forth in Rule 8100 was not warranted.").

[81] Comm'r's Mem. Supp. Summ. J. 20. *See also id.* at 22.

[82] In support of her assertion that appraiser judgment cannot overcome prima facie validity, the Commissioner cites two cases. Comm'r's Mem. Supp. Summ. J. 13, 22 (citing *New Corner Bar, Inc. v. Comm'r of Revenue*, No. 7221 R, 2001 WL 1007811, at *6 (Minn. T.C. Aug. 29, 2001) and *Lawson v. Comm'r of Revenue*, No. 2616, 1979 WL 1108, at *4 (Minn. T.C. May 9, 1979)). These cases are inapposite, however, because they pertain to a taxpayer's *ultimate burden of proof* at trial, not its *initial burden of production* to defeat the presumption. *New Corner Bar*, 2001 WL 1007811, at *7 (holding that the taxpayer "must establish, by a preponderance of the evidence, that the method used by the Commissioner was unreasonable"); *Lawson*, 1979 WL 1108, at *3 (finding "a clear split of authority as to whether a total burden of proof must then shift").

value of the property.' " *SMBSC*, 737 N.W.2d at 559 (quoting *Gale v. County of Hennepin*, 609 N.W.2d 887, 890 (Minn. 2000)). The court observed that a taxpayer "might meet this burden by, for example, presenting evidence of truly comparable sales that the county had not considered or showing that the county taxed property that is not taxable." *Id.* at 559-60. *SMBSC* thus forecloses the Commissioner's argument that a taxpayer cannot defeat prima facie validity by presenting expert testimony indicating only that the Commissioner's assessment is flawed. Expert testimony attacking the Commissioner's appraisal judgment in applying Rule 8100 qualifies as evidence that the Commissioner's assessment is flawed, does not reflect market value, and is therefore invalid.

Second, the Commissioner's argument that "appraiser judgment alone is insufficient to invalidate the Commissioner's use of Rule 8100," [83] is directly contrary to the evidentiary standard long applied by this court,[84] and recently reaffirmed by the Minnesota Supreme Court: "When a taxpayer presents *substantial evidence* that the Commissioner's assessment order is invalid or incorrect, the presumption of validity is overcome, and the case is decided by the trier of fact the same as if the presumption had never existed." *Conga*, 868 N.W.2d at 53 (emphasis added) (internal quotation marks and citations omitted).

In this case, CenterPoint has identified evidence indicating that the Rule's default method unduly constrains appraisal judgment: "In my opinion, the provisions of the Rule regarding the income approach do not give the appraiser the flexibility to select an income approach that reflects the characteristics of the subject property and thus, will more than likely, not allow the appraiser

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[83] Comm'r's Mem. Supp. Summ. J. 20.

[84] *See, e.g.*, *Groth v. Comm'r of Revenue*, No. 6909, 1999 WL 333420, at *3 (Minn. T.C. May 24, 1999); *Gubbins v. Cty. of Hennepin*, No. TC-1491, 1982 WL 1091, at *1 (Minn. T.C. May 20, 1982).

to achieve market value." [85] This expert evaluation appears not in Mr. Tegarden's appraisal report prepared for CenterPoint but, instead, in Mr. Eyre's draft appraisal prepared *for the Commissioner*. Thus, although the Commissioner's summary judgment motion is based, in part, on her assertion that CenterPoint cannot "explain[] why departure from Rule 8100 is necessary to determine the market value of [CenterPoint's] gas distribution system," [86] the Commissioner's *own* appraiser apparently concluded—while drafting the Commissioner's appraisal report for this very case—that the Rule's default method is unlikely to accurately estimate the market value of CenterPoint's system, in particular.

We ruled above that Mr. Tegarden's fee appraisal is sufficient to overcome the prima facie validity of the Commissioner's Rule 8100 assessment. *See supra* § IV. We now hold that Mr. Eyre's statement, as quoted above, constitutes substantial evidence likewise defeating the statutory presumption and creating a genuine issue of material fact concerning whether the Commissioner's assessment accurately estimated the market value of CenterPoint's pipeline. For both reasons, we deny the Commissioner's motion for summary judgment.

VII. CONCLUSION

The Commissioner's proposals would transform prima facie validity—a device meant simply to allow affirmance when a taxpayer fails to appear in court with substantial evidence—into a bar locking the courtroom door against all taxpayers by deeming their evidence *per se* insubstantial. Rather than serving its intended purpose—ensuring that utility valuation appeals proceed to trial only when a taxpayer's challenge is adequately supported—prima facie validity would instead terminate virtually all such appeals short of trial, and would thus defeat the

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[85] Supp. Kilgore Aff., Ex. C at 12.

[86] Comm'r's Mem. Supp. Summ. J. 2.

legislatively created rights to appeal the Commissioner's utility assessments. We will not allow the Commissioner to use as a bludgeon to crush *all* challenges, a shield meant to protect her utility assessments only from insubstantial ones.

Before closing, we think it necessary to highlight two troubling aspects of the Commissioner's conduct during these proceedings. The first arises from a contrast with *MERC*. In both cases, the taxpayer appealed a Rule 8100 utility assessment. In *MERC*, the Commissioner instructed her expert appraiser, Mr. Eyre, to conduct an independent valuation.[87] When MERC argued that Eyre's resulting appraisal was inadmissible in court because Rule 8100 bound both the Commissioner during assessment and appraisers valuing utilities in tax court proceedings, the Commissioner responded: "In performing his valuations, Eyre was not constrained by the mass appraisal methods of Rule 8100.0300. Eyre's goal was to arrive at an independent opinion of market value using the most appropriate methods available." [88] The Commissioner's position in *MERC*, then, was that a fee appraisal based on generally accepted appraisal practices is competent evidence of market value in tax court proceedings.[89] We so held. *MERC*, 2014 WL 4953754, at *4 (agreeing with the Commissioner's argument "that Minnesota law requires [the court] to consider the best estimate of market value, not only the estimate generated by the rule").

Here, in contrast, the Commissioner's counsel instructed Mr. Eyre to perform a Rule 8100 compliant valuation (rather than an independent one).[90] Then, after receiving Mr. Tegarden's fee

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[87] Suppl. Kilgore Aff., Ex. B, Dep. pp. 46-47.

[88] Comm'r's Post-Trial Mem. 8, *MERC*, 2014 WL 4953754 (No. 8041 et al.).

[89] Comm'r's Mem. Opp'n to Mot. For Exclusion of Expert Evid. 7-9 & n.5, *MERC*, 2014 WL 4953754 (No. 8041 et al.).

[90] Suppl. Kilgore Aff., Ex. B, Dep. pp. 46-47.

appraisal prepared in accordance with generally accepted appraisal practices,[91] the Commissioner argued that Tegarden's appraisal "is not competent evidence of the market value of [CenterPoint's] gas distribution system because it does not comply with Rule 8100." [92] The Commissioner, in other words, now takes a position directly contrary to her *prevailing position* in *MERC*. When we offered the Commissioner's counsel the opportunity to comment on this reversal, she instead denied that the two positions were contradictory.[93]

The Minnesota Supreme Court recently urged the Commissioner to apply her administrative rule governing tax domicile "in a consistent and equitable manner," explaining that "[f]or taxpayers to have trust and confidence that Minnesota's tax system is fairly and equitably applied to all, it is vitally important that taxpayers be able to understand the Department's [domicile] factors and how those factors are applied in any given situation." *Mauer*, 829 N.W.2d at 76 n.2.[94] In a similar vein, Rule 8100 itself furnishes the Commissioner with broad discretion "to address concerns of predictability and stability in estimations of market value" and "to ensure that utility valuation is easily understood and administered." Minn. R. 8100.0200. It is difficult to understand how taking directly contrary positions in consecutive cases advances these transparency and consistency goals.

Our second concern about the Commissioner's conduct involves the manner in which she pursued summary judgment in this case. Having been instructed by the Commissioner's counsel to produce a Rule 8100 compliant valuation, Mr. Eyre apparently concluded—in preparing his

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[91] Bruggeman Aff., Ex. 2, at bates 1476.

[92] Comm'r's Mem. Supp. Summ. J. 17.

[93] Tr. (June 3, 2016) at 45-46.

[94] The lone dissenter in *Mauer* found more than mere inconsistency in the Commissioner's application of the rule: "The Commissioner's interpretative practices as applied to the domicile rule can only be described as arbitrary." *Mauer*, 829 N.W.2d at 78 (Anderson, J., dissenting).

draft appraisal report—that the constraints imposed by the Rule's default method deprived him of "the flexibility to select an income approach that reflects the characteristics of the subject property and thus, will more than likely, not allow the appraiser to achieve market value." [95] Although possessing a previously requested but undisclosed copy of Eyre's draft appraisal—and in spite of her own on-the-record undertaking to provide that document to CenterPoint—the Commissioner filed a summary judgment motion contending, in part, that CenterPoint could not identify any evidence showing "that the Commissioner's valuation using Rule 8100 does not reflect the market value of [CenterPoint's] gas distribution system" or that "the Rule incorrectly determines market value." [96] The undisclosed Eyre Draft, however, represents willfully withheld evidence creating genuine issues of material fact on both points.

B.S.D.

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[95] Supp. Kilgore Aff., Exhibit C, at EYRE 0426. In *MERC*, the Commissioner criticized MERC's appraiser for considering himself bound to follow Rule 8100, arguing that he had "severely handicapped [his] opinions as to the 'market value' of MERC's system by repeatedly stating that [he] was constrained by Rule 8100 and thereby failing to utilize all methods available to an appraiser." Comm'r's Post-Trial Mem. 11, *MERC*, 2014 WL 4953754 (No. 8041 et al.). Here, by expressly instructing Mr. Eyre to produce a Rule 8100 compliant appraisal, the Commissioner affirmatively imposed identical constraints on Eyre, constraints that apparently chafed.

[96] Comm'r's Mem. Supp. Summ. J. 2.