



offshore wind farm was under construction and the power it generated was to serve Block Island. Consequently, BIPCO, which both generated and distributed electricity, was to become just a distribution company with back-up generation facilities. The Town expressed interest in buying BIPCO. On November 11, 2016, after negotiations, Drs. Casazza and Pezzimenti agreed to sell their shares in BIPCO, representing two-thirds of the outstanding stock, to the Town. The Trust did not sell its shares to the Town.

In 2017, the General Assembly, at the behest of the Town, created the Block Island Utility District (BIUD). *See* G.L. 1956 chapter 67 of title 45. BIUD was authorized to acquire the assets and assume the liabilities of BIPCO. BIUD's Board was to be elected by the voters of the Town. Beginning in late 2017, the BIPCO Board expressed interest in selling its assets to BIUD.

On December 3, 2018, at a Special Meeting of the Stockholders of BIPCO, the Town voted to sell BIPCO's assets to BIUD. By e-mail dated November 30, 2018, the Trust submitted to BIPCO an objection to the proposed corporate action. On December 10, 2018, the Trust submitted to BIPCO a letter exercising dissention rights pursuant to G.L. 1956 § 7-1.2-1202 and demanding payment for the fair value of the Trust's one-third interest in BIPCO. The closing of the sale of the assets of BIPCO occurred on March 25, 2019.

From the proceeds of the sale, the Trust received the sum of \$900,000 for its one-third interest in BIPCO. The Trust does not agree that \$900,000 is the fair value of its shares.

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transferred half the stock in 2007 and the other half in 2010, but they never advised BIPCO of the transfer until 2016. Trial Tr. Vol. III, 596:4-8. She did not indicate whether the transfer from her husband was directly to the Trust or whether she transferred it to the Trust. That fact bears no impact on the decision in this case.

## II

### Travel

This Petition was filed pursuant to § 7-1.2-1202 for the determination of the fair value of the one-third interest of the Trust in BIPCO. After extensive discovery, the case was tried without a jury from March 8 through March 11, 2021.

Petitioner presented the following witnesses:<sup>3</sup> Dr. Casazza, Nancy Dodge, who was the Town Manager of New Shoreham from 2000 to 2016 and then became Chair of the Board of BIPCO, David Bebyn, who is a certified public accountant and a utility rate consultant who, with other members of his firm, did accounting and rate increase requests for BIPCO, and Glenn Walker, BIPCO's valuation expert. The Trust presented as witnesses its valuation expert, Dylan D'Ascendis, its real estate expert, Peter Scotti, and Sara McGinnes.

Petitioner introduced forty-three full exhibits and the Trust introduced twenty-two full exhibits.

The parties submitted lengthy post-trial memoranda and reply memoranda. Closing argument was held on May 13, 2021.

## III

### Standard of Review

In a non-jury trial, “[t]he trial justice sits as a trier of fact as well as of law.” *Hood v. Hawkins*, 478 A.2d 181, 184 (R.I. 1984). “Consequently, he weighs and considers the evidence,

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<sup>3</sup> The Court will not engage in the exercise of providing a detailed summary of each witness's testimony. Much of the testimony was merely laying a background and while helpful for context, it is unnecessary for the Court's decision. Rather, the Court will weave essential testimony and the important documents into this Decision where it is necessary to support its findings of fact and conclusions of law.

passes upon the credibility of the witnesses, and draws proper inferences.” *Id.* “The task of determining the credibility of witnesses is peculiarly the function of the trial justice when sitting without a jury.” *Walton v. Baird*, 433 A.2d 963, 964 (R.I. 1981). “It is also the province of the trial justice . . . to draw inferences from the testimony of witnesses . . . .” *Id.*; *see also* *Rodrigues v. Santos*, 466 A.2d 306, 312 (R.I. 1983). Pursuant to Rule 52(a) of the Superior Court Rules of Civil Procedure, the Court will proceed to make the following findings of fact and conclusions of law.

#### IV

#### Analysis

#### 1

#### **G.L. 1956 § 7-1.2-1202 – Fair Value**

Section 7-1.2-1201, entitled “Right of Shareholders to Dissent,” states:

“(a) Any shareholder of a corporation has the right to dissent from any of the following corporate actions:

“ . . .

“(2) Any sale or exchange of all or substantially all of the property and assets of a corporation which requires the approval of the shareholders under § 7-1.2-1102.”

Section 7-1.2-1202 has a detailed procedure with specified deadlines for the dissenting shareholder and the corporation to take certain actions. The parties agree that both BIPCO and the Trust correctly followed the procedural steps required under this provision. A dissenting shareholder is entitled to “*the fair value of the shares as of the day prior to the date on which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of the corporate action.*” Section 7-1.2-1202(a) (emphasis added).

The parties both concede that when determining the fair value of the Trust's shares, there should be no discount for lack of marketability or minority status. This conforms to the conclusion of our Supreme Court in *Charland v. Country View Golf Club*, 588 A.2d 609, 613 (R.I. 1991).<sup>4</sup>

While "fair value" is not defined in § 7-1.2-1202(a), the Rhode Island Supreme Court addressed the issue of defining "fair value" pursuant to the predecessor statute of § 7-1.2-1202(a) in *Jeffrey v. American Screw Company*, 98 R.I. 286, 201 A.2d 146 (1964). In that case, which involved the fair value of shares of a shareholder who dissented to the transfer of corporate assets, the Court stated: "The real objective is to ascertain the actual worth of that which the dissenter loses because of his unwillingness to go along with the controlling stockholders, that is, to indemnify him. . . . [T]his is to be determined *by assuming that the corporation will continue as a going concern—not that it is being liquidated . . .*" *Id.* at 292, 201 A.2d at 150 (emphasis added) (quotation omitted).

The parties basically agree on this definition of fair value, and they rely on appraisal reports presented by their experts to support their respective view of fair value.

The Petitioner engaged George E. Sansoucy, P.E., LLC to value BIPCO in anticipation of the sale to BIUD. The report was prepared by Glenn C. Walker in June 2018, valuing BIPCO as of February 28, 2018. His conclusion was that the value of BIPCO was \$5,000,000, and his report was introduced at trial as Respondent's Exhibit K (Walker Report 1).

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<sup>4</sup> Petitioner did write: "[T]he argument can certainly be made that a minority discount and lack of marketability discount should not be applied in dissolution cases, but should be applied in cases involving the fair value of shares of a shareholder who dissents to the transfer of corporate assets. However, in the case before the Court here, the Petitioner's appraiser has taken a very conservative approach and has not applied either of these discounts in determining the fair value of the Respondent Trust's one-third interest." Pet'r's Post-Trial Br., 4-5.

In July 2020, Petitioner engaged Mr. Walker to value BIPCO and the fair value of the Trust's shares as of December 2, 2018. Mr. Walker valued BIPCO at \$5,500,000 and then deducted certain liabilities that existed at the time the Petitioner sold its assets to BIUD on March 25, 2019. His conclusion was that, as of December 2, 2018, the going concern value of BIPCO was \$5,500,000 and the fair value of the Trust's shares in BIPCO was \$810,000. This report was introduced as Petitioner's Exhibit 3 (Walker Report 2).

The Trust engaged ScottMadden, Inc., specifically, Dylan D'Ascendis, to value BIPCO and the Trust's interest. On April 16, 2018, Mr. D'Ascendis issued his report and concluded the value of BIPCO as of January 31, 2018 was \$8,676,526, and the Trust's one-third interest was worth \$2,892,175. At trial, on at least four occasions, Mr. D'Ascendis was asked if his opinion of value would change if his report was as of December 2, 2018. On each occasion, he said it would not because if it changed at all it would increase and to be conservative, he made no change. *See* Trial Tr. Vol. III, 493:13-20, 501:8-22, 505:14-19, and 508:23-509:1. He repeated that position on cross-examination. *Id.* at 549:11-16. This report was introduced as Respondent's Exhibit M (D'Ascendis Report).

## 2

### **The Court's Task in a Battle of Experts**

The conclusions of Mr. Walker and Mr. D'Ascendis differ by nearly \$2.1 million, or more than 250 percent. To paraphrase the quotes that preceded this Decision, while fairness is in the eyes of the appraiser, the experts in this case have decidedly different vision. Through what lens does the Court now view these appraisals?

When it comes to corporate law, Rhode Island courts frequently look at decisions of Delaware courts, and this Court believes *In re Stillwater Mining Co.*, No. 2017-0385-JTL, 2019

WL 3943851, at \*18 (Del. Ch. Aug. 21, 2019) presents the charge it must follow in deciding this case.

“In a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions . . . . No presumption, favorable or unfavorable, attaches to either side’s valuation . . . . Each party also bears the burden of proving the constituent elements of its valuation position . . . , including the propriety of a particular method, modification, discount, or premium. . . . In discharging its statutory mandate, the [Court] has discretion to select one of the parties’ valuation models as its general framework or to fashion its own. . . . [I]t is entirely proper for the [Court] to adopt any one expert’s model, methodology, and mathematical calculations, *in toto*, if that valuation is supported by credible evidence and withstands a critical judicial analysis on the record. . . . Or the [C]ourt may evaluate the valuation opinions submitted by the parties, select the most representative analysis, and then make appropriate adjustments to the resulting valuation. . . . The [C]ourt may also make its own independent valuation calculation by . . . adapting or blending the factual assumptions of the parties’ experts. . . . If neither party satisfies its burden, however, the [C]ourt must then use its own independent judgment to determine fair value.” *Id.* at \*18-19 (internal citations omitted).

This deferral to the independent judgment of the trial justice has also been embraced by the Supreme Court of Rhode Island in municipal taxation cases. “Just as a trial justice may pick and choose among evidence presented by laypersons, he or she may do the same when dealing with evidence of experts.” *Ferland Corp. v. Bouchard*, 626 A.2d 210, 216 (R.I. 1993). Moreover, a trial justice may reject both parties’ experts’ opinions and devise his own method for determining fair market value of the property if specific facts and expert testimony support the trial justice’s ultimate valuation. *See Whittemore v. Thompson*, 139 A.3d 530, 541 (R.I. 2016).

This Court has no doubt that it has the authority to engage in the exercise set forth in *In re Stillwater Mining Co.*

Messrs. Walker and D’Ascendis agreed that there are three approaches to valuation: (1) Cost; (2) Market or Sales Comparison; and (3) Income Capitalization, and both engaged each of these methods to determine the value of BIPCO as a going concern. The Court will proceed to do the same.

**Cost Approach****a****Physical Assets**

The cost approach starts with the replacement cost of the assets and then reducing that value by certain factors such as depreciation, functional obsolescence, and economic obsolescence.

In Walker Report 1, the replacement cost of the assets was \$23,967,000 and in Walker Report 2, it was \$26,888,000. In Walker Report 1, Mr. Walker applied a depreciation factor of 55 percent, while in Walker Report 2, he applied 60 percent. When confronted with the fact that between the time that Walker Report 1 was prepared and the time Walker Report 2 was prepared 12 percent of BIPCO's assets were brand new, Mr. Walker could not provide a satisfactory explanation as to why he increased the rate of depreciation. *See* Trial Tr. Vol. III, 415:14-417:9. Accepting the 55 percent depreciation figure in Walker Report 1, the Court believes Mr. Walker should have decreased his depreciation rate by 12 percent, to 48 percent or rounded to 50 percent.

Mr. Walker did not believe there was any functional obsolescence to BIPCO's assets, but he did apply an economic obsolescence factor of 66 percent. Table 7 at page 31 of Walker Report 2 explains how he calculated that rate. He used a blended rate of return of 7.6 percent by assuming a debt-to-equity ratio of 40:60 and applied that earnings rate to the depreciated value of the assets to determine what those assets should produce in income, which was \$817,000. He deducted the "Required Levelized Earnings" net operating income (NOI) of \$280,000, thus calculating an earnings deficiency of \$537,000. Because the earnings deficiency was 66 percent of the "Required Levelized Earnings," he determined the economic obsolescence to be 66 percent. The Court



believes Mr. Walker made a substantial error by using NOI instead of EBITDA.<sup>5</sup> NOI is calculated by deducting depreciation. However, Mr. Walker had previously devalued the assets by using a depreciation factor, so in essence he depreciated the assets twice.

The Court believes Mr. Walker should have used an economic obsolescence factor calculated as follows:

**Adjusted Economic Obsolescence Factor**

1	Reproduction Cost of Assets	\$26,888,000
2	Depreciation at 50 percent	\$13,444,000
3	Net Value of Assets	\$13,444,000
4	Required Levelized Earnings at 7.6 percent	\$ 1,021,744
5	EBITDA	\$ 677,000
6	Earnings Deficiency	\$ 344,744
7	Economic Obsolescence Factor Line 6 divided by Line 4	34 percent

Using the Adjusted Economic Obsolescence Factor with a 50 percent depreciation factor, Mr. Walker's cost approach would result in a value of \$8,873,000.

Mr. D'Ascendis calculated the replacement cost in a different manner. He used the Handy-Whitman Index to determine the current reproduction value of BIPCO's assets.<sup>6</sup> He took the asset classes from BIPCO's books and used a ratio of the index today to the index at the time the asset was put in service and multiplied that ratio by the original cost to determine the replacement cost.

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<sup>5</sup> EBITDA is an accepted accounting term meaning Earnings before Interest, Taxes, Depreciation and Amortization.

<sup>6</sup> At page 4 of the D'Ascendis Report, Exhibit M, Mr. D'Ascendis describes the index as existing since 1924 using accounts prescribed by the National Association of Regulatory Utility Commissioners.

He then applied BIPCO's depreciation rate to the asset to determine its current value. While the Trust vigorously cross-examined Mr. D'Ascendis, he was not questioned on this aspect of the cost approach. The Court, however, questioned him and found this methodology to be sound and credible.

Mr. D'Ascendis, like Mr. Walker, found no functional obsolescence. He also did not apply any economic obsolescence as he believed it to be an external market driven factor, which he did not see in this case.

Consequently, Mr. D'Ascendis' conclusion as to the value of the assets was \$6,627,553.

**b**

**Land, Cell Tower, and Rights of Way**

The parties agreed that to complete the cost approach, the current value of approximately twenty-four acres of land had to be added to the value of the assets. Mr. Walker valued BIPCO's land at \$1,500,000 while Mr. Scotti, the Trust's real estate expert, valued it at \$1,875,000.<sup>7</sup>

Mr. Walker used a sales comparison approach while Mr. Scotti used a discounted cash flow analysis as if the property were developed for seven house lots. Mr. Walker examined five sales but selected the lowest sale per acre. He made none of the adjustments usually made in comparable sales analyses—in particular, he did not adjust for the fact that his comparable was two years old nor did he articulate any understanding of the local Block Island real estate market. He also failed to inquire as to the circumstances of his comparable; a sale to the Block Island Land Trust, which may or may not have been part gift, part sale.

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<sup>7</sup> Mr. Scotti's appraisal was originally \$2,000,000 but at trial he acknowledged a mistake and revised his opinion. Trial Tr. Vol. III, 570:3-21.

The Court finds Mr. Scotti's analysis to be more credible and more accurate. He has extensive experience in Block Island transactions, including land trust purchases. He was candid and on his own initiative identified an error which lowered his opinion of value.

The Trust also contends that the cost approach should include the fair market value of a cell tower on BIPCO's property and the rights of way necessary for its distribution system. Mr. Scotti valued these at \$1,300,000 and \$1,500,000, respectively. While the Court finds Mr. Scotti's values to be credible and accurate, it does not believe that these values should be included in the cost approach.

In granting a Special Use Permit for the cell tower, the New Shoreham Zoning Board of Review stated that its decision was based on the fact that "the income from the BIPCo tower will go into BIPCo's revenues, allowing BIPCo to hold down future rate increases . . . ." Trial Ex. 43, at 1. While not a condition of the approval, the testimony was uncontradicted that the cell tower revenues benefited the ratepayers and not the shareholders. Consequently, the cell tower's value should not be considered in determining the fair value of BIPCO.

As to the rights of way, there is no question that they are essential to BIPCO's operations. However, the Act of the General Assembly creating BIPCO authorized the company to "with the consent of the town council of the town of New Shoreham, put up, lay, maintain and use lines of wires and conductors for electricity . . . in, through, over and under the highways, streets and sidewalks of the aforesaid town, and, with the consent of the owners thereof, upon and over buildings . . . ." An Act to Incorporate the Island Light and Power Company, H 820A § 3 (1925). Since the wires, conduits, etc. are in place, the Court, in the absence of any contrary evidence, can infer that consent was given by the Town and the private owners. The burden to prove that BIPCO

paid to acquire these rights of way was on the Trust and it failed to do so. Consequently, the Court finds that it was inappropriate for Mr. D'Ascendis to include these assets in his cost approach.

If the Court adds the land value of \$1,875,000 to the cost approach of Mr. D'Ascendis, then the cost approach value is \$8,502,553, and the Court revised value for Mr. Walker would be \$10,748,000. The Court believes the revised value of Mr. Walker is too high and will use for the cost approach value Mr. D'Ascendis' court adjusted value rounded to \$8,500,000.

#### 4

### **Market or Sales Comparison Approach**

Mr. Walker in Table 10 of Walker Report 2 compared certain sales of utilities in the Northeast from 2010 to 2013. In this table, he displayed certain metrics; namely, sales price to gross revenue, sales price to customer, sales price to adjusted book value, and sales price to EBITDA. He also included the sale of the two-thirds interest in BIPCO to the Town in 2016 and the sale of BIPCO's assets to BIUD. Mr. Walker wrote and testified that these two sales were the best evidence of value.

The Court finds that the 2019 sale of assets to BIUD is not an arm's length sale. The BIUD and the Town Council both are elected by the voters of the Town. Prior to the Town's purchase of its shares in BIPCO, the Town Council created an energy task force to interact with BIPCO. Four members of that task force became Board Members of BIPCO when the Town acquired a two-thirds interest. Then, those four individuals resigned to become Members of BIUD. Trial Tr. Vol. I, 99:9-100:8. Moreover, Walker Report 2 was distributed at a public meeting, and thus, BIUD, the Buyer, had the appraisal of the Seller. *See id.* at 122:12-124:14. In what arm's length transaction does a seller, while negotiating a purchase price, provide the buyer with its expert's opinion of value? Surrogates for the Town were on both sides of this transaction.

The Trust challenged the use of the 2016 sale in the market analysis. It argues that Drs. Casazza and Pezzimenti never marketed the property. While they certainly were familiar with BIPCO's operations and they did consult with people who were experts in the field, they never had a valuation study prepared. They believed it was the right thing to do to sell to the Town. While there were some negotiations with the Town, there was no evidence on how they established an asking price of \$3 million, other than having talked with some purportedly knowledgeable people.

But even if, as Mr. Walker testified, the 2016 sale was the best comparable, he failed to apply its metrics in his report. The 2016 sale had a sales price to net book value of 1.32 (Trial Ex. 6). Applying that ratio to the net book value of BIPCO as of December 2, 2018, which value was \$4,378, 232 (Trial Ex. 17), produces a value rounded to \$5,779,000, not \$5,500,000. That sale had a ratio of sales price to EBITDA of 10.37 (Trial Ex. 6). Applying that ratio to the actual 2018 EBITDA of \$677,000 (Walker Report 2, Table 11) produces a value of \$7,020,000.

Lastly, Mr. Walker testified that he put the most weight on the net book value multiple. Trial Tr. Vol. III, 444:21-445:1. In Walker Report 1, a multiple of 1.5 times net book value was used, but in Walker Report 2, the multiple was 1.25. Mr. Walker's explanation was that what he did in Walker Report 1 was an error. *Id.* at 444:12-17. If the 1.5 ratio had been used by Mr. Walker, the sales comparison value would be rounded to \$6,567,000.

Mr. D'Ascendis found five sales from around the country that were later in time than those in Walker Report 2. He then used the sales price per customer and sales price to EBITDA ratio to come up with a mid-point value. Next, he looked at publicly traded utilities and averaged their market value to book value ratio and found a mid-point value for BIPCO. He then averaged the midpoints of the two measures to reach a value of \$8,512,492. He then added the cell tower and

rights of way values to that number, but the Court has previously rejected the use of those in the cost approach. The Court also rejects adding these assets in the market approach. The Petitioner challenged Mr. D'Ascendis' use of the sales price per customer metric because the utility sales selected include companies that had customers who received both natural gas and electricity. The Court concurs with this position. The Court also believes that using information about publicly traded companies is not beneficial to this exercise.

Interestingly, on April 2, 2017, the electric utility company serving a small island off the coast of Maine was sold to a large Maine utility company. This sale was not included in either Walker Report or the D'Ascendis Report. It was discovered when someone was reviewing Peter Scotti's work papers. The Court believes that the failure of either expert to discover this sale reflects unfavorably on both appraisers. This sale could have been an excellent comparable but very little is known about it. While the raw data was added to one of Mr. Walker's attachments (*see* Trial Ex. 6), it is not clear whether the sales price includes any assumption of debt and/or liabilities. There was also some vague testimony about the Maine Public Utilities Commission putting pressure on the parties to complete the sale. Consequently, the Court does not feel it can include this sale in its analysis.

While the Court has some reservations about the arm's length nature of the 2016 sale, its metrics are more reliable than the other market analyses of the experts. Applying the EBITDA and book value ratios to the sales price and averaging the results, the Court will use for the market approach a rounded value of \$6,400,000.

### Capitalization of Income Approach

Messrs. Walker and D'Ascendis addressed capitalization of income differently. Mr. Walker used a direct capitalization method which he described as follows:

**“Direct capitalization** is a method used in the income capitalization approach to convert a single year’s income expectancy into a value indication. This conversion is accomplished in one step, by dividing the net operating income estimate by an appropriate income rate.” *See* Trial Ex. J at 39.

Mr. Walker capitalized both EBITDA and net operating income before depreciation using a 10 percent rate for EBITDA and a 0.6 percent rate for net income. These capitalization rates seem reasonable and very much in line with Mr. D'Ascendis' 7.32 percent capitalization rate. However, even though Mr. Walker's definition states direct capitalization uses one year's income, he used a four-year average for EBITDA.<sup>8</sup> Had he used the actual EBITDA of \$677,000 for 2018, then his value would have been \$6,777,000. Similarly, for the capitalization of income he uses Mr. Bebyn's normalized income for 2018 instead of the actual income for 2018. These normalized numbers were based on Mr. Bebyn conducting a mock full rate filing and assuming where BIPCO's net income numbers from 2018 might end up if there were such a full rate hearing. *See* Trial Tr. Vol. II, 267:17-20. The Court finds this totally speculative and an unreliable measure. Had Mr. Walker used the actual income for 2018 of \$549,000 (Walker Report 2, Table 12 at 41), then the direct capitalized value would be rounded at \$7,224,000. Mr. Walker gave equal weight to both the EBITDA and net income approaches which would result in a capitalized income value of \$7,000,000.

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<sup>8</sup> Moreover, the four-year average as calculated in Table 12 is not even correct, e.g., income tax has a four-year average that should be \$25, not \$101; gain on disposition of property has a four-year average that should be \$161, not \$321. (Walker Report 2, Table 12 at 41.)

Mr. D'Ascendis employed a discounted cash flow analysis to arrive at his income approach to value. A discounted cash flow analysis calculates the present value of a future income stream. It is a method of valuation that has been accepted consistently by courts. However, its reliability is a function of its assumptions. In this case, Mr. D'Ascendis assumed a rate of increase of revenue of 5 percent every three years and an increase in expenses based on inflation and capital expenses of \$200,000. As previously stated, he used a discount rate of 7.32 percent. His conclusion was a value of \$7,811,685. While the Court found his analysis to be thorough and his assumptions to be reasonable if this were a non-regulated company, but just as it rejected Mr. Bebyn's normalized income for 2018, the Court is concerned that the assumption regarding rate increases is speculative because it is dependent on action by the Public Utilities Commission.

Consequently, for the income approach, the Court will use the value of \$7,000,000.

## 6

### **Conclusion of Value**

Messrs. Walker and D'Ascendis determined their final valuations by allocating weight to each approach. Mr. Walker gave the greatest weight to the sales comparison approach and concluded that BIPCO's value as a going concern was \$5,500,000. Walker Report 2, at 41. Mr. D'Ascendis allocated 30 percent to the cost approach, 60 percent to the income approach and 10 percent to the market approach with a resulting value of \$8,676,526. D'Ascendis Report, at 11.

The Court believes that it is appropriate to assign a weight to each approach, but it disagrees with Mr. D'Ascendis' weighting. Because of the age of BIPCO's physical assets, the Court finds cost to be the least reliable measure of value and will assign only 10 percent to the cost value. In most valuations, the income approach is preferred, and the Court will assign a 50 percent weight



to this approach leaving 40 percent to the market approach. Therefore, the Court reaches a value for BIPCO as a going concern as follows:

<u>Approach</u>	<u>Weight</u>	<u>Value</u>	<u>Weighted Value</u>
Cost	10 percent	\$8,500,000	\$ 850,000
Market	40 percent	\$6,400,000	\$2,560,000
Income	50 percent	\$7,000,000	\$3,500,000
<b>FINAL VALUE</b>			<b>\$6,910,000</b>

## 7

### Liabilities

In Walker Report 2, Mr. Walker deducted from his value of \$5,500,000, the sum of \$3,070,000 in BIPCO liabilities for an equity value rounded to \$2,430,000. Mr. Walker obtained his list of liabilities from Mr. Bebyn, which is set forth in Table 4, entitled “BIPCo Sale Use of Proceeds,” and it is basically the items that would be on a settlement statement from the asset sale to BIUD on March 25, 2019. Walker Report 2, Table 4 at 12. He therefore concluded that the fair value of the Trust’s shares in BIPCO was \$810,000. Because the ratepayers ultimately pay the debts of BIPCO, Mr. D’Ascendis did not deduct any liabilities in calculating the fair value of the Trust’s shares. He merely divided his entity value by three to establish a fair value of \$2,892,175.

The Court believes that both experts were wrong. The Trust looks to *Rapid-American Corp. v. Harris*, 603 A.2d 796 (Del. 1992) to support its position, but its reliance is misplaced. In that dissenting shareholder appraisal proceeding, the Delaware Supreme Court blessed the trial justice’s use of the market value of the debt in calculating the fair value of the dissenting shareholder’s shares. The market value of the debt was less than its book value, thus increasing

the fair value of the dissenting shareholder's interest. The Trust argues that because the ratepayers ultimately pay BIPCO debt, the market value of BIPCO's debt is zero. However, the Trust has conflated two separate concepts. Market value is what someone would pay the holder of the debt—in this case the Rural Utility System (RUS)—to acquire the debt. Market value is a function of many factors, including interest rate, term, security, risk, and creditworthiness of the debtor. The fact that the ratepayers will ultimately pay the debt affects risk and creditworthiness and would undoubtedly increase the market value of the debt. In *Rapid-American*, there was no dispute that the debt had to be subtracted to determine fair value. The issue was what value of the debt to use in the calculation. In any event, the Trust introduced no evidence as to the market value of the debt, so if there is to be a deduction, it would have to be the book value.

The Court also rejects the Trust's contention that because the ratepayers will ultimately pay the debt, it should not factor the debt into the calculation of fair value. According to the Trust, if there were two identical utilities with identical going concern value of \$10,000,000, but one had long-term debt of \$3,000,000 and the other had long-term debt of \$1,000,000, the fair value of a one-third owner's interest would be the same. Neither the Trust nor Mr. D'Ascendis has cited any case to support this proposition. Moreover, debt is paid out of revenue in just about any going business. The revenue generated from tenants paying rent is used to pay the mortgage on a commercial building, just as revenue generated from the sale of electricity to consumers on Block Island is used to pay the loan to RUS. Admittedly, the risk of not collecting from tenants is greater than not collecting from utility customers. Because of the difference in risk, the expected rate of return from a utility would be different than from a commercial building. Nevertheless, debt should be deducted in calculating an owner's equity in either case.

Mr. Walker, however, deducted too many liabilities in calculating fair value. The statute requires a calculation of “*the fair value of the shares as of the day prior to the date on which the vote was taken approving the proposed corporate action, excluding any appreciation or depreciation in anticipation of the corporate action.*” Section 7-1.2-1202(a) (emphasis added). An examination of BIPCO’s balance sheet as of December 2, 2018, shows that the RUS loan was \$1,768,582.68 (Trial Ex. 17), not \$1,917,000. There was no balance due on the line of credit on that date. *Id.* The other deductions, principally state and federal taxes incurred because of the sale of assets, all relate to the corporate action from which the Trust dissented and thus cannot, as Mr. Walker did, be used to depreciate the fair value of the Trust’s shares.

## V

### **Conclusion**

Based on the foregoing analysis, the Court will deduct the book value of the RUS loan, or \$1,768,582.68, from its going concern value of \$6,910,000 and finds as fact and concludes as a matter of law that the value of BIPCO’s equity as of December 2, 2018 was \$5,141,417.32 rounded to \$5,145,000, and thus, the fair value of the Trust’s shares is \$1,715,000. Since the Trust has received \$900,000, judgment shall enter for the Trust in the amount of \$815,000 plus, as required by §§ 7-1.2-1202(f) and (g), interest from December 2, 2018, and the costs and expenses of this proceeding.

Counsel shall prepare an order and judgment consistent with this Decision.



**RHODE ISLAND SUPERIOR COURT**  
*Decision Addendum Sheet*

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**TITLE OF CASE:** **Island Light and Power Company v. Sara Golvinveaux  
McGinnes 2011 Trust**

**CASE NO:** **WM-2019-0211**

**COURT:** **Washington County Superior Court**

**DATE DECISION FILED:** **June 3, 2021**

**JUSTICE/MAGISTRATE:** **Licht, J.**

**ATTORNEYS:**

**For Plaintiff:** **Katherine A. Merolla, Esq.  
William Landry, Esq.**

**For Defendant:** **William M. Russo, Esq.  
Mark J. Hagopian, Esq.**