

**BOARD OF ASSESSMENT APPEALS,  
STATE OF COLORADO**  
1313 Sherman Street, Room 315  
Denver, Colorado 80203

**Docket Nos.: 44022  
and 44023**

Petitioner:

**OPEX COMMUNICATIONS, INC.,**

v.

Respondent:

**PROPERTY TAX ADMINISTRATOR.**

**ORDER**

**THIS MATTER** was heard by the Board of Assessment Appeals on June 15, 2005, Diane M. DeVries, Karen E. Hart and Sondra W. Mercier presiding. Petitioner was represented by Richard D. Judd, Esq. Respondent was represented by Larry A. Williams, Esq. Petitioner is protesting the taxation of and the value assigned to the subject property for tax years 2003 and 2004.

**PROPERTY DESCRIPTION:**

Subject property is described as follows:

**OPEX Communications, Inc.  
Division of Property Taxation File No. TX627**

**ISSUES:**

**Petitioner:**

Petitioner contends that OPEX Communications, Inc. (OPEX) is not a public utility, and therefore is not subject to taxation in Colorado. Petitioner further contends that Respondent incorrectly valued the subject property.

**Respondent:**

Respondent contends that OPEX is a public utility pursuant to Title 39, Article 4 and has been valued correctly.

**FINDINGS OF FACT:**

1. Docket Nos. 44022 and 44023 were consolidated for the purpose of this hearing.

2. OPEX Communications, Inc. is a switchless reseller of long distance services and is not a facilities based reseller. OPEX has contracts in Colorado with Qwest and Global Crossing to provide toll access. The contracts do not provide for the leasing or management of equipment or bulk purchases of services.

3. Petitioner's customers complete order forms for OPEX services and the orders are reported to either Qwest or Global Crossing. When an OPEX customer makes a call, the local carrier connects with Qwest or Global Crossing (the long distance carriers) and the call is then switched to the final local carrier. Qwest and Global Crossing report the minutes used to OPEX on a daily basis and OPEX bills their customers on a monthly basis. In the event that customers encounter any service problems, they report them directly to OPEX, and not to Global Crossing or Qwest.

4. Petitioner reported that switchless resellers that are similar in size to OPEX sold for three to five times the amount of earnings before interest, taxes, depreciation and amortization (EBITDA). Based on reported valuations completed by three different consulting firms, Petitioner presented the following indicators of value for the company (system wide):

| <u>Tax Year 2003</u>               | <u>Tax Year 2004</u> |
|------------------------------------|----------------------|
| \$20,000,000.00 to \$25,000,000.00 | \$18,000,000.00      |

5. OPEX apportions 0.8 percent of its business to Colorado operations based on IRS procedures.

6. Petitioner is requesting the Board to make a determination that OPEX does not have taxable property in the State of Colorado, or in the alternative, to reduce the actual value of the subject property.

7. Respondent presented the following indicators of value for the company (system wide) based on the income approach:

| <u>Tax Year 2003</u> | <u>Tax Year 2004</u> |
|----------------------|----------------------|
| \$25,923,000.00      | \$55,499,100.00      |

8. To allocate value attributable to Colorado operations, Respondent divided the customer count and gross revenue of the company system wide by the customer count and gross revenue of the company in Colorado. Of the total system wide value, Respondent allocated 2.21% for tax year 2003 and 2.39% for tax year 2004. An equalization factor of 98 percent was applied to the 2004 Colorado value.

9. Respondent assigned an actual value of \$573,925.00 for tax year 2003 and an actual value of \$1,299,000.00 for tax year 2004.

### **CONCLUSIONS OF LAW:**

1. Sufficient probative evidence and testimony was presented to prove that OPEX meets the statutory definition of a telephone company and is therefore subject to unitary assessment as a public utility under 39-4-102 (1) C.R.S.

2. In *Transponder Corp. of Denver, Inc. v. Property Tax Administrator*, 681 P.2d 499, 503 (Colo. 1984) the courts concluded that “an essential attribute of a telephone company is providing a communication service through which customers can communicate with other unrelated persons” and that “telephone companies traditionally provide a communication service which allows customers to contact other customers who may be at many different locations.” *Id.* at 503.

3. Pursuant to the Supreme Court’s findings in *United States Transmission Systems, Inc., v. Board of Assessment Appeals*, 715 P.2d 1249 (Colorado 1986), “If the company directly facilitates two-way communication between a significant number of unrelated persons or businesses . . . that company is telephone company.” The Court further determined that the company “was a telephone company for the year in question and, thus, a public utility for the purpose of property taxation.” Further, the court found that a public utility is not required to have tangible property in Colorado before it can be considered to have operating property and plant subject to valuation and taxation.

4. While it is clear that OPEX does not own or control any tangible or real property within the State of Colorado, the record shows that over 4,000 customers rely on OPEX to provide “a communication service through which customers can communicate with other unrelated persons.”

5. The \$25,923,000.00 value assigned to the subject property for tax year 2003 is supported by both Respondent’s analysis and Petitioner’s estimate of value.

6. The \$55,499,100.00 value assigned to the subject property for tax year 2004 is considered excessive given the decline in Petitioner’s revenue and customer count. However, the Board was not convinced that the value of the subject property declined in value to the \$18,000,000.00 presented by Petitioner.

7. Respondent’s allocation factors of 2.21 percent for 2003 and 2.39 percent for 2004 are substantiated by Petitioner’s Annual Statements of Property. Petitioner did not provide adequate support of its 0.8 percent apportionment to Colorado operations.

8. The Board calculated the actual value of the subject property as follows:

Tax Year 2003

|                        |                 |
|------------------------|-----------------|
| System Wide Value      | \$25,923,000.00 |
| Colorado Allocation    | x 2.21%         |
| Colorado Current Value | \$ 573,925.00   |
| Equalization Factor    | x 100.00%       |
| Colorado Actual Value  | \$ 573,925.00   |

Tax Year 2004

|                        |                 |
|------------------------|-----------------|
| System Wide Value      | \$25,923,000.00 |
| Colorado Allocation    | x 2.39%         |
| Colorado Current Value | \$ 619,560.00   |
| Equalization Factor    | x 98.00%        |
| Colorado Actual Value  | \$ 607,168.00   |

**ORDER:**

The assigned value for tax year 2003 shall remain at \$573,925.00. Respondent is ordered to reduce the actual value of the subject property to \$607,168.00 for tax year 2004.

The Property Tax Administrator is directed to change her records accordingly.

**APPEAL:**

This order may be subject to appeal as provided in 39-4-109(1) C.R.S. to the Court of Appeals for judicial review within 45 days from the date of this decision.

**DATED and MAILED** this 8<sup>th</sup> day of July 2005.

**BOARD OF ASSESSMENT APPEALS**

*Diane M. DeVries*

Diane M. DeVries

*Karen E. Hart*

Karen E. Hart

*Sondra W. Mercier*

Sondra W. Mercier

This decision was put on the record

**JUL 08 2005**

I hereby certify that this is a true and correct copy of the decision of the Board of Assessment Appeals.

*Penny S. Lowenthal*  
Penny S. Lowenthal

