FINAL ADMINISTRATIVE DECISION
ILLINOIS PROPERTY TAX APPEAL BOARD

APPELLANT: Kendall Power Company LLC
DOCKET NO.: 22-02863.001-I-3 & 23-03721.001-I-3
(consolidated for hearing and decision)
PARCEL NO.: 09-25-400-003

The parties of record before the Property Tax Appeal Board are Kendall Power Company LLC, the appellant, by attorneys David A. Suess, of Faegre Drinker Biddle & Reath LLP in Indianapolis Indiana, and Thomas M. Atherton, of the firm Thomas M. Atherton, Attorney at Law, LLC in Noblesville, Indiana; the Kendall County Board of Review; and the Minooka C.C.S.D. #201, Minooka C.H.S.D. #111, Minooka Fire Protection District, Three Rivers Public Library District, Village of Minooka, and Seward Township & Road District, intervenors, by attorney Stuart L. Whitt of Whitt Law LLC in Aurora.

Based on the facts and exhibits presented in this matter, the Property Tax Appeal Board hereby finds that ***reductions*** in the assessments of the subject property as established by the **Kendall** County Board of Review for the tax years 2022 and 2023 are warranted. The correct assessed valuation for each tax year of the property is:

2022 tax year:

LAND:	$1,101,300
IMPR.:	$12,145,765
TOTAL:	$13,247,065

2023 tax year:

LAND:	$1,101,300
IMPR.:	$10,643,806
TOTAL:	$11,745,106

Subject only to the State multiplier as applicable.

Statement of Jurisdiction

The appellant timely filed the above appeals from the decisions of the Kendall County Board of Review pursuant to section 16-160 of the Property Tax Code (35 ILCS 200/16-160) challenging the assessments for the 2022 and 2023 tax years. The Property Tax Appeal Board finds that it has jurisdiction over the parties and the subject matter of the appeal.

Pursuant to Property Tax Appeal Board Rule 1910.78 (86 Ill.Admin.Code §1910.78), Docket Numbers 22-02863.001-I-3 and 23-03721.001-I-3 were consolidated for the purpose of both hearing and decision.

Stipulations of the Parties

Prior to the hearing, the parties entered into a "Joint Stipulation of Agreed Facts" as follows:

- The Kendall County Board of Review is a party to these appeals but will not be participating in the hearing before the Property Tax Appeal Board (PTAB).

- The land at the subject property consists of 73.42 acres, for which the Kendall County Board of Review set an assessed value of $1,101,300 reflecting a market value of $3,303,900 or $45,000 per acre of land area. The parties stipulated to the assessed value of the land at $1,101,300 for both tax years 2022 & 2023. The parties further stipulated that all appraisals in the record support a market value of the land at $45,000 per acre of land for both 2022 & 2023 tax years.

- The only issue in these proceedings is the value of the ***real property improvements*** at the subject property. The real property classified improvements at the subject property were established by the decision of the PTAB issued in Docket No. 01-00965.001-I-3. These include buildings, mechanical systems required to operate the buildings (but not the power generation equipment), building foundations, foundations under the equipment, exterior storage tanks, and typical site improvements such as paving and fencing, as more fully described in the PTAB's decision.[1]

- Personal property at the subject facility, including gas and steam turbines, heat recovery stream generators (HRSGs), and other machinery, equipment and piping that are part of the power-production systems is not assessable and has been excluded from both parties' appraisals.

- For both the January 1, 2022 and January 1, 2023 assessment dates, the assessed value of the real property improvements (land excluded) at the subject property, as determined by the Kendall County Board of Review, is $27,344,378, reflecting a market value of $82,033,134.

- The appellant's (taxpayer's) contention of value of the *real property improvements* (excluding land) for the 2022 assessment year is $12,115,682, reflecting a market value of $36,350,680.

[1] The Board takes judicial notice of its prior decision regarding the subject property under Docket No. 01-00965.001-I-3. On page 68 of the referenced PTAB decision, the PTAB found that prior to January 1, 1979 (effective date of the "Freeze Act,") Kendall County classified, assessed and taxed as real property all land, buildings, and site improvements. Furthermore, the Board found that "section 24-5 of the Property Tax Code precludes the process-related machinery and equipment used in the generation of electricity at the subject property from being classified as real property for ad valorem taxation purposes." (*Id.* at p. 68)

- The appellant's (taxpayer's) contention of value of the *real property improvements* (excluding land) for the 2023 assessment year is $10,653,141, reflecting a market value of $31,962,619.

- The intervenors' (taxing bodies') contention of value of the *real property improvements* (excluding land) for the 2022 assessment year is $26,330,700, reflecting a market value of $79,000,000.

- The intervenors' (taxing bodies') contention of value of the *real property improvements* (excluding land) for the 2023 assessment year is $23,897,610, reflecting a market value of $71,700,000.

- The highest and best use of the subject property, as improved, as of the effective dates of the appraisals, is for its continued use as it was built, a natural gas-fired electricity generation facility, as this use is physically possible, legally permissible, economically feasible, and all other uses would not be maximally productive.

- The cost approach to value is the only approach developed by both parties' appraisers to value the subject property.

- The sales comparison approach and the income approach to value were considered, but not developed or relied upon by either party's appraiser due to lack of sufficient or reliable market data to value only the real property improvements at the subject property as established by the decision of the PTAB in Docket No. 01-00965.001-I-3.

Historical Background

The subject power plant was previously the subject matter of an appeal before the Property Tax Appeal Board for the tax year 2001 under Docket Number 01-00965.001-I-3. At the time of that appeal, the subject property was approximately 95% complete. Following a hearing, the Property Tax Appeal Board issued a decision lowering the total assessment of the subject property to $5,728,177 based on the evidence and testimony of witnesses presented at the hearing. In its decision, the Property Tax Appeal Board affirmed the methodology utilized by the appellant's appraiser, Mike Kelly of Real Estate Analysis Corporation (REAC) in concluding that the percentage of real estate classified costs compared to the total costs of the entire plant as of the 2001 valuation date was approximately 6%. In other words, the real estate classified components (which are the subject matter of this appeal) comprised approximately 6% of the entire power plant costs.

The initial appeal was followed by several more years of property tax appeals before the PTAB, eventually resulting in the parties entering into a 10-year settlement agreement as to the assessments beginning with tax year 2011 and ending in tax year 2021. Tax year 2022 is the first year not subject to the aforementioned settlement agreement of the parties.

Description of the Subject Power Plant

The subject property consists of the real estate components of a natural-gas combined-cycle gas turbine ("CCGT") electrical power generation facility called the Kendall County Generation Facility (Kendall plant). Kendall plant began operation during calendar year 2002. The subject matter of these appeals includes *only the value of the real estate classified items* consisting of the land, 17 buildings (containing a combined total of 148,721 square feet of gross building area), mechanical systems required to operate the buildings, building foundations, foundations under the equipment, exterior storage tanks, and typical site improvements, i.e., a cooling pond, gravel paving, fencing, and a perimeter berm. *The appeals do not include the process-related machinery and equipment* such as the turbines and generators used in the generation of electricity. The subject property has a 3,198,310 square foot site (73.42 acres) and is located in Minooka, Seward Township, Kendall County.

In simplest terms, a natural-gas combined-cycle electrical power plant utilizes natural gas to power a gas turbine described as being similar to a large jet airplane engine. This "engine" (turbine) spins a generator that produces electricity. The heat generated by the gas turbine is captured by the heat recovery steam generator ("HRSG") and passes through a series of water lines which creates high-pressure steam that in turn is utilized as "fuel" to operate a secondary (steam) turbine which spins the second generator that likewise produces electricity.

The subject power plant complex today consists of four electrical generating units housed and supported by a total of 17 buildings that contain a combined total of 148,721 square feet of gross building area. The site improvements include exterior storage tanks, equipment foundations, a cooling pond, gravel paving, fencing, and a perimeter berm. The power plant was primarily constructed from 1999 to 2002. In 2006, four equipment enclosures ("doghouses") and a small metal-sided enclosure were added to the plant at a reported cost of $254,900. Also in 2006, a cooling pond of approximately 34 acres was constructed, along with a perimeter berm and a chain link fence to enclose the pond at a reported cost of approximately $1,111,997. In 2014, an approximately 2,880 square foot addition was made to the pole storage barn at a reported cost of $110,000. In 2016, an approximately 1,800 square foot office trailer was added at a cost of approximately $50,000 including installation, gravel, and skirting. In 2020, a gravel parking lot was added at a reported cost of $84,000. Finally, in 2022, a spare transformer containment pit was added at a reported cost of $158,000. (See images of the subject plant below)

Image source: Real Estate Analysis Corporation appraisal report July 18, 2023.

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Analysis

The appellant, through counsel, appeared before the Property Tax Appeal Board contending overvaluation as the basis of the appeal. In support of this argument, the appellant submitted an appraisal report for each of the two tax years on appeal, both reports prepared by Alan R. Geerdes, MAI, AI-GRS, a Certified General Real Estate Appraiser, and Bradley R. Braemer, MAI, AI-GRS, a Certified General Real Estate Appraiser, of Real Estate Analysis Corporation, (REAC). Geerdes and Braemer estimated the subject property had a market value of $39,650,000 as of January 1, 2022, and a market value of $35,260,000 as of January 1, 2023.[2]

Testimony of Ted Lindenbusch (plant manager):

The first witness called by appellant's counsel was Ted Lindenbusch, the plant manager of Kendall power plant (subject property). Lindenbusch testified that in addition to the subject power plant, he also manages the Calumet power plant in Chicago. These two power plants are owed by Vistra, which Lindenbusch described as one of the largest competitive power producers in the US with over 50 power plants across the United States ranging from Maine to California.

Lindenbusch testified that his responsibilities include everything that is "done and not done at the plant." This includes responsibilities for safety and environmental compliance; the National

[2] REAC also valued the subject property based on a hypothetical condition that the Illinois state environmental regulation called the Climate & Equitable Jobs Act (CEJA) was NOT in effect. Based on that hypothetical assumption, REAC estimated the subject property had a market value of $54,450,000 as of January 1 2022, and a market value of $49,780,000 as of January 1, 2023.

Electrical Reliability Council (NERC) compliance; and any other government compliances and/or permits. Overall, Lindenbusch makes sure both Kendall and Calumet power plants are reliably generating electricity at low cost. He has both short term and long term planning responsibilities. In short term, he and his staff oversee day-to-day operations of the plant. Long term, he is responsible for planning for operations and maintenance (O&M) capital, long term compliance planning, and making major capital decisions. In addition, Lindenbusch is responsible for the operations side, the maintenance side, the engineering support side, and everything that happens at the plant.

Lindenbusch explained that having a firm understanding of the design and construction of the Kendall facility and being familiar with the design and construction of the buildings, foundations, and site improvements is crucial due to the accountability for the plant's operation, long term planning, maintenance, and improvements. This includes being familiar with specifications and operating requirements of both the gas and the steam turbines, specifically determining when the plant runs, how long it runs, and how it is dispatched, or the declaration of the plant's availability for production of electricity in times of power outages or increased need.

Lindenbusch affirmed that he is personally responsible for ensuring that Kendall plant complies with federal and state environmental and energy regulations, including the Illinois Climate and Equitable Jobs Act (CEJA) which imposes mandatory emissions standards and requirements that impact how the plant operates day-to-day as well as long term.[3] Lindenbusch explained that Kendall plant sells electricity not only for today, but for the future as well, which is called hedging, or a way to guarantee future revenues. Hedging is crucial at the Kendall plant due to having to assure CEJA's mandated standards and compliance while forecasting the Kendall plant's output over the next several years. CEJA requires a 12-month rolling average of carbon emissions. Lindenbusch and his staff monitor the output production and the resulting carbon emissions for the next 12 months, in order to forecast whether the plant will be in compliance with CEJA based on the emissions. Lindenbusch updates a weekly spreadsheet with the aforementioned production/emissions data and participates in weekly calls with staff to monitor the data. When the plant gets too close to the compliance margin, he steps up the frequency of those conference calls, because if the plant is out of compliance at any given 12-month rolling period, the power plant could be required to shut down or throttle down the plant operations in order to reduce emissions and remain in compliance. Lindenbusch has also instructed Kendall and Calumet plants' marketing group, planning group, and executive group on the CEJA requirements, how that law is applied, how to keep in compliance with the CEJA mandates, and overall, on how CEJA impacts Kendall and Calumet plants. Following a thorough *voir dire* by counsel for the intervenors, Lindenbusch was then tendered and accepted as an expert witness in the operation of power plants in Illinois.

Under direct examination, Lindenbusch initially described three different types of power plants commonly referred as "peaker," "base load," and "intermediate load" plants. He described a "peaker" plant as one that is designed and used to capture the higher electrical needs or "peaks"

[3] The Illinois Climate and Equitable Jobs Act (CEJA) enacted by the Illinois General Assembly with an effective date of September 15, 2021 is a major point of contention between the parties in terms of its impact on day-to-day operations of the subject plant as well as its impact on long term economic life of the subject plant which directly impacts the subject's market value.

of load. A “load” is the electric requirements or demand in any given geographical area. Load changes constantly as the electrical needs change throughout the day in any given service area. A peaker plant is designed to start fast, run for a period of time as needed, and then shut down fast. For example, during hot summer days or cold winter nights when the demand for electricity is high, the peaker plants are turned on quickly to meet the excess demand. Typically, peaker plants utilize gas turbine power to generate electricity. Combustion turbines generate electricity, and the wasted heat that comes out of that is distributed into the atmosphere much like a jet airplane engine. Conversely, a “base load” plant is the other end of the spectrum. Base load plants typically run continually at full load, stay at full load, and are not expected to cycle off and on. An example of this would be a nuclear power plant. Nuclear plants are not expected to follow the load requirements. They are turned on and remain running.

On the spectrum between the peaker and base load plants is an “intermediate load” plant which includes the subject Kendall plant. Lindenbusch described Kendall plant as an intermediate load plant because it operates when the market tells them, and shuts down when the market dictates. Lindenbusch explained that Kendall power plant operates and shuts down as directed by one of the regional transmission organizations called PJM. PJM (which stands for Pennsylvania - New Jersey – Maryland) manages thousands of miles of electrical power lines across several states including parts of Illinois, to ensure reliable and affordable electric flow as needed. PJM operates a daily competitive market by purchasing electrical power from generators such as Kendall power plant and selling it to utility companies. PJM also coordinates the dispatch of power plants (mostly peaker and intermediary plants) to maintain stability and prevent overloads. They also ensure long term reliability of power by paying power plants to be available for a number of years in order to ensure future demands for electricity.

PJM can dispatch Kendall plant to run when it’s noneconomical in cases of emergency. In that case, Kendall plant doesn’t make a profit, but it does recoup cost of operation. In practical terms, PJM tells Kendall through the corporate office in Dallas that it's time to operate, and they provide a daily schedule for what load is expected to be at every hour of the next day. Lindenbusch explained that PJM sends Kendall plant a signal every five minutes, and their units automatically respond to that signal throughout the day. There are two daily peaks in Illinois. A morning peak as people are getting ready to leave for work, and an evening peak as many people come back home. Therefore, on any given day, Kendall plant could go to full load for both those peaks, and in between those peaks they could go to minimum load or cycle off entirely.

Kendall plant has four identical units. Each unit consists of a gas turbine, which has a generator associated with it. The waste heat from each gas turbine goes through a heat recovery steam generator (HRSG) which powers a steam turbine. That steam turbine is also tied to a generator and the two generators come together through a transformer that goes to the high voltage electric grid. These are the same generating equipment units that were installed when the plant first went into service.

Lindenbusch next explained how the heat rate affects the efficiency of the power plant in terms of having to comply with emission limits. Lindenbusch described heat rate as a measure of efficiency of a unit. It is basically the fuel used to produce electricity divided by the electricity produced, usually measured in Btu, or British thermal units, divided by kilowatt-hours or kWh. The higher heat rate is less efficient, meaning it takes more fuel to produce the same amount of

energy. Lower heat rate is more efficient because the same amount of energy is produced with less fuel. So, from a production standpoint, the higher the heat rate, the more fuel is needed and, conversely, the lower the heat rate, the less fuel is needed, and thus more profits are realized. In sum, the heat rate directs when it's profitable to operate the unit because it defines the cost of production as the fuel is purchased in the amount of heat that's contained in that fuel. The fuel is purchased by the million Btu, and the higher the price of fuel or the higher usage of fuel results in higher cost of producing electricity.

Kendall's average yearly operating heat rate is around 7,400 Btu's. Constant monitoring of this heat rate is crucial because it is used for planning purposes. More recently, the heat rate has been getting worse in part due to the number of times the plant has to cycle off and on. When the plant is cycled off, all of the equipment cools off. When powered up again, the temperature has to be raised again to create steam. Those startups can take up to four or five hours for a combined-cycle plant like Kendall, so many times the plant is at 0 or very low load while it's burning fuel as the heat is generated. Lindenbusch testified that one of the reasons Kendall needs to be cycled off and back on more often now than in the past is due to CEJA emission requirements.

Lindenbusch next described how the design of the real estate improvements (i.e. buildings, foundations supporting the equipment, and site improvements such as paving and fencing) relate to the power-generating equipment that they support. He explained that all of the real estate improvements such as the foundations under the equipment and the buildings surrounding the power generation equipment are custom designed specifically for the equipment that's installed. The foundations are made to support the weight and the forces that are produced by the turbines and generators. The buildings or shelters that encompass the equipment were engineered and custom built with ceiling heights and clearances to the level of detail that if any equipment needed to be serviced, custom designed lifting equipment and beams are utilized in order to clear the equipment that it is protecting. Without the specialized lifting equipment, there would be no access to the machinery.

Hypothetically, if the Kendall plant were to be repurposed as a different type of plant or even with upgraded turbines and/or generators, Lindenbusch explained that the current buildings, foundations, and structures housing the machinery would be obsolete. The alignment of the enclosures and foundations is critical. The turbines are multi-ton pieces of steel that spin at 3,600 revolutions per minute and are bolted from the gas turbine to the gas generator and from the steam turbine to the steam generator. The alignment specifications for those are within thousandths of an inch, so the alignments are critical. The enclosures for the foundations underneath the equipment are custom designed with strength and alignment necessary to support the weight and the operational forces of that precise equipment. Additionally, from an operating perspective, the decision to reuse real estate improvements would only be made after analyzing detailed cost information on the equipment and its usage.

Lindenbusch expounded that a decision to invest in a new power plant or repurposing a gas turbine combined-cycle plant like Kendall involves a very complicated analysis. The costs could be in the hundreds of millions, or possibly a billion-dollar investment, especially when considering CEJA and the new expected permit requirements that the new facility would have to meet. The investor would have to look at pollution control and things that were not even considered or didn't even exist when Kendall plant was built. Therefore, if one was to consider

building a new combined cycle power plant at Kendall, a complicated analysis would be needed comparing the type of plant proposed that would meet all design and statutory requirements with the cost of construction, and then project what the market is going to bear both in the capacity market and the energy market.

Lindenbusch was then asked specifically about how CEJA impacted Kendall's operations in 2022 & 2023. He stated that effective in late 2021, CEJA emissions standards were the law in Illinois. CEJA established a three-year baseline emission period for power plants that were already in production, and for the Kendall plant that three-year baseline period was for years 2018, 2019, and 2020. So at the enactment of CEJA, Kendall had an emission cap that was the average of those three years in place. Since it's a 12-month rolling total emissions average, each month the limit changes because the emission numbers of the first month of the 12-month period fall off and the latest month's emission is added. If at any time during this 12-month rolling period Kendall's emissions exceed CEJA mandates, the plant needs to shut down one or more of its turbines/generators and adjust the energy prices that Kendall offers to PJM. If the price Kendall is charging for electricity goes up, they sell less electricity. In addition, cycling the machinery off and on increases maintenance costs. Each time a unit is cycled, that unit goes from a firing temperature of approximately 2,000 degrees down to ambient conditions, it stresses the steel and other alloys making up the unit. For this reason, the maintenance schedule is based on the operating hours and number of starts/stops of each unit. Therefore, compliance with CEJA made Kendall plant more costly and less efficient to operate in 2022 and 2023.

Furthermore, CEJA established future compliance deadlines. Lindenbusch explained that CEJA has a threshold that by 2035, if Kendall's heat rate on a unit-by-unit basis is less than 7,000 Btu's per kWh, it may be able to operate until the year 2045. However, if it is above 7,000 Btu's in 2035, the plant must be shut down and retire by 2040. Currently, Kendall's heat rate average is 7,400 Btu per kWh. Second, Kendall has to cut CO2 equivalent emissions by 50% for the period from 2035 to 2040. Therefore, CEJA conditions *future* operation based in part on the facility's *current* heat rate. As there are no known engineering ways for Kendall to reduce CO2 emissions by 50% other than reducing the production by 50%, at the current rate, Kendall plant would not be in operation past 2040. In spite of engaging with original equipment manufacturers for the gas and steam turbines and the HRSG, in addition to third party engineering company, they have not been able to develop a way to reach the emission levels mandated by CEJA. As of now, the technology is not in place to be able to reduce the heat rate below 7,000 Btu per kWh or to reduce CO2 emissions by 50%.

Of the several district plants that have shut down operations for variety of reasons, Lindenbusch testified that at least two plants, (St. Louis and Duck Creek) were demolished. Even if the Kendall plant was repurposed as a solar and battery power plant, the real estate components of the plant such as the building enclosures and foundations would be obsolete for a solar and battery plant. From an operator's standpoint, CEJA creates real uncertainty about Kendall's long-term operation.

Cross-examination of Ted Lindenbusch by counsel for the taxing bodies:

Under cross-examination, Lindenbusch was asked about his responsibility for reliability in terms of power production. Lindenbusch defined "reliability" as the ability of the power plant to supply

energy when it's required. His responsibility is to make sure that the equipment at Kendall plant is available when it's required to be. This happens both on a short-term basis (day by day and hour by hour) as well as long-term basis (looking ahead five years or longer). In short-term, PJM officials (who determine the amount of electrical power needed in the area serviced by Kendall plant and the cost per kWh) would contact Kendall's parent company, Vistra, and Kendall would plan to generate the requested power to upload to the grid. This supply can be adjusted on an hour-by-hour basis depending on emergency situations such as natural disasters, inclement weather, etc. On a long-term basis, Lindenbusch acknowledged that PJM has a look-ahead capacity market, meaning that PJM will run an auction for capacity that is expected to be required in the next three years. PJM will accept bids from power generators like Kendall and then issues a solution that satisfies the load for the load-serving entities and the capacity of the generators being supplied. Another way to look at it is PJM sets the load requirement for a geographical location under their control. The power generators like Kendall all bid into that market. The solution that PJM produces matches the load. If the generation bid comes in way above the load, the Kendall plant may get nothing of that capacity. When asked by the ALJ whether compliance with the CEJA regulations affects Kendall's long-term planning in terms of bidding, Lindenbusch stated that Kendall would not be allowed to participate in the bidding process if they are out of compliance with CEJA. This is the reason that Lindenbusch looks five years ahead to see whether the current emissions will meet the future benchmarks set by CEJA.

Under further cross-examination, Lindenbusch agreed that CEJA did nothing to change the way that real property (such as buildings and foundations) is used at the Kendall plant. However, he noted that as soon as CEJA went into effect in September 2021, it immediately impacted the day-to-day and the longevity of the Kendall plant. He agreed that in an emergency, PJM can propose that Kendall continue to operate depending on the need for power and the availability of resources, but quickly added that PJM does not have the authority to tell him to violate Illinois law as mandated by CEJA.

When asked about his opinion as to the "goals of CEJA," in terms of reliability of electrical power, Lindenbusch opined that the main goal of CEJA is to shut down all fossil-fuel (gas, coal, and oil) in the state of Illinois rather than providing reliable electrical power to the grid. When questioned about alternate energy sources to fossil-fuels such as wind, solar, and hydro-electric, Lindenbusch stated that wind power and solar power are not dispatchable (or able to operate as the need arises) because they each depend on favorable weather conditions in order to generate power. As to hydro-electric power, Lindenbusch was not aware of any large-enough body of water in the subject's market area to realistically consider this source of power for the Kendall plant.

Under re-direct examination, Lindenbusch affirmed that the emission requirements imposed by CEJA adversely impacted the operations of Kendall plant by making it more costly and less efficient to operate in 2022 and 2023.

When asked by the ALJ about the possible penalties for non-compliance with CEJA, Lindenbusch stated that there could be civil as well as criminal penalties against the plant and/or plant manager personally. He reiterated that ongoing compliance requires him to manage emissions on a daily basis, and the plant has had to power down many times due to getting too close to the emission limits.

At the conclusion of Lindenbusch's testimony, counsel for the intervenors (taxing bodies) moved to withdraw what had been marked as Taxing Bodies' hearing exhibits #3 and #4 for identification and offered into evidence what had been marked as Taxing Bodies' hearing exhibits #5 and #6 for identification.[4] The Property Tax Appeal Board ruled as follows: 1) Neither document has been submitted to the PTAB during the time for submission of all evidence, thus violating PTAB Rule 1910.67(k), nor were they provided to opposing counsel prior to the hearing; 2) both exhibits fall withing the definition of hearsay without any applicable exceptions, and 3) there is no foundation laid for these documents as to their authenticity. Consequently, taxing bodies' exhibits #5 and #6 were ruled inadmissible.[5]

Testimony of Alan Geerdes (appraiser for the appellant):

The next witness called by counsel for the appellant was Alan Geerdes, MAI & AI-GRS. Geerdes testified that he is a certified Illinois real estate appraiser and vice president of Real Estate Analysis Corporation, (REAC), a real estate appraisal, consulting, and valuation firm. He has been with REAC for approximately 24 years and has held his MAI designation since 2019. To obtain his MAI designation from the Appraisal Institute, Geerdes explained that he was required to pass a certain number of classes, have experience hours, pass a comprehensive exam, and submit a demonstration report. Geerdes also holds an AI-GRS designation since 2022. AI-GRS is a review specialist designated member of the Appraisal Institute. This requires class time and reviews of other appraisals where the reviews must be accepted by the Appraisal Institute. As a part of his appraisal practice, Geerdes has appraised approximately 30 to 50 complex industrial properties including electric power generating plants at the request of both the taxpayers and taxing bodies. Geerdes has previously testified as an expert witness before the Property Tax Appeal Board in the area of appraising power plants. There being no objection from the counsel for the taxing bodies (intervenor), Geerdes was accepted to testify as an expert witness.

Geerdes testified regarding the January 1, 2022 and January 1, 2023 REAC appraisals of the Kendall power plant. With respect to each date of value, Geerdes stated that he applied the same methodology, analysis, and approach to value. As there are some small differences between the two appraisals, Geerdes was first questioned about the similarities between the two reports. In both reports, Geerdes stated that he applied the same appraisal methodology; he developed only the cost approach to value in both reports, and he did not develop the income or sales comparison approaches to value in either of them for reasons that will be discussed further below. He relied on the same types of appraisal data in both reports, and he concluded the same highest and best use analysis in both reports. The primary difference between the 2022 & 2023 reports is that the Kendall plant was one year older when writing the 2023 report, so the depreciation numbers were a bit different, and the cost of construction amounts were "trended" to 2023 instead of 2022. (Tr. p. 229)

[4] For clarity, taxing bodies' hearing exhibit #5 is the 2025 "Resource Adequacy Study," and hearing exhibit #6 is the aerial rendition/drawing of a proposed site of Equinix Data Center. Additionally, taxing bodies' hearing exhibits #7 and #8 (the 2003 REAC appraisal and the prior PTAB decision, respectively) were offered and admitted into evidence later in the course of the hearing, while hearing exhibit #9 was withdrawn.

As to the 2022 report, Geerdes testified that the purpose of the appraisal report is to estimate the retrospective market value of the fee simple estate of the subject's **real property only** as of January 1st, 2022 rather than appraising the total going concern of the Kendall plant. Therefore, the values that are stated are only for the real property. However, the fact that the real property is affixed and somewhat integrated with the personal property including the machinery and equipment means that the power plant would generally be sold or leased as a total going concern which makes the allocation between real and personal property important. (Tr. p. 232)

Geerdes stated that there were prior assignments that REAC undertook with respect to the subject property before the 2022 and 2023 REAC appraisals of Kendall power plant. Michael Kelly, previously of the REAC, appraised the subject property as of January 1st, 2001, 2002, 2003, 2004, 2005, 2006, and 2007. Geerdes affirmed that he has reviewed Kelly's prior appraisal reports in addition to the prior Property Tax Appeal Board's decision in Docket No. 01-00965.001-I-3 regarding the subject property. Geerdes also reviewed Kelly's testimony at the hearing regarding the said appeal. Geerdes added that he and Kelly both developed the cost approach to value and that the total final construction costs upon which Geerdes relied are included in Kelly's appraisal reports. The prior PTAB's decision regarding the subject property affirmed the allocation of real property versus personal property for the Kendall plant, and also affirmed the methodology utilized in Michael Kelly's appraisals. (Tr. pp. 232-235)

Geerdes specified the real estate classified items included in his valuation of the subject included land, buildings, mechanical systems required to operate the buildings, building foundations, foundations under the equipment, exterior storage tanks, and typical site improvements. These items of real property are consistent with the prior appraisals by REAC and include all real property items that the PTAB determined to be real property in its earlier decision. Geerdes concluded that the highest and best use of the subject property as improved as of the effective date of the appraisal is for its continued use as it was built, a natural gas-fired electric generation facility as this use is physically possible, legally permissible, economically feasible, and all other uses would not be maximally productive. Geerdes did not develop the sales comparison approach to value due to lack of sufficient or reliable sales or market data to value only the real property improvements. He did not develop the income approach to value similarly due to lack of market or lease data to value only the real estate portion of the subject property as both the income and the sales approaches generally value the entire "going concern" or the entire business as a whole, including real, personal, and business interests. (Tr. pp. 241-242) Gerdes has never known or encountered a gas-fired plant like the subject to have its existing power generation equipment and machinery sold or replaced with different power generation equipment apart from the real estate component of the plant. Since the majority of the value of the total going concern is the machinery, equipment and business value, the extraction of only the real property aspect of that would be substantial and it would minimize the reliability of the sales comparison or the income approaches to value. With respect to the 2023 appraisal, Geerdes testifies that he applied the same approaches to both appraisals, the same appraisal methodology, developed the cost approach to value only, and arrived at the same highest and best use conclusions in both reports.

Geerdes was then asked to explain the reason he applied a "hypothetical condition" when discussing the Climate and Equitable Jobs Act (CEJA). A hypothetical condition is something that's directly contrary to what exists, which is to be distinguished from an "extraordinary assumption" which is an assumption about uncertain information as of the date of value.

Geerdes did not make any extraordinary assumptions in either of his reports. Geerdes explained that CEJA (Illinois law in effect at all relevant times herein) was enacted to reduce and eventually entirely omit emissions from the electrical generation. Geerdes testified that CEJA diminished or lowered the economic life of the subject property from what a typical life would be due to the emissions at the subject property. He developed an alternative value based on a hypothetical condition that CEJA did not exist in order to show the effect that CEJA had on the value of the subject property. Since CEJA was in place as of the date of value of the subject property, that would be the true market value. Therefore, in order to value the subject **excluding** CEJA, the appraiser employed this hypothetical condition. (Tr. pp. 243-245)

Geerdes conducted an inspection of the entire Kendall plant on June 9th, 2023. He noted that the overall condition of the property was consistent with a property of its age. His inspection included taking photographs of the entire plant and getting a tour of the plant by the plant manager, Ted Lindenbusch. He also obtained from Mr. Lindenbusch the site history, the property history, the improvements that were on the site as of the date of value, any improvements that were added or deleted since those dates, differences between the two dates of value, and a general property and operating history of the site. Geerdes also obtained from Lindenbusch information on the operating emissions and continuing compliance with CEJA regulations. Geerdes also obtained information on the emissions, the heat rates for each of the generating units, and information on the costs for the real property items that were added through the 2022 and 2023 dates of value.

Geerdes explained that CEJA regulations impact the valuation of the subject because CEJA limits emissions and heat rates in order to phase out the carbon emissions and other pollutants from fossil-fuel-based electricity generation. (Tr. p. 264-265) If the subject property is not in compliance with the heat rates and/or emission standards, or if they do not reduce emissions by 50 percent by 2035, they would not be able to operate. Even if they comply with reduced emission requirements, but they remain at their current heat rate of above 7,000 Btu's, they would still be forced to shut down by 2040. This reduces the economic life of the plant. The subject has a typical economic life of 60 years, which would indicate a remaining economic life of approximately 40 years, given the subject's actual age of 20 years. However, with CEJA in place, Kendall plant would be required to cease operations by 2040, which would reduce the remaining economic life to 18 years (or 17 years if looking at the 2023 REAC appraisal report). (Tr. pp. 267-268)

In developing the cost approach to valuing the subject property, Geerdes stated that he followed the same steps and guidelines as described in *Appraisal of Real Estate 15th Edition*. As to the land value, Geerdes acknowledged that the parties stipulated to the assessed value of land at $1,101,300 for tax years 2022 and 2023. He affirmed that his own opinion as to the value of the land of the subject property for 2022 and 2023 tax years is consistent with the amount stipulated by the parties. Additionally, all appraisals in the record (including the intervenor's appraisal) support this value of the subject's land. Between "replacement cost" and "reproduction cost," Geerdes in this case relied on reproduction cost due to the unique structure of the subject improvements. Since they were custom built for the equipment and machinery that is in place, reproduction cost method is a more accurate reflection of true costs for the subject improvements than the replacement cost method. His cost estimate includes all cost items necessary to reproduce the improvements as of January 1, 2022 and 2023. (Tr. pp. 273-275)

With regard to cost sources and data, Geerdes relied upon prior appraisals conducted by Mike Kelly beginning in 2002 which cost figures and methodology was affirmed by the prior PTAB decision regarding this very property. The cost figures utilized by Mike Kelly are the most reliable figures because these were the actual construction costs as of the date the subject property was completed in May 2002, with the exception of certain buildings, landscaping, and cooling pond that were built between 2002 and 2022 and whose costs were then added by Geerdes to the original cost figures. Geerdes testified that he utilized a multiple-page itemization (breakout) of the description of the actual costs and classifications that were broken out in the 2002 Kelly appraisal. (Tr. p. 276) Geerdes reiterated that these are the identical columns that were utilized in the Kelly appraisal and affirmed by the PTAB. Geerdes then explained each column, the first being the line items of categories that are included in the cost of the subject property. Other columns include "Cost New as of 1/1/02"; "Trend Factor" which projects the 2002 cost figures into the future to 2022 & 2023; "Cost New 2022," which is the trended costs of the subject property as of 1/1/22; "Real Property" which is the percentage allocation of the overall costs toward only the real estate as opposed to personal property as determined by Kelly's prior appraisals; and the last column which is labeled "Personal Property" which is the percentage allocation of the overall costs toward personal property only. Both real and personal property are trended or projected forward to present time. The sum total of all direct and indirect costs of construction including real and personal property as well as the additional construction added from 2002 to 2022 was $564,853,608. (Tr. pp. 279-280)

From the total cost of construction, Geerdes deducted everything that was NOT considered real property. This included "indirect costs" under subcategories of "general costs", engineering & design costs, startup labor & spare parts, pre-completion testing costs, and penalties for not completing the project within the contract time. These were the same line items utilized in the original 2002 Kelly appraisal, and Geerdes treated these line items the same way as they were treated in the original report in terms of classifying them as real or personal property. Geerdes affirmed that the maximum total price or the total construction cost of the plant in each of the Kelly appraisals did not change in the subsequent Kelly reports as in the original 2002 report. The only difference in the 2022 & 2023 appraisal reports is due to "trending" the original costs to current years and the addition of several structures which did not exist is 2002.

Geerdes then explained the difference between "direct costs" and "indirect costs." Direct costs include labor, supplies, and materials. Indirect costs are the costs not directly related to the construction of the plant such as project management fees, cost of financing, construction management fees, interest during construction, and sales tax. The aforementioned cost table includes all direct and all indirect costs of the Kendall plant. The allocation of indirect costs between real and personal property was done consistent with each prior appraisal of the subject property and was affirmed by the Property Tax Appeal Board. Therefore, 6% of the total indirect costs were allocated toward real property. (Tr. pp.284-289)

Geerdes was then asked to discuss the approximately $35 million in "approved change order" amounts in his appraisals as well as in the original appraisals done by Mike Kelly. Geerdes explained that these were all *personal property* amounts that included items such as "fast track premium" paid to a different contractor to complete the project after the original contractor went bankrupt. These amounts also included Dynegy Completion Security penalty for the project not

being completed on time, "Startup Labor & Spare Parts" related to machinery and equipment, and "pre-completion revenues" relating to fuel costs while the plant was in testing mode. Based on his review of Kelly's appraisals and his testimony in the 2005 hearing before the PTAB, Geerdes explained that all these costs were excluded from total costs by both Kelly and Geerdes in their respective appraisals because they were entirely attributable to *personal*, not *real property*. (Tr. pp. 284-292)
As far as "trending" the 2002 cost figures forward to 2022, Geerdes utilized the trend factors as published by Handy-Whitman, an index of public utility construction costs. Geerdes explained that he applied the trend factor to all items, both real property and personal property to arrive at the total cost trended since the allocation was made based on the total cost (real and personal property). After, trending the construction costs, the total cost new as of January 1, 2022 was $1,236,803,467. (Tr. p. 298) After trending, the total cost of the *real property* items was $70,910,544, including both direct and indirect costs as they relate to real property. (Tr. p. 298)

Geerdes applied the same approach and mathematical steps in the 2023 cost approach to determine the reproduction costs new as of 1/1/23. He also used all the same direct and indirect real property cost categories and trended the same total costs forward from 2002 to January 1 of 2023. To the extent the trended original cost amounts differ from 2022 to 2023, this is due to the Handy-Whitman utilizing different trending factors for each year.

Having determined the reproduction cost new of the subject real property, the next step in Geerdes' analysis was adding adjustments for heat and electric costs since the real property cost did not include those. Furthermore, since the original construction in 2002, there have been additions of real property at Kendall plant that need to be added to the total cost. These additions include some equipment enclosures, a pond expansion and fencing, a pole storage barn, an office trailer, and an addition to the gravel parking lot. Geerdes utilized the actual costs of each improvement installed as of the year that it was installed, and he applied the same approach to classifying these items as real property as what the PTAB classified as real estate in the prior PTAB decision. Once Geerdes obtained the total trended original reproduction cost new of the original subject real property from the original plant that was constructed, ($70,910,544), Geerdes added the costs for heat and electric to the primary turbine buildings, ($2,877,289) and the trended costs of the real property additions since the 2002 original plant was completed, ($2,901,366), and arrived at a total reproduction cost of the subject real property of $76,689,199 or $515.66 per square foot of gross building area as of January 1, 2022. This amount includes both direct and indirect costs. (Tr. p. 311-312)

Geerdes used the price per square foot of gross building area as a test of reasonableness to make sure that it is within the ranges of other typical real estate properties. He did this by taking the total reproduction cost of $515.66 per square foot of gross building area and compared it to costs indicated by *R.S. Means Cost Manual* and *Marshall Valuation Service*, which confirmed that the indicated costs of the subject property are toward the high-end of the ranges indicated by the manuals. This is due to higher than normal building heights as several of the subject buildings have heights up to 65 feet. There is also heavy steel framing to support all the equipment within the buildings, and there are also extensive foundations that are included that would not be included in the cost manuals.

The next step in the cost approach is to consider "entrepreneurial incentive" which is the anticipated incentive for an entrepreneur for undertaking a project. (Tr. p. 314) This differs from "entrepreneurial profit" which is the actual realized profit that is gained from the project. Geerdes opined that under generally accepted appraisal practice, the types of market evidence that an appraiser would look for or expect to find to support the inclusion of entrepreneurial incentive or profit would be the *actual construction costs of similar properties* that showed the entrepreneurial profit or incentive. If there is a lack of market data from which to derive entrepreneurial incentive, it should not be included, as indicated in the publication *The Appraisal of Real Estate*. (Tr. p. 316) Geerdes explained that the reason for not applying entrepreneurial incentive in his calculation of reproduction costs is two-fold: First, there is no market data or evidence where the real estate portion only of a power plant transaction sold for more than its construction costs. The addition of entrepreneurial incentive in the calculation of reproduction costs without supporting market data, the cost approach is less reliable as stated in the publication *The Appraisal of Real Estate*. (Tr. pp. 316-317) Second, contractor, engineer, and architect fees in this case are already itemized and included in the reproduction cost figures in the appraisal report. (Tr. p. 318-319)

In the next step in the cost approach, Geerdes considered three forms of depreciation, i.e., physical deterioration, functional obsolescence, and external obsolescence. Depreciation is necessary to reflect the difference between costs and market value. To quantify the amount of depreciation affecting the subject improvements, Geerdes used the economic age/life depreciation method. This involves estimating the effective age of the subject property and dividing it by the estimated economic life of the property to indicate total amount or percentage of depreciation. In this case, the economic age/life method is most appropriate for quantifying depreciation for the subject property since it encompasses all the forms of depreciation for the real estate portion of the subject property. (Tr. p. 321)

In calculating depreciation using the age/life method given the current CEJA mandates, the subject's total economic life is reduced to 38 years (down from typical 60 years) due to the fact that the Kendall plant would be required to cease operations by the year 2040. Given the subject's effective age of 20 years, the remaining economic life of the plant is 18 years, (i.e., 38 - 20 = 18). Mathematically, dividing the effective age (20) by the total economic life (38) results in total accrued depreciation of 52.6% or $40,338,519, (i.e., $76,689,199 x .526 = $40,338,519). Without CEJA in place (hypothetical condition), dividing the effective age (20) by the total economic life (60) results in total accrued depreciation of 33.3% or $25,537,503. (Tr. pp. 321-323)

In arriving at the life expectancy for each real property component, Geerdes relied on the Life Expectancy Guideline in the *Marshall Valuation Service*. However, the life expectancy tables only indicate the life of a typical industrial building described, excluding any external factors or functional obsolescence. Geerdes concluded that there would likely be functional obsolescence indicated at the subject property due to ongoing technological advances of the machinery and equipment which is "housed" by custom built structures that would need upgrading along with upgraded equipment which would be a form of obsolescence. Although Geerdes relied on *Marshall Valuation Service* for life expectancy, he did not rely on *Marshall's* depreciation tables because those tables are extremely vague and there is no breakout for specific property types. (Tr. p. 329) In other words, all commercial and industrial properties such as warehouses or banks

are grouped together that have a similar age and have a similar life, and there is no differentiation between property types, nor is there any accounting for depreciation resulting from laws or regulations in place. Geerdes explained that the *Marshall Valuation* depreciation schedule does not reflect any super-adequacies that would be specific to power plant buildings, it does not reflect any excess construction costs associated with the power plant buildings, and it does not account for losses in value attributable to power plant specific functional or economic obsolescence.

In addition, there is also external obsolescence present at the subject property due to the state of the utilities industry given the CEJA regulations which decrease the remaining economic life of the plant. Geerdes did not calculate the total amount of functional or economic obsolescence because such calculation would require determining the value of the total going concern which was beyond the scope of this appraisal assignment which was to value only the real property. Therefore, Geerdes summarized that with CEJA in place, the subject property indicated a total reproduction cost new of only the real property of $76,689,199. Deducting from this amount the total accrued depreciation of $40,338,519 results in a depreciated value of the real estate only of $36,350,680. Adding back the land value of $3,300,000 indicated a total value conclusion of the subject real estate of $39,650,000 (rounded) as of January 1, 2022.[6] (Tr. p. 331)

As to the 2023 appraisal, Geerdes reiterated that the main difference in the cost schedules and the final value amounts from the 2022 appraisal is the different "trend factor" used to calculate construction costs per *Handy-Whitman* publication, and the amount of accrued depreciation given that the subject has one year shorter economic life. Taking these factors into account, Geerdes opined that the subject property indicated a total reproduction cost new of the real property of $71,504,740. The total accrued depreciation was $39,542,121. The indicated depreciated value after deduction of the accrued depreciation was $31,962,619. Adding land value of $3,300,000 indicated a total value of $35,260,000 (rounded) as of January 1, 2023.[7] (Tr. p. 343)

Cross-examination of Alan Geerdes by counsel for the taxing bodies:

Under cross-examination, counsel for the taxing bodies first questioned the witness with regard to the 2003 REAC appraisal report and offered said report into evidence. This appraisal report had not previously been submitted into evidence by any party. Section 1910.67(k)(1) of the PTAB rules states as follows:

In no case shall any written or documentary evidence be accepted into the appeal record at the hearing unless: 1) Such evidence has been submitted to the Property Tax Appeal Board prior to the hearing pursuant to this Part. (86 Ill.Admin.Code §1910.67(k)(1))

As no exception to the above PTAB rule applied, the ALJ ruled that the appraisal in question was not allowed into evidence pursuant to the above PTAB rule, but may be used to impeach the

[6] Given the hypothetical condition *without* CEJA in place, the total value conclusion of the subject real estate would be $54,450,000 (rounded) as of January 1, 2022.

[7] Given the hypothetical condition *without* CEJA in place, the total value conclusion of the subject real estate would be $49,780,000 (rounded) as of January 1, 2023.

witness' credibility, to refresh his recollection, or any other purpose allowed by the evidentiary rules during the cross-examination of the witness. Geerdes agreed that the "Schedule of Costs" in Kelly's 2001 appraisal depicted a significantly different maximum price of construction than his 2002 appraisal with a 2021 addendum. (Tr. pp. 345-348) The witness was then asked about a 4-page document that is part of taxing bodies' Exhibit #1 previously admitted in evidence. This document is a fax transmission dated September 12, 2002 from Tom Atherton, one of the attorneys for the appellant, to the owner of the subject plant at the time which was NRG. The document itemizes total direct construction costs for the Kendall plant including specific labor and materials depicting original maximum price, approved change orders, and maximum price as of May 31, 2002. (Tr. p. 354)

Geerdes was asked if Kendall's parent company, Vistra, ever sold the Kendall plant, would they not expect to sell it for more than the amount they paid to build it? Geerdes replied that if Vistra was looking to sell the Kendall plant today, they would try to sell it based on the total going concern value which is different from the real estate that was appraised for this assignment. Geerdes was then questioned how he was able to quantify the external obsolescence when that involved having to value the entire total going concern which he did not do. Geerdes agreed that determining the *total* amount of functional and external obsolescence, he would have to value the total going concern, however, CEJA is only a portion of the total obsolescence, so he was able to identify and extract that portion of depreciation based on the reduced economic life of the Kendall plant due to CEJA regulations. (Tr. p. 359-360)

Geerdes was next questioned about his conclusion of 60-year total economic life of the subject property when cost publication *Marshall Valuation Service* would dictate otherwise. He replied that he utilized *Marshall Valuation Service* to get the initial ages of various subject buildings and concluded a total physical life of 60 years after making adjustments by excluding mortality from excessive economic or environmental changes or shortened special product use. He agreed that physical depreciation exists irrespective of CEJA. (Tr. pp. 382-384)

Re-direct examination of Alan Geerdes:

Under re-direct examination, Geerdes was asked to clarify the maximum cost of construction between the faxed letter from attorney Tom Atherton (attorney for the appellant in the original PTAB appeal) and the figures in the Kelly appraisals. Geerdes explained that the faxed letter was prepared in September 2002. The first appraisal by Mr. Kelly was completed on December 30th of 2003, more than one year later. Geerdes testified that for his appraisal reports, Mr. Kelley obtained all the actual original cost data directly from the company, thus making Kelly's cost numbers much more reliable than the faxed document. (Tr. p. 388-389)

Next, Geerdes was asked by the ALJ to clarify the lack of adding zero amount for entrepreneurial incentive to the total construction costs given that a power plant is built to make financial profit. Geerdes explained that when a power plant like Kendall is constructed by an owner user, their benefit from the property is from the *operation* of the property, not from selling it. So, when building a special purpose property like the Kendall plant, the incentive comes from ongoing sale of electricity, not the plant itself. Therefore, there is no need to build an additional incentive on top of the construction cost because investor is getting compensated through

operation of the building and machinery and equipment and from the sale of electricity. (Tr. pp. 392-393)

Geerdes was also asked by the ALJ why he concluded that the age/life method of calculating depreciation was preferred in this case over utilizing a cost manual such as *Marshall Valuation Service.* Geerdes clarified that a cost manual doesn't differentiate between different property types. So, a bank is going to have the same total depreciation in the cost manual as a power plant and as any other commercial or industrial property. The cost manual doesn't factor in a heavy industrial building, which has a different life than a bank or any other specific property. For different types of property, there are different levels of depreciation for wear and tear, different levels of function and external obsolescence, and different economic factors. For example, a bank isn't subject to CEJA regulations. In the cost manuals, every building and every property type commercial or industrial is going to have the same exact level of total depreciation. (Tr. pp. 393-395)

At this point appellant's counsel rested its case-in-chief reserving the right to call their review appraiser, Robert Herman, in rebuttal following the intervenor's appraiser's testimony. A motion was raised by the appellant's counsel to allow Mr. Herman to be present during the testimony of the intervenor's appraiser as he would be offering rebuttal testimony. There being no objection, the motion was granted.

Testimony of Mark Pomykacz (appraiser for the taxing bodies):

Intervenor's (taxing districts') counsel called Mark Pomykacz MAI ASA & AI-GRS with Federal Appraisal, LLC as its first witness. Pomykacz is a managing member and appraiser for Federal Appraisal, LLC which specializes in energy properties and businesses including power plants. He was retained by counsel for the taxing districts to serve as an expert in proceedings regarding the assessed valuation of only the real estate portion of the property at the Kendall County Generation Facility. His assignment was to prepare an appraisal of the fair market value of the real property as of January 1, 2022, as well as January 1, 2023. These reports were marked as "Taxing Bodies' Exhibits #1 & #2, respectively. As to his professional background and experience, Pomykacz testified that he obtained a Bachelor of Arts degree in political science from Rutgers University in New Brunswick. He is a licensed and state-certified general real estate appraiser in the state of Illinois as well as 25 other states. Pomykacz is a Member of the Appraisal Institute (MAI), an accredited senior appraiser with the American Society of Appraisers (ASA), and holds the Appraisal Institute's designation for General Review Specialist (AI-GRS).

Pomykacz's work experience involved specializing in the appraisal of industrial and commercial properties of "investment grade and institutional grade" real estate, as well as other types of general investment properties across the country. In 2001, Pomykacz formed Federal Appraisal, LLC where he is the managing member and also appraises general commercial real estate with a specialty in utilities, power plants, infrastructure, energy assets, refineries, pipelines, and transmission lines. Pomykacz testified at the hearing that he has appraised most of the nuclear power plants in the US, many natural gas-fired power plants, coal plants, geothermal plants, solar, wind, and even a compressed air facility, as well as hydro-electric plants of different types.

(Tr. pg. 418) The assignments and purpose for which he appraised power plants were for determining property tax assessments and litigation involving that assessment.

Pomykacz further testified that he has valued power plants at the request of the owners, prospective investors, lenders, and various government entities such as assessors and taxing districts. In his career, Pomykacz has appraised more than 500 power plants in over 30 states across the country. In his appraisal work, he has testified before courts and administrative agencies such as the Property Tax Appeal Board as an expert in his field. His professional experience also includes teaching courses required for others who want to become state licensed and those who want to become MAI's. Additionally, Pomykacz testified that he has written an article that was published by The Appraisal Journal, a peer-reviewed journal, that won the "Article of the Year" award. At this point, there being a stipulation as to his qualifications, Pomykacz was accepted as an expert witness in the area of appraisal of power plants. Furthermore, the 2022 & 2023 Federal Appraisal reports prepared by Pomykacz were marked as "Taxing Bodies' Trial Exhibits #1 and #2," respectively, for identification.

Pomykacz testified that he did not make an "extraordinary assumption" in this case which he defined as an assumption that's made by the appraiser that is unknown to the appraiser and may or may not be true but, which may have a large impact on the value if it was not made. He explained that the Kendall plant is an unusual property; it's a power plant; it's rare; it's not like an ordinary office building or an apartment building. But as he appraised it, he did what he believed to be the ordinary steps for this extraordinary property and none of those steps included extraordinary assumptions. (Tr. p. 426) Similarly, Pomykacz testified that he did not consider a "hypothetical condition" which he described as an assumption or a condition that is **known to be false** but is done for appraisal analysis purposes. For example, in a condemnation or partial taking, there may be an analysis known as before and after analysis, or before the taking and after the taking. One of those scenarios is going to be known to be false, but it's made anyway so that you can determine damages. (Tr. pp. 426-427, 435-436)

Pomykacz was then asked to refer to his 2023 appraisal from which he read his explanation why there was no consideration of a "hypothetical condition" in this case.[8] He stated the reason being because in his analysis, he assumed a 35-year life for the machinery and equipment (personal property) at the Subject plant, and also for the real property components of the Facility that directly support the machinery and equipment (for example, the foundations under the gas turbines and the steam turbines). (Tr. p. 428) Since the Subject was placed in service in 2004, his projected 35-year life means that those assets are projected to be fully depreciated by 2039, which is already earlier than the 2040 or 2045 targets – targeted phaseout dates for the subject property. Pomykacz expounded that the real property improvements that do not directly support the shorter-lived machinery and equipment (for example, the buildings, tanks, and site work) have a projected useful life of 55 years. Given the projected demand for electricity and the fact that the Subject is an existing power generation facility, he expects that at the end of the useful life of the current machinery and equipment, it is most likely that the subject site and buildings will be reused or repurposed with new technology or updated equipment to allow it to continue

[8] Pomykacz was asked to refer to his 2023 appraisal as the 2022 Federal appraisal report makes no mention of the CEJA legislation or its impact on the value of the subject property even though the 2022 Federal appraisal report is dated April 23, 2024 or approximately 2.5 years **after** CEJA was signed into law.

generating electricity into the PJM market. He then concluded that the highest and best use for the real property improvements will be for continued use in support of electricity generation activities. (Tr. p. 429)

Pomykacz explained that the subject site has a number of very important characteristics: It's already been in use for power generating activity. It's very hard to get permits and approvals to build a power plant. If you have a site that's already been used for that activity, you've sort of crossed a very important bridge; it's got transmission lines; it's got a gas line to the site; and it has already made improvements that are built and used for this activity. So of all the potential uses, continued use for electricity generation seems the most obvious. (Tr. p. 431)

Pomykacz next described what he considers to be the real property components versus personal property. His description of the real property of the Kendall plant was drawn from the prior 2002 REAC appraisal prepared by Mr. Kelly and affirmed by the prior PTAB decision in the 2002 appeal. The classification of real versus personal property is consistent with REAC's 2022 & 2023 appraisals. (Tr. pp. 436-437) In identifying and valuing the real estate portion of the Kendall plant, Pomykacz reiterated that based on the prior PTAB decision, he took the data from the original REAC report prepared by Mr. Kelly in 2002, which included a classification of the various line items of cost associated with the entire plant. From those classifications, he determined what was real property versus personal property. Had his assignment been to appraise all of the tangible property at the Kendall County Generation Facility, Pomykacz stated that his approach to value and methodology would have been different as he would be appraising the entire plant ("going concern") and he likely would have relied primarily on the income approach to value. (Tr. pp. 437-438) As is, he only developed the cost approach to value. He added that the cost approach is particularly useful for appraising parts of a plant. That's the technique that appraisers typically utilize for allocation because you can break out the whole plant into its parts. Also, the cost approach is a traditional approach used for special-purpose real property.

Pomykacz compared his current assignment as being similar to the ones in states like Pennsylvania and Ohio where he would only appraise the real estate portion of the subject property rather than the property as a whole. In Pennsylvania, for instance, the definition of real property is quite limited and similar to this assignment where the real property portion accounts for a very small part of the overall plant value, and the non-real estate assets can be as much as 90 percent of the entire value. (Tr. p. 439) Pomykacz did not agree with the notion that the overall economic life of the personal property, e.g. power-generating equipment and machinery at the facility establishes the maximum economic life of all the *real property improvements*. In this case, the power plant machinery and equipment that may have a relatively short life of 35 years, but the real estate associated with the subject property is generally perceived as having a 50-to-60-year life. He therefore concluded 55 years generally. (Tr. p. 442) Once the equipment has outlived their economic life, replacement equipment or upgrades to the old equipment will likely be made so that the plant itself will **likely remain as a power generating facility** which in a broad sense is referred to as "repowering"- not to be confused with "repurposing" which involves the use of the same structures for a purpose *other than* the current use. (Tr. pp. 442-443)

Pomykacz opined that "fracking" has also influenced electricity prices from natural-gas powered plants. Fracking has been a relatively new technological development in the last 20 years. It has made available at an economic price an abundant amount of natural gas resulting in natural gas prices being at rock-bottom rates for the last 10 to 15 years. Because natural gas plants are able to buy natural gas at much lower prices, fracking has had the impact of greatly reducing electricity prices in recent years. This has allowed some power generating plants to operate for more years than economically anticipated. As a result, Pomykacz predicted that the outlook for natural gas power plants such as the Kendall plant is that they are still economically feasible and will be profitable well into the future. When asked by the ALJ for clarification whether this trend applies to Illinois as well as nationally, Pomykacz clarified that the trend for increased need for natural gas-powered plants in his chart is nation-wide but does apply to Illinois as well. (Tr. p. 469)

Pomykacz testified further that for this assignment, he did not first appraise the entire power plant and then deduct 6% allocation for the real estate portion as was determined by the 2002 REAC. Pomykacz opined that he considered such a technique, but ultimately concluded it was not appropriate because the reliability of estimating an overall plant value and then deducting 94% is a substantially less reliable technique than just doing a summation of the costs of the several items that total up to that 6%, assuming that 6% is the correct allocation for the real estate. (Tr. p. 472) He did not interpret the prior decision of the Property Tax Appeal Board to have determined an exact percentage allocated to real property, nor is he aware of any settlement agreement(s) providing such a percentage of allocation toward real property at the subject facility. His understanding of the prior PTAB decision is that the ruling prescribes *how* to categorize the equipment rather than a specific percentage to allocate toward it. (Tr. pp. 473-474)

Turning to the discussion of his development of the cost approach to valuing the subject property, Pomykacz explained that the cost approach is a method based on the principle of substitution. An investor or owner could buy a property somewhere else or rent a property somewhere else, or one could go out and build the replacement. (Tr. p. 474) The idea is that you will add up all the costs to build it outright, including the cost of acquiring the land. Those costs include everything from indirect to direct costs, as well as financing and everything else. There are two general variations, i.e., "reproduction cost" and "replacement cost." In valuing the Kendall County Generation Facility as of 2022 and 2023, Pomykacz performed a reproduction cost analysis called a "trended original cost" which involves utilizing the original cost data along with published cost manuals in order to adjust those numbers for appreciation/inflation of the cost to construct. This is a common approach for special purpose properties like power plants. Pomykacz testified that he was provided with two sources of data regarding original costs, both of which were originally provided to the assessor's office by the property owner at the time of construction. The first data source for the original costs was found in the original appraisal of the subject real property assets by Real Estate Analysis Corporation ("REAC") dated December 30th, 2003, with a valuation date of January 1, 2002. The second data source for original costs was a fax transmission dated September 12, 2002 from attorney Thomas M. Atherton (one of the attorneys for the appellant herein) including a 3-page spreadsheet which Atherton believed listed the direct construction costs for the Kendall property. The REAC appraisal data included construction costs through that appraisal's valuation date of January 1, 2002. (Tr. pp. 477-479)

The REAC appraisal data was useful according to Pomykacz because it included both direct and indirect costs as of 1/1/2002. (Tr. p. 479) Indirect costs included line items such as general project management, engineering and design, finance & legal consulting, property/transit/liability insurance, sales/use/property taxes, startup labor and spare parts, and interest during construction, among others. Pomykacz noted that he calculated the total indirect costs as a percentage of the total costs. He found the percentage by taking the $115,534,076 total indirect costs and dividing this by the total maximum cost of $564,863,603 which included all direct and all indirect costs to construct the plant and it included all real property and all personal property. He arrived at 20.5% which represents the ratio of indirect costs to the total cost of the project. As it relates to the classification of the property as either real or personal, Pomykacz followed the same classification found in the 2002 REAC appraisal that was affirmed by the PTAB in the 2001 appeal under docket number 01-00965.001-I-3. The same classification and methodology was applied to the cost numbers in the fax transmission provided by attorney Atherton. (Tr. p. 492)

"Trending" the costs to the present time, Pomykacz applied a trend factor of 2.19 to the total real estate costs of $31,184,326 to arrive at a trended original direct real property costs of $68,279,964. Adding to this amount the 20.5% for indirect costs as calculated above, Pomykacz arrived at the total direct and indirect real property costs of $85,836,484. Then, adding entrepreneurial incentive of 12% resulted in the total direct and indirect costs, plus entrepreneurial incentive of $96,136,862. Deducting for physical depreciation, the trended original cost less physical depreciation amounted to $75,800,965. (Tr. pp. 496-497)

For the 2023 tax year, the only difference from the prior year is the cost index as of 2023 that depicts the trend factor to be 2.0247. Pomykacz noted that in some years, the cost of construction actually decreases over the prior year as it was during these two years. As a result, the trended original cost is $63,139,691. The indirect costs as a percent of the whole is 20.5%, so the total direct and indirect real property costs are $79,374,515. Adding 12% for entrepreneurial incentive to this amount resulted in the total direct and indirect costs, plus entrepreneurial incentive of $88,899,457. Deducting for physical depreciation, the trended original cost less physical depreciation amounted to $68,647,957. (Tr. p. 500)

Next, Pomykacz accounted for the cost of the additional structures classified as real property that were built/added after the original REAC appraisal in 2002 to the present day. The direct costs associated with these improvements were obtained from the original REAC appraisal in addition to the data from the County Assessor's records. The real property additions included equipment enclosures, pond expansion, and fencing which were all added in 2006; pole storage barn added in 2014; office trailer added in 2016; and gravel parking lot added in 2020. Each of these were "trended" to the present day by applying the trend factor as of January 1, 2022 to arrive at the final trended direct real property cost **of the additions** as of January 1, 2022 of $2,901,366 which were then added to his trended original real property costs of approximately $68 million. (Tr. p. 504)

Next, Pomykacz was asked to explain the reason for the addition of entrepreneurial incentive of 12% to the overall cost figures. (Tr. p. 506) Pomykacz first distinguished the concept of "entrepreneurial *incentive*" from "entrepreneurial *profit*." He explained that they are very different concepts and should not be confused or used interchangeably. Entrepreneurial

incentive is an **expectation** by the investor or the owner whereas entrepreneurial profit is basically an accounting concept describing **what actually occurred**. In other words, *incentive* is what is expected to happen, whereas *profit* is what actually happened. He gave the following example: Everyone who buys property or builds a property or invests in one and rents it out is expecting some kind of benefit from it. If you're a business, you're expecting that the asset will help you make money. That's why you're doing it. Either you're a real estate investor or you're a business owner who believes that buying or renting or building that real estate is going to help you make more money elsewhere in your larger business practice. The *incentive* is what it takes for a developer or investor to invest in the real estate. (Tr. p. 507) For example when a home developer builds a home, after all his costs he's going to expect to make a profit above and beyond his costs. That's the incentive. Even if he loses money, he still had the expectation to make money, and so that has to go into the total cost. (Tr. p. 508)

In arriving at the entrepreneurial incentive of 12%, Pomykacz explained that there are no publications or surveys for entrepreneurial incentive like *Price Waterhouse Coopers* cap rate surveys, or *Marshall & Swift Valuation Guide* for costs. Therefore, he relied instead on corporate authorizations for expenditures, reports from clients, and his own experience in appraisal practice. Pomykacz asserted that he has seen corporate documents that include the board of directors' expected return on the investment of 15% to 18%. (Tr. pp. 510-511) This important data supports the notion that entrepreneurial incentive is a real thing and not just an appraisal theory. Pomykacz added that the *Appraisal Institute* suggests that it should be added to overall costs. In his experience of appraising properties similar to the subject, he could establish a range of expectation for that incentive of 10% to 25%. For this assignment, Pomykacz applied the lower end of the range at 12%. (Tr. p. 511)

When asked if he would agree that entrepreneurial incentive is an intangible asset attributable to the business value component of a going concern and not attributable to the real estate, Pomykacz responded that he cannot completely agree with that statement for two reasons. First, there are intangible qualities or attributes and then there are intangible assets, and they're two different things. Pomykacz expounded that real estate has numerous intangible qualities and attributes such as permits and property rights that create value. So saying something is intangible doesn't say anything about whether it should be real property or not. Pomykacz defined an "asset" as something that could be transferred from one owner to the next. A seller could transfer the whole property and the expectation of future benefits of income or sales, but that's not an asset that sells separately from the real estate, so it's not appropriate to call it an intangible asset. Second, labor for carpentry for instance is an intangible in the same sense as entrepreneurial labor incentive. You would never separate out the intangible value of carpentry labor. That's part of the real estate. Once these items, intangible or tangible, get appended to the property, it becomes part of the real property. The carpenter brings in wood and he brings in his labor, and he leaves that value behind. Now you have an improved property with a wooden building on it. It's now part of the real property, and its value belongs to the real property. Pomykacz added that he has been working with developers of electric generation facilities, and every single one of the investors expected a profit – that's why they are in business. He also believes that the 12% entrepreneurial incentive is a market-based figure. Every one of these investors has alternatives. If nothing else, they can buy stocks or bonds, and there is always an expectation of some kind of return; that's the entrepreneurial incentive. Sometimes investments underperform, and you lose

money, or you just don't make as much as you thought. That's the entrepreneurial profit issue. That's after the fact. (Tr. 512-515)

Next, Pomykacz discussed the issue of depreciation in context of the subject property. Pomykacz described "depreciation" as a broad category of reasons why properties lose value from their initial construction. He explained that there are three types of depreciation: Physical depreciation, functional obsolescence, and economic/external obsolescence. Physical depreciation is deterioration over time or "wear-and-tear." Pomykacz found it was appropriate to deduct from the original cost for physical depreciation. Functional obsolescence means the property doesn't perform the way it was intended due to design, super adequacy, etc. resulting in loss of value. With respect to the subject property, Pomykacz didn't see a reason to classify any of the assets as functionally obsolete. External obsolescence is the idea that something is occurring off the site of the subject property outside of the owner's control that is causing the value of the subject property to decline. With power plants, it usually means some kind of government regulation. (Tr. p. 517) As it relates to the subject property, Pomykacz testified that he first considered if there is a particular cause for the obsolescence, and then he considered methods to measure the impact on value. Given the assignment here, Pomykacz focused on real estate only. He looked at the broader picture and determined that in the long-term, this real estate is going to function within the energy generation space in some way even if the Kendall plant ceases to operate in its current configuration. Pomykacz agreed with the statement that "[i]n order to quantify the presence of obsolescence, functional and/or external, the total going concern would have to be analyzed with a corresponding allocation of obsolescence to the real estate depending on the amount of the obsolescence identified." (Tr. p. 518)

With regard to physical depreciation, Pomykacz explained that one of the basic means for determining depreciation is an analysis of the age and the expected life of the facility and using that kind of a model to determine the depreciation of the various buildings at the subject property. In the case of the 2022 appraisal, he started with the historic age of the Kendall plant which is 20 years, (or 21 years as it relates to the 2023 appraisal). The next question is how long will this building last or how many years will it be useful economically and physically. The goal being to estimate how long each of these buildings will be useful since it's done on a building-by-building basis. To determine their service life, Pomykacz looked at the kinds of buildings they are, and then consulted Marshall Valuation Service for estimates on expected life spans for each type of building. Marshall Valuation Services is ubiquitous in the appraisal community. It is also used by architects, builders, cost estimators, and assessors to estimate depreciation in using the age/life method. (Tr. pp. 519-520) From this data, Pomykacz drew his conclusions regarding the life expectancy for the buildings at the subject property. First, looking over the list of all subject buildings, how they were built, categories of construction, and what categories they fall under, (industrial, warehouse, garage-type buildings) and then looking at the kind of life spans that are estimated in the manual, they range from 50 to 60 years. From this data, Pomykacz concluded a life expectancy of 55 years for many of the subject buildings that house generators and mechanical equipment, and 35 years for other real estate such as custom concrete foundations, platforms, gratings, and ladders. However, somewhat confusingly, Pomykacz opined that **all** real property associated with the power-generating equipment at the subject property is to be depreciated over 35 years and not the longer 55 years. (Tr. p. 527) He therefore concluded that given that the improvements were made in 2002 and they depreciate over 35 years, they're assumed to be fully depreciated in 2037, before the January 1, 2040 deadline when

the subject would be forced to shut down due to CEJA regulations.[9] At that point, he predicted that the buildings will be repurposed for continued use as an electric generating facility of some type. The average physical depreciation per the Marshall Valuation Service is 13% or 39% depending upon whether it's a 55-year life or a 35-year life. Pomykacz chose an average of 21.2% overall physical depreciation for the real property at the Kendall plant. (Tr. p. 531)

To summarize his cost analysis figures for the tax year 2022, Pomykacz began with the real property direct costs as of May 31, 2002 of $31,184,325. To this, he applied a trend factor of 2.19 to arrive at the trended original real property direct costs as of January 1, 2022 of $68,279,964.[10] After adding the trended cost of $2,901,366 which represents the real property added after the original build in 2002, he arrived at the "Total Trended Real Property Direct Costs as of 1/1/22 of $71,181,330. To this amount, Pomykacz added 20.5% for the indirect costs of the real property to arrive at the "Total Real Property Costs as of 1/1/22" of $89,483,864. Next, Pomykacz added 12% for "Entrepreneurial Profit" (sic)[11] and arrived at the "Total Real Property Costs plus Entrepreneurial Profit" (sic) of $100,221,928. Then, from this amount he subtracted 21.2% for physical depreciation to arrive at the "Trended Original Cost Less Physical Depreciation" of $79,021,914, or $79,000,000 (rounded)[12] Lastly, adding the value of the subject land of $4,300,000, Pomykacz arrived at the final value conclusion for the subject property via the cost approach of $83,300,000 as of January 1, 2022.

For the tax year 2023, Pomykacz developed the same cost approach and the same methodology with the only two differences being the trend factor of 2.02 which is lower than prior year of 2.19, and the amount of physical depreciation was higher at 22.8% compared to the prior year of 21.2%. This resulted in the total value conclusion of $76,000,000 as of January 1, 2023.[13]

At the end of his testimony on direct exam, Pomykacz reiterated that he made no adjustments in his opinions of value due to the requirements of CEJA. Pomykacz contended that CEJA will not impact the industry until 2040. Before that happens, he expects that by 2037 the machinery and equipment will be retired, and the real estate portion of the Kendall plant will be fully depreciated. Therefore, by the time Kendall plant would be impacted by CEJA in 2040, the plant will be repowered and continue to operate as a power generating facility. (Tr. p. 539)

[9] This estimate of 35 years economic life for ALL real estate components appears to be in direct conflict with Pomykacz's opinion that all buildings including the administrative building, gas turbine buildings, and the "miscellaneous" buildings he assumed to have a 55 year economic (useful) life. (Tr. p. 525) The Board finds this discrepancy critical as it contradicts Pomykacz's argument that the shorter life expectancy means that real estate components would be fully depreciated BEFORE being forced to shut down by CEJA and, therefore, CEJA has no impact on depreciation.

[10] This summary is depicted on the errata p. "TBs-22-0185" of the Taxing Body's trial exhibit #1 and confirmed by Pomykacz in his testimony on Tr. pp. 531-536. The Board is cognizant that the math is incorrect even though the errata pages were added in order to correct errors/discrepancies in the original appraisal report relating to the real property direct costs.

[11] Should be entrepreneurial *incentive* rather than "profit" given the appraiser's definition of the two terms during his testimony.

[12] Pomykacz did not add any depreciation for functional or economic/external obsolescence.

[13] This summary is depicted on the errata p. "TBs-23-0185" of the Taxing Body's trial exhibit #2.

Cross-examination of Mark Pomykacz by counsel for the taxpayer:

Under cross-examination, Pomykacz acknowledged that he has no direct work experience or history of working for a power producer like the subject property, Kendall Power or Vistra; he never worked on the operations side of a power plant; he never worked for a company that constructs power plants; he has never been a plant manager overseeing the day-to-day operations of a gas-fired power plant or any other kind of power plant; he has not worked for a Regional Transmission Organization like PJM; and he's never worked for the Federal Energy Regulatory Commission, (FERC). (Tr. pp. 543-544) With regard to his publication, "*The Appraisal of Power Plants*," which he characterized as an "award-winning article by The Appraisal Journal," he considers that article to be current and up to date in terms of appraisal theory. That article was written in his capacity as a professional appraiser, and the article is intended to inform other appraisers about best practices in the appraisal of power plants. He further noted that the article accurately reflects his professional opinions regarding power plant appraisal methods. (Tr. pp. 544-546) Pomykacz was then questioned about reaching four different conclusions of value for the subject property, all as of January 1, 2022 valuation date. The first appraisal was dated November 8, 2022 in which he valued the subject property (real estate only) at $121,300,000, land included, as of January 1, 2022. (Tr. p. 548) At the time Pomykacz prepared this report, he believed it accurately represented the subject's value as of 1/1/22 based on the data he had. The second appraisal report was dated a month later on December 14th, 2022, where he valued the same subject property at $105,900,000, including land, as of January 1, 2022. (Tr. p. 549) On the day he prepared that appraisal as of December 14th, 2022, he believed it accurately represented the value of the same property that he had valued a month earlier. Then in April 2024, Pomykacz prepared another appraisal dated April 23rd of 2024, and that opinion of value was $84,000,000, land included. (Tr. p. 552) Finally, approximately one week prior to the hearing before the PTAB, he supplied errata sheets that corrected yet another error which resulted in a new opinion of value of $83,300,000, land included, as of January 1, 2022. (Tr. p. 555) Pomykacz acknowledged that his current opinion of value is the fourth opinion of value he has developed about the subject property, but reiterated that he doesn't recall the circumstances and the scope of work, or the definition of the subject property as it can change because of litigation. Pomykacz could not recall the reason for the differing values in his appraisal reports, but speculated that he was in effect appraising something different each time. (Tr. p. 552) However, at no time did he ever appraise the "going concern" or the entirety of the property, but rather just the real estate portion of the subject property. (Tr. pp. 546-555)

Under further cross-examination, Pomykacz confirmed that his appraisal reports are intended to estimate a retrospective market value for the subject property as of January 1, 2022, and January 1, 2023. With respect to each date of value, he applied the same appraisal methodologies and techniques for both years. It was a trended original cost analysis in both reports; he evaluated the same types of appraisal data in both reports; and he reached the same highest and best use analysis and conclusions. To the extent there were differences in his cost approach, those primarily related to differences in the results of the Handy-Whitman trend factors for the years 2022 and 2023, and the minor adjustments in physical depreciation attributable to the extra year of age. (Tr. 557-559)

Pomykacz acknowledged that a major difference between his 2022 & 2023 appraisal reports is that in his 2023 report he addressed the Climate and Equitable Jobs Act (CEJA), whereas his

2022 report contains no reference, comments or discussion of the Illinois law. Pomykacz further agreed that a reader of his 2022 appraisal report would not know or have any reason to believe that he considered CEJA at all in his appraisal of the subject property as of January 1, 2022. (Tr. p. 561)

Notwithstanding the differences with respect to CEJA, Pomykacz confirmed that there were no material differences in data, methodology, or analysis between the 2022 and the 2023 appraisals. In both reports he relied on an excerpt of costs from a January 1, 2022, appraisal by REAC; in both reports he applied the same methodology and mathematical calculations to determine the same 20.5% for indirect costs that he applied in his analysis; in both reports he applied the same methodology and concluded the same percentage of entrepreneurial incentive of 12%; in both reports he used the same Marshall Valuation Services and the same schedule to determine the useful life and percent of depreciation applicable to the subject property; in both reports he concluded there is no functional or external obsolescence; there is no difference in his discussion of functional and external obsolescence; and finally, in both reports he applied the same analysis and approach in his reconciliation. The purpose of each appraisal was to determine the fair cash value or the market value of only the real estate portion of the subject property. (Tr. pp. 557-563)

When asked about whether intangibles should be excluded from his conclusion of value of the subject real property, Pomykacz disagreed with the notion that all intangibles are to be excluded. For example, permits and approvals, legal services, engineering services, and all rights associated with the ownership of the property such as the fee simple rights are all considered "intangibles." However, Pomykacz was unable to allocate the breakdown of the cost amounts related to permits, approvals, engineering services, etc. as he believed that these would be "imbedded" in the schedules from REAC or the costs from Mr. Atherton's fax. If they're not expressly stated there, or not intrinsically included there, then he might have added indirect costs as an adjustment in the form of entrepreneurial incentive. Therefore, these would be the big adjustments that he made for the topics that may include intangibles. (Tr. pp. 564-566) Pomykacz agreed with the notion that the parties have stipulated that the real property improvements at the subject property were established by decision of the PTAB issued in Docket No. 01-00965.001-I-3. He, himself, also relied on the same PTAB decision in determining what was and what was not real property. Additionally, Pomykacz confirmed that he accepted the categories and allocation of costs in the REAC appraisal from 2002. (Tr. pp. 566-568)

When questioned about direct and indirect costs to construct the plant, Pomykacz confirmed that the maximum price that he concluded for total construction costs was $564,863,603 and that this maximum price included all direct and all indirect costs to construct the plant and it included all real property and all personal property. He also noted in the appraisal report that the REAC appraisal data was useful because it included both direct and indirect costs as of 1/1/02. (Tr. p. 570) Pomykacz further confirmed that as of January 1, 2002, the plant was 93.2% completed, and roughly $526,650,000 had been spent or earned. Of this $526,650,000, approximately $30,580,000 was classified as real property costs, including all direct and indirect costs. Pomykacz then read a portion of the PTAB decision as follows:

"Using p. 47 of the appraisal, Kelly identified the major categories of General, Engineering & Design, and Indirect Costs as examples of indirect costs. He allocated the indirect costs as either personal or real based on calculating what the percentage was of earned-to-date expenditures for

the real estate classified items as compared to the total costs of the whole plant which came to approximately 6%. He then applied that 6% to the indirect cost (sic) to allocate that to the real estate." (Tr. p. 575)

After refreshing his recollection, Pomykacz agreed that the PTAB determined the value of the subject property based on REAC's original appraisal and cost figures. However, Pomykacz clarified that the PTAB may have relied on some parts of the REAC appraisal and not other parts, or maybe not even agreed with other parts. (Tr. p. 577) Upon further questioning, Pomykacz acknowledged that he is not aware of any other total of direct and indirect costs for the plant other than the $564,863,603 number. In addition to the REAC costs, he referred to a second source of data for original costs which was contained in the Atherton fax. (Tr. p. 586) The cover page of the faxed document states that "Attached is a 3-page breakdown that I believe lists the direct construction costs for NRG's Kendall property." (Tr. p. 589) However, Pomykacz's appraisal report does not reference any documents from Mr. Atherton from between September of 2002 and when REAC completed its appraisal in December of 2003. Furthermore, Pomykacz stated that he doesn't know whether Mr. Atherton's fax was the source of any information that was provided to the PTAB or to Mr. Kelly. (Tr. p. 592) He agreed that neither the REAC appraisal nor the PTAB decision mention any information from Mr. Atherton regarding costs.

Under further cross-examination, Pomykacz testified that what he labeled as "Total Direct and Indirect Costs" in his appraisal in the amount of $564,863,603 is the same number as the "Current Maximum Price" depicted in the REAC appraisal and this is the same number that Pomykacz utilized to calculate his indirect costs as a percentage of total costs. (Tr. p. 593) Furthermore, the Atherton fax was relied on as a source for only direct real estate costs. (Tr. p. 594) By dividing total indirect costs by total construction costs, Pomykacz arrived at an indirect percent of 20.5%. He then increased the overall cost of the real property by 20.5%, rather than 6% as allocated by REAC. (Tr. p. 607-608) Pomykacz agreed that the REAC appraisers allocated 6% to every line item of real property but that was based on earned-to-date numbers which were incomplete and thus was not the right basis to estimate the real property. (Tr. 609-610) Upon further questioning, Pomykacz did not recall having any information indicating that the costs he relied on excluded indirect costs. Therefore, Pomykacz agreed that if the cost figures from REAC included the total direct and indirect costs, then it would be incorrect to add "indirects" again. (Tr. p. 613)

With regard to entrepreneurial incentive, Pomykacz agreed with the statement that entrepreneurial incentive is a market derived figure that represents the amount an entrepreneur expects to receive for his or her contribution to a project and risk. When asked if he agreed with the notion that those appraisers who incorporate estimates of entrepreneurial incentive find the task of empirically supporting their estimates to be problematic, Pomykacz disagreed with the characterization "problematic." He was then asked to read from an article titled "Defining and Supporting Entrepreneurial Profit, Entrepreneurial Incentive, and External Obsolescence" written by Mark Pomykacz himself:

Estimating entrepreneurial profit, entrepreneurial incentive, and external obsolescence continues to be a contentious issue. Those appraisers who incorporate estimates of entrepreneurial profit,

entrepreneurial incentive, and external obsolescence find the task of empirically supporting their estimates to be problematic. (Tr. pp. 618-619)

Pomykacz conceded that the goal in appraisal is always to have any entrepreneurial incentive supported by market evidence. (Tr. p. 619) Furthermore, entrepreneurial incentive must be consistent with how the property or type of property was actually developed as of the applicable date of value. Pomykacz confirmed that in both 2022 and 2023 appraisals, he presented a chart or a table titled "Example of Entrepreneurial Profit and Incentive" which is simply a hypothetical scenario in order to explain the concepts, but did not contain market data applicable to the subject property. Additionally, none of the hypothetical numbers in the table apply to the subject property. (Tr. pp. 620-621) Finally, Pomykacz confirmed that his report and analysis of entrepreneurial incentive presents no sales data at all, and there are no actual prices obtained for any power plant properties in his report.

Next, Pomykacz was challenged regarding his discussion of entrepreneurial incentive with reference to working with investors and developers of power plants. He confirmed that his work with power plants spanned over two decades of work and hundreds of appraisals of power plants around the country. However, with regard to his discussion of entrepreneurial incentive, his report doesn't identify any of the investors or developers, nor does he identify whether or which of these investors or developers were investing in developing the entirety of power plants (going concern) or just the real property components of power plants. Other than his general observation that in his experience he has seen a range of profit expectations and entrepreneurial incentive from 12% to 30%, he did not identify in his report any specific power plants appraised or any transactions involving any specific amount of entrepreneurial incentive. Pomykacz did not recall anywhere in the PTAB decision or the original 2002 REAC appraisal any discussion about entrepreneurial incentive or there being inclusion of any entrepreneurial incentive or profit in the cost figures. He agreed with the notion that the $564 million was the total construction price of the plant as complete, and that amount would have included all profit to the contractor, engineer, and anyone who delivers a service in the construction of that project. He clarified that the $564 million figure is not the basis of his conclusion of value as that figure did not take into consideration the entrepreneur. (Tr. pp. 624-630) Pomykacz acknowledged that his report contains no analysis of specific property returns actually achieved by developers of comparable properties and his report does not cite to or reference any external data source, no paired sales analysis, no market survey, and no published study at all that would relate to or support his conclusion of 12% entrepreneurial incentive. (Tr. p. 631)

During the continued cross-examination, Pomykacz testified that, as of the January 1, 2022 valuation date, his total trended cost new for the subject real property was $100,221,928. (Tr. p. 638) At counsel's request, Pomykacz calculated using an assumed area of approximately 148,000 square feet of gross building area, resulted in $677 per square foot of building area before depreciation. (Tr. pp. 638–639) Pomykacz acknowledged that he did not compare his total trended cost new, either in total or on a per-square-foot basis, to the Marshall Valuation Service, to RS Means, to any cost comparables for the market, or to any other generally accepted source of market data on costs. He added that one would not perform such a comparison as part of a trended original cost analysis. (Tr. p. 640–641)

Pomykacz agreed that to perform the cost approach, all forms of depreciation—physical deterioration, functional obsolescence, and external obsolescence—must be estimated and deducted. Furthermore, if obsolescence exists, the failure to quantify and deduct it would mean the resulting value does not reflect market value. (Tr. p. 641–642) He was directed to his article, *"The Appraisal of Power Plants,"* and read a sentence stating that estimating physical deterioration is often the main source of concern about the validity of the cost approach on power plants. (Tr. p. 643) Pomykacz was then asked to read from his article the sentence, "Functional obsolescence is common at power plants and is often easily spotted." He agreed that the article identifies functional obsolescence frequently found at power plants as including deficiencies requiring additions, deficiencies requiring modifications, deficiencies requiring additional operating costs, and super-adequacies. (Tr. pp. 644-645) Pressed further, Pomykacz agreed with the general notion that, unlike general real estate where the property will continue to function if it is adequately maintained, even well-maintained power plants may suffer critical, economic, and functional obsolescence. As to the subject property specifically, the items of real property with a 35-year life would be fully depreciated and would have no remaining value after that. (Tr. pp. 647-648)

Pomykacz testified that his article identifies the economic age-life method among the most widely used depreciation techniques for power plants and acknowledged that he applied that method when he appraised the Byron Generation Station in a 2020 appraisal. (Tr. pp. 649-650) He explained that in the Byron assignment he appraised the entire plant, whereas the subject Kendall plant assignment was to value the real estate components only. He confirmed that for the subject property he did not apply the economic age-life method but instead applied physical depreciation based on the Marshall Valuation Service depreciation schedule for general commercial properties. (Tr. pp. 650-651) Pomykacz acknowledged that he did not personally visit the plant and did not enter or inspect any of the buildings. (Tr. p. 652) He also acknowledged that in his published article he does not discuss or approve the use or reliance of Marshall Depreciation Schedules at all, but explained that his article is about valuing whole power plants, not about valuing only the real estate portion. He confirmed that nowhere in his article does he mention the words "Marshall Valuation Service" (MVS) in connection with the cost approach. (Tr. p. 654) Pomykacz also confirmed that he did not identify MVS as an acceptable source of depreciation at all in his article, and he did not rely on MVS cost schedules to derive his replacement cost new for the subject property. (Tr. p. 655)

Pomykacz further testified under cross-examination that he applied the same MVS schedules in his 2023 appraisal. (Tr. p. 657) He acknowledged that MVS does not contain a separate category for power plant buildings, but explained that the subject's buildings fit within Marshall's existing categories for industrial and heavy-duty industrial buildings. He agreed that the life expectancy guidelines and the depreciation schedules in MVS do not address or identify the impact of environmental laws or regulations such as CEJA on useful life of the subject property. (Tr. p. 657-659) Pomykacz further agreed that the Marshall depreciation schedule upon which he relied is the same schedule that would be used for non-power-plant buildings such as post office buildings, warehouses, or apartments, and that it assigns the same physical depreciation to any building of a given age and assigned life. He agreed with the statement that the MVS depreciation schedule assigns the same amount of depreciation to any 20-year-old building that is assigned a 35-year life, as a building that would have a 55-year life. (Tr. pp. 661-662) He acknowledged that the MVS does not reflect super-adequacies or external obsolescence, which

would need to be separately identified and quantified. Finally, he acknowledged that, aside from MVS, his report contains no other evidence supporting his concluded depreciation percentages of 21.2% for 2022 and approximately 22.8% for 2023. (Tr. pp. 662-663)

Pomykacz explained that his concluded 21.2% physical depreciation for tax year 2022 **preceded** his discussion of functional and external obsolescence. In addition, he acknowledged that the entirety of his discussion of "functional obsolescence" was contained in a few paragraphs of his appraisal report, and that all but the last paragraph of his discussion on functional obsolescence is devoted to the definition and typical causes of functional obsolescence. The last paragraph of this discussion reads, "[w]e found no functional obsolescence in the real estate improvements at the Subject." (Tr. pp. 669-671) He testified that his 2023 report contained the same discussion. (Tr. p. 671)

With respect to environmental regulations, Pomykacz concluded that no external obsolescence exists. In his appraisal, he stated that "[w]e have considered all of the typical potential causes of external obsolescence" followed by a list of typical causes including government regulations. (Tr. p. 673) Pomykacz acknowledged that his 2022 report did not discuss CEJA or any other Illinois law potentially impacting the subject property, while his 2023 report contained a section he titled the "Illinois Clean Energy Jobs Act" (Sic) which he clarified should be corrected to read the Illinois Climate and Equitable Jobs Act (CEJA). (Tr. pp. 647, 676) His 2022 report contains a discussion in general terms about the impact of environmental regulations on the electricity industry. Pomykacz was then asked to read from his report as follows: "At the same time, new regulations concerning power plant emissions are creating new requirements for lowering pollution that may require costly upgrades to some plants with higher emissions, causing some plants (especially coal plants) to reduce their operations or retire." (Tr. p. 675) He agreed that this statement recognizes that new environmental regulations can directly impact power plants; that stricter pollution regulations can result in power plants needing to make costly upgrades; and stricter regulations can force power plants to reduce operations or even retire. He also agreed with the notion that all three of these, if they occur, would be sources of obsolescence. (Tr. p. 676) In spite of this, his 2022 report makes no mention of CEJA or any other state or federal law or regulation, and he therefore concluded **zero** external obsolescence for the subject property.

Pomykacz testified further under cross-examination that CEJA was enacted in 2021, that it was in effect on January 1, 2022, and January 1, 2023, and that it remained in effect when he authored his reports. (Tr. p. 677) He acknowledged that his 2023 appraisal report identified several issues that CEJA addresses, including "Fossil-fuel Phaseout." In discussing this phaseout, he stated that "[t]he fossil-fuel phaseout mandates either the phased retirement or adoption of emission-free technologies for all fossil-fuel units in Illinois over time." (Tr. p. 679-680) He also acknowledged that the subject is a fossil-fuel plant, and that the subject's historic heat rate of 7,130 Btu per kilowatt-hour had been above the 7,000 Btu per kilowatt-hour threshold targeted in the phaseout for 2021, 2022, and 2023. (Tr. p. 678-681) He agreed that the Kendall plant could be required to shut down by 2035 if it continued to operate as its current heat output. (Tr. p. 681-683) Pomykacz agreed that a potential knowledgeable buyer or the Kendall plant would factor the risk of an emissions cut or closure into a purchase price. He also agreed that his 2022 report contained no discussion of these risks, and that, although his 2023 report discussed CEJA, he made no adjustment for the risk of early forced closure of the Kendall plant. In his analysis, he estimated the risk would not be material and the adjustment was therefore zero. (Tr. p. 683-684)

Pomykacz testified that there is "zero" expectation of a closure of this plant because the closure would not occur until 2040, which is after what he thinks is going to be the life of the subject facility. He predicted that by 2040 the entire plant (not just the real estate portion) will not be around due to outliving its useful or economic life and not due to any government regulations such as CEJA. (Tr. pp. 685-686)

Pomykacz further testified under cross-examination that the fossil-fuel phaseout was, in his words, "aspirational," though he agreed that he believed the law was technically mandatory, and he also agreed that, as of the valuation dates, no determination had been made that the subject itself would be necessary to remain in operation in order to maintain the needs of the power grid even if the plant is in non-compliance with the state regulations. (Tr. pp. 686-689) He explained that, in his view, whether the deadlines in CEJA would apply was speculative because 2035 was a long way off and the determinations would not be made until 2035 or 2040. (Tr. pp. 691-693) He agreed that if another gas operator wanted to purchase the subject plant today and has equipment that puts out a heat rate greater than the maximum 7,000 Btu per kilowatt-hour as mandated by CEJA, they would not purchase this property today for reuse because they would be subject to having to replace by 2035 what's there with other gas fossil-fuel technology that meets the CEJA limits. (Tr. p. 694)

Pomykacz testified that the items to which he assigned a 35-year life are components of real property that directly support the machinery and equipment like the foundations and structural steel, comprise a smaller part of the plant. More of his value was assigned to the 55-year-life category. (Tr. pp. 694-695) Pomykacz explained that on a straight-line depreciation basis, the 35-year-life components were 60% depreciated through their lifespan, but that he applied only 42% depreciation to them due to use of the Marshall Valuation Service schedule. (Tr. pp. 695-696, 703-705) Using a construction date of 2002, he agreed that a 55-year life would extend the useful life of the subject property to 2057. (Tr. pp. 701-702) And even if Kendall plant could replace the existing power generation machinery and equipment with gas-fired equipment that has a heat rate below the maximum 7,000 Btu per kilowatt-hour as mandated under CEJA, the shutdown date would still be 2045 just because they are a gas-fired plant. (Tr. pp. 702-703) Pomykacz acknowledged that his report contained no real-world examples of gas-fired, combined-cycle power plants that had all of their original machinery and equipment removed and replaced with different power generation equipment, and that any future reuse would require significant modification of the existing plant. (Tr. pp. 705-706)

Redirect examination of Mark Pomykacz by counsel for the taxing bodies:

During redirect examination, Pomykacz testified that the Atherton fax, dated September 12, 2002, predated the REAC appraisal, which was not completed until December 30, 2003, and that it would not be appropriate under USPAP for an appraiser to use post-valuation-date expenditures and predate them to a January 1, 2002, valuation date unless the data was merely a compilation of information known as of that date. (Tr. pp. 716-717) He explained that the original 2002 REAC report (the Kelly appraisal) stated that the costs to construct the facility were provided directly by the property owner. (Tr. pp. 717-718)

Regarding entrepreneurial profit and incentive, Pomykacz again distinguished entrepreneurial *profit* (which he described as an accounting term recorded after the fact) from entrepreneurial

incentive (which he described as the expectation of profit built into a project's budget at the outset). He agreed that a prudent entrepreneur expects to make a profit and marks up costs accordingly, and that contractors and subcontractors build their profit into their prices. (Tr. pp. 725-731) He testified that he used the Marshall & Swift valuation while REAC used an age-life, straight-line depreciation; that he assigned a 55-year life to the standard industrial buildings and a 35-year life to the real property improvements directly connected to or supporting the machinery and equipment; and that the power plant has a typical expected life of 35 years. (Tr. pp. 731-732) Pomykacz explained that property that has a 35-year life expectancy depreciates at approximately 2.86% per year while property with a 55-year life depreciates at approximately 1.82% per year, and that because the personal property depreciates faster, the allocation of value to the real estate, which he placed at approximately 6%, would necessarily increase over time, including as of the 2022 and 2023 valuation dates. (Tr. pp. 732-735) He opined that the Marshall Valuation Service is preferred over straight-line depreciation because straight-line falls apart at the end of a building's life, when an old building still in use plainly retains value, and even old buildings have some value. (Tr. pp. 745-746) He read a passage from his 2022 report stating that natural gas plants like the subject should be able to look forward to higher electricity prices and would remain economically feasible and profitable currently and in the long term. (Tr. p. 748) At this point, taxing bodies' counsel concluded the redirect examination of the witness.

During re-cross-examination, conducted by the taxpayer's counsel, Pomykacz acknowledged that he did not identify any particular project in support of his conclusion with respect to the added entrepreneurial incentive percentage other than his general experience appraising these types of properties. (Tr. p. 753) As to the issue of indirect costs, he confirmed that the original 2002 REAC report stated the costs were provided by the property owner and contained no reference to the Atherton fax, and that a key assumption underlying his indirect cost math was that every dollar of indirect costs applied equally to real property and personal property. (Tr. pp. 757-759) At that point, the taxpayer's counsel concluded the re-cross-examination.

The ALJ then posed clarifying questions to Pomykacz regarding the expectation of 12% entrepreneurial incentive and whether that relates to the sale of electricity as a result of operation of the power plant or the sale of real estate assets that are the subject of this appeal. Pomykacz clarified that as future expectations of profit, for a power plant, entrepreneurial incentives relate to the sale of electricity rather than the sale or lease of the buildings, with each component—turbine, generator, and real estate—contributing to and earning a return from the sale of electricity. (Tr. pp. 760-763) He agreed with the Judge's characterization that the subject property consists mainly of 11 buildings, five of which are highly customized with 65-foot ceiling heights that cannot easily be repurposed, and six of which are ordinary buildings that can be repurposed but have less value. (Tr. pp. 761-762) Pomykacz explained that the special cost of constructing the higher buildings was captured in the original cost data drawn from REAC, and that the Marshall depreciation and useful life tables he used did not require adjustment for ceiling height. (Tr. pp. 764-765) When the ALJ asked if he would clarify the large discrepancy between Pomykacz's indirect cost allocation toward real property of 28.5%, and REAC's allocation of just under 1%--both percentages purportedly derived from the same REAC 2002 cost numbers--Pomykacz testified that he could not fully explain the gap, but that he used the maximum-price data rather than the earned-to-date numbers because, in his view, it was the best data, and that he used the Atherton figures for line-item dollar amounts because they were closer to the valuation date while using the REAC numbers to calculate the indirect ratio. (Tr. pp. 765-768) Regarding

the plant's overall life, Pomykacz explained that the power plant's machinery and equipment wears out like a car and was not likely to operate much past 35 years, while the real estate was capable of lasting longer and could be reused if the plant were repowered. He acknowledged that the plant manager had testified the equipment was so integrated into the buildings that replacing the machinery would require replacing the entire building. (Tr. pp. 769-771)

Following the conclusion of Pomykacz's testimony, counsel for the taxing bodies requested that the PTAB take judicial notice of the transcript of testimony given by Michael Kelly in a prior PTAB proceeding involving the subject. Pomykacz was then excused. The Board finds that given that said testimony is already made part of the prior PTAB official record, the Board takes judicial notice of the transcript of testimony given by Michael Kelly in a prior PTAB proceeding involving the subject property as well as the prior PTAB decision under Docket Number 01-00965.001-I-3.

Testimony of Robert Herman (taxpayer's rebuttal witness and review appraiser):

Counsel for the taxpayer then presented a rebuttal witness, Robert Herman, MAI. (Tr. p. 777) Herman testified that he is employed by Kroll LLC as a managing director, where he both performs and manages valuation assignments. He holds a Bachelor of Business Administration from the University of Wisconsin–Madison with a major in real estate and finance. He holds appraisal licenses in Illinois, Minnesota, Michigan, and Florida, having been licensed in Illinois since licensure began in that state in the 1990s. Herman testified that he has been appraising properties since 1984 and has held the MAI designation issued by the Appraisal Institute since 1990. He stated that he has conducted approximately 25 appraisals of power generation facilities, most for property tax purposes and some for financial reporting or transactions. He has also appraised other special-purpose properties including chemical plants, paper mills, and large unique manufacturing properties such as Diamond Star Motors in Illinois. (Tr. p.780–781) He testified that he has conducted approximately five appraisal reviews involving power generation facilities. He has testified before the PTAB approximately 30 times, and he has been recognized as an expert in valuation in those proceedings. (Tr. p. 781) Herman further testified that, over the past five years, he has been heavily involved with renewable energy, assisting developers, buyers, and sellers in projecting property tax liabilities. He has performed valuation work for both taxing bodies and taxpayers using the same methodology. (Tr. pp.782-783) The ALJ confirmed that the parties agreed to accept Herman as an expert in his field. (Tr. p. 783)

Herman testified that the purpose of his engagement was to prepare an appraisal review, which he described as an opinion as to the completeness, accuracy, adequacy, relevance, and reasonableness of the analysis in the work under review, i.e., the Federal Appraisal reports of 2022 & 2023. (Tr. p. 784) He testified that he prepared two written appraisal review reports, one addressing the 2022 Federal report and one addressing the 2023 Federal report. Both Kroll reports were marked and identified as Appellant's Exhibit No. 4 (the Kroll 2022 report) and Appellant's Exhibit No. 5 (the Kroll 2023 report). For the record, the parties clarified that Appellant's Trial Exhibit No. 1 is the REAC 2022 report, Appellant's Trial Exhibit No. 2 is the REAC 2023 report, and Appellant's Trial Exhibit No. 3 consists of pages 108 through 114 of the Federal Appraisal report. (Tr. p. 786) Herman testified that, after receiving errata pages relating to the Federal appraisal, he issued additional pages amending his 2022 and 2023 reports accordingly, which were marked as Appellant's Trial Exhibit Nos. 4A and 5A, respectively. (Tr.

pp. 787–-89) Herman testified that he did not offer an independent opinion of value of the subject property because that was not part of the scope of his assignment. Herman clarified that under USPAP, an independent opinion of value is not necessary to conduct an appraisal review of another appraiser's work. (Tr. p. 789) Herman stated that his review reports followed USPAP Standards, which apply to the development and reporting of appraisal reviews. (Tr. p. 790)

Herman testified that power plants are unique assets designed around a specialized purpose. (Tr. pp. 790–791) Herman testified that he reviewed the prior PTAB decision concerning the subject property, and that he found the testimonies of the original appraiser, Michael Kelly, and the engineer, Paul Boyne, to be particularly insightful, clarifying that he was referring to the Board's recitation of that testimony rather than the testimony itself. (Tr. pp. 791-792)

Herman further testified that he reviewed the Illinois legislation, Climate and Equitable Jobs Act (CEJA) enacted on September 15, 2021, that moves Illinois to 100% carbon-free electric power by closing all fossil-fuel plants no later than 2045. (Tr. pp. 792-793) He testified that, for his 2023 report, he corresponded regarding the plant's operations with Ted Lindenbusch, whom he understood to be the plant manager, and Jim Ross, whom he understood to be involved with environmental compliance. (Tr. p. 794) Herman explained that CEJA's significance to the valuation was twofold: First, in the near term, it placed emission ceilings on six critical pollutants, which had the effect of limiting the amount of time the plant could operate and thus reducing its ability to generate electrical power. Second, it provided guidance on the likely range of time when the plant in its current state would cease operation. (Tr. p. 795)

Herman testified to two issues he raised regarding the Federal appraisal's treatment of CEJA. First, he raised a competency issue under USPAP because the 2022 Federal report made no mention of CEJA despite noting generally that environmental regulations have an impact on a power plant's valuation. (Tr. p. 796) Herman expounded that CEJA was a critical piece of legislation impacting the plant's value as it is currently operating, it mandates an end date for ceasing operation of the Kendall plant in the future, and affects any reuse of the existing buildings. He stated that whether the omission was negligent or intentional, it was a problem because it raises the question of the appraiser's competency. (Tr. p. 797) Second, Herman cited USPAP Standards Rule 1-1(b), which directs an appraiser not to commit a substantial error or omission that significantly affects an appraisal. He characterized the failure to discuss CEJA as an omission. (Tr. pp. 797-798)

Herman testified that the Federal appraiser developed reproduction cost estimate from two source documents: 1) the original REAC cost data used in REAC's January 1, 2002 appraisal of the subject property, and 2) a three-page fax, referred to as the "Atherton fax," sent from taxpayer's counsel, Tom Atherton, to the assessing official, Fred Lane, containing what Atherton *believed* to be the original maximum price numbers for the Kendall plant, as well as approved change orders, and the maximum price as of May 31, 2002. (Tr. pp. 799–800) Herman testified that he found no problem with the use of a trended original cost analysis itself, but that as a reviewer, the fax was a cause for "consternation." (Tr. p. 800) He was unable to reconcile the numbers from the two sources of data. On one hand, the REAC costs were very well detailed and broken out, and from reading the PTAB decision, he could track the numbers and understand what items were included and not included and how they were categorized. Conversely, the Atherton fax was a completely different type of document with an unknown preparer, unknown

source, and devoid of detailed breakdown of what is and is not included in the data. Herman spent considerable time attempting to reconcile the two sources of cost data. (Tr. pp. 800–801) He noted that while Michael Kelly had obtained his costs directly from a representative of the Kendall plant, the source of the cost data in the faxed document was never identified (other than the transmitter of the fax report itself). (Tr. p. 800)

Regarding the calculation of indirect costs, Herman testified that the Federal appraisal's first step was to calculate indirect costs as a percentage of total costs using the total indirect costs of approximately $115 million. However, REAC had not allocated all of those indirect costs to real estate. REAC allocated roughly $94 million (of the maximum price of approximately $565 million) to the real estate, leaving approximately $21 million effectively defaulted to the personal property. (Tr. pp. 801-803) He testified that the indirect costs REAC allocated to real property were roughly $5.6 million, which, divided over the estimated maximum price of approximately $565 million, amounted to about 1%, in contrast to the 20.5% figure used in the Federal appraisal. (Tr. pp. 804-805) Herman explained that the difference was driven in part by REAC's differing treatment of the approved change orders—REAC incorporated approximately $26 million toward indirect costs while the Atherton fax figures reflected approximately $35 million toward indirect costs.

More importantly, the real difference between the 2002 REAC cost data and the Federal cost data is that REAC did not allocate any of the $35 million change order to real property as Federal did. The reason for this is because, in Herman's recollection, REAC felt it related to some acceleration payments applicable only to personal property rather than real estate. (Tr. p. 809-810) Herman testified that the 6% overall allocation of indirect costs toward real property would not materially change as the plant moved from being a little over 95% complete as of January 1, 2002, to 100% complete. (Tr. pp. 811-815) He testified that Federal's addition of indirect costs further exacerbated the deviation from the 6% amount allocated to the real estate by REAC. Additionally, Federal appraisal's method of spreading all of the indirect costs over all of the property, all else being equal, resulted in a higher direct and indirect cost allocated to the real property than under REAC's 2002 allocation. (Tr. pp. 815-816)

With respect to entrepreneurial incentive, Herman cited *The Appraisal of Real Estate, 15th Edition*, for the proposition that estimating an appropriate amount of entrepreneurial incentive **from an analysis of the market** is a step to be considered in the cost approach, and that, **depending on market conditions**, **the appropriate amount could be zero**. (Tr. p. 818-820) He noted that the Federal report stated entrepreneurial incentive "must be added." In Herman's view, the appraiser should survey the market before considering an amount, if any. The key point is that the estimate of entrepreneurial incentive is a **market-derived** amount based upon an analysis of the market. Herman opined that there is a disconnect between the publication's definition of entrepreneurial incentive and the Federal appraisal which assumes that entrepreneurial incentive "must" always be added even without market evidence to support it. (Tr. p. 820-821) He referenced again *The Appraisal of Real Estate, 15th Edition,* stating that an estimate of entrepreneurial incentive is only as reliable and precise as the available market data warrants. Separating the value impact of entrepreneurial incentive from other market influences can be difficult, especially in times of little or no construction. (Tr. pp. 820-822)

Herman's next critique of Federal's treatment of entrepreneurial incentive is that there is no suggestion that Federal report scrutinized the cost data in which the value estimate is based to determine whether or not an allowance for entrepreneurial incentive or profit has already been made. If this is not done, the contribution of the entrepreneur could be included twice. (Tr. p. 823) Herman testified that the Federal report's justification for its 12% entrepreneurial incentive estimate was not based on any specific market analysis of the PJM marketplace in northeastern Illinois, but was a broad-brush statement unsupported by tangible evidence from verified individuals or other documentation from power plant developers. As a result, Herman did not see enough evidence in the Federal report to be convinced of the need to allocate any percentage toward entrepreneurial incentive. He testified that the same language and approach appeared in the Federal 2023 report. (Tr. p. 824-825)

Herman testified to a check of reasonableness as a way to compare the replacement cost used by REAC versus the trended cost that was used in the Federal report. He referenced a recent plant, the Three Rivers Energy Center, built approximately 12 miles south of the subject property and under construction as of both valuation dates and having very similar megawatts and configuration as the Kendall plant, making it a good enough example just as a check from the market to compare costs. (Tr. p. 826-827) He testified that the Three Rivers plant had an estimated replacement cost of approximately $1.3 billion. Herman then divided the approximately $100 million trended cost from the Federal report by that estimated replacement cost of the Three Rivers plant and obtained a cost figure that was roughly 20% higher than the trended cost analysis utilized by REAC. Herman concluded this higher cost was attributable in part to Federal's different allocation of indirect costs, along with the inclusion of entrepreneurial incentive which REAC did not add. (Tr. p. 827-828)

Turning to the issue of depreciation, Herman critiqued the Federal appraisal's analysis and methodology of calculating depreciation. Federal began with the actual age of the plant (20 years old as of January 1, 2022) and then applied the Marshall Valuation Service (MVS) average service life table to derive two life categories for two differing types of buildings, one having a 35-year useful life and another having a 55-year useful life. Depending on useful life, two depreciation rates were applied using the MVS cost schedule to arrive at a blended (average) depreciation of 21.2%. (Tr. p. 829-830) Herman testified that a critical distinction was that most of the subject's real estate improvements are not typical industrial buildings but are custom built around the power generation machinery and equipment. They are highly specialized and they are built to be used in conjunction with a combined-cycle power plant with 65-foot clear ceilings, very heavy framing, overhead crane service, and piping penetrations, in order to house very heavy turbines and generators. (Tr. pp. 831-832) He explained that the buildings and site improvements at the Kendall plant are integrated with the operation of the machinery and equipment, not independent of the operation of the plant. This was the basis of his disagreement with the Federal report which used the MVS cost to depreciate average industrial buildings. He disagreed with the suggestion that the integration applied only to the foundations and items specifically tailored for the machinery and equipment, noting that the parties had stipulated, and that he concurred, that the highest and best use of the real estate is its use as an operating power-generating facility. (Tr. p. 832-834) He explained that the foundations are poured first, with piping and wiring buried in the concrete, followed by the equipment and then the building shell. (Tr. p. 834-835) There really isn't any secondary purpose for these buildings. When the plant shuts down, the physical characteristics of most of the square footage at the subject property do

not have features that the general industrial marketplace wants or can use, especially ones that are 65-foot tall and heavy framing and have all sorts of holes punched through with piping because they were built around a very specific process.

Herman testified that the Federal report itself stated that if the subject real property components were evaluated as typical industrial buildings, there would be a significant amount of functional and external obsolescence due to the super-adequacy of the improvements and the lack of market demand for such improvements. Such super-adequacies would not be reflected in the Marshall depreciation tables on which the Federal appraisal relied. (Tr. p. 835-836, 843) He disputed the suggestion that another power producer could repurpose the buildings with minimal change. Herman reasoned that because CEJA requires all gas and coal plants to be shut down by 2045, no rational investor would spend an amount he estimated as potentially $2 billion to build another gas plant that could operate for only about seven years and could not recover its capital. (Tr. p. 837-838) As to repowering the subject plant after shutdown and continuing operation as a non-fossil-fuel energy producer, Herman testified that this notion is highly unlikely: A wind farm would not need the buildings for obvious reasons; a solar farm likewise would not require buildings because panels need exposure to the sun; hydrogen-powered plant lacks sufficient water source in northern Illinois; and nuclear plant would have to be paired with a generating asset rendering current buildings in place obsolete. (Tr. pp. 838-839)

When asked specifically what impact does CEJA have on the Kendall plant's remaining life and depreciation, Herman testified that having reviewed confidential information memorandums for sales of Illinois gas-plant portfolios that contained substantial information about CEJA and likely closure dates, and that, in his opinion, the market takes CEJA very seriously. (Tr. p. 840-841) From his review of the emission-reduction requirements mandated by CEJA, he concluded that the plant's likely closure would probably occur somewhere between 2035 and 2040. This is because after 2035 a plant with a heat rate still above 7,000 Btu's per kilowatt-hour or emissions of different types of gasses above the specified levels would have to operate on a very limited basis. Currently technology doesn't exist that would lower the heat rate below the required threshold. (Tr. pp. 841-842, 846) Separately, the emission ceilings would continue to reduce the subject's generation of power and, therefore, result in reduced profits. (Tr. p. 841-842) He testified that these effects would not be reflected in the Marshall depreciation tables, which, according to their narrative, remove aberrations due to excess or unusual obsolescence as they are geared toward general commercial buildings rather than specialized buildings. (Tr. p. 842-843)

Given the agreed highest and best use of the subject property is to be used as part of an electric generation facility, Herman opined that when the plant shuts down, none of these buildings will be repurposed. He hasn't seen it happen in the power-generation marketplace. For instance, when coal-powered power plants have shut down, he has not seen the building portion of them get re-purposed or repowered for another type of power generation facility. (Tr. p. 845) Therefore, practically speaking, an economic age-life method is more appropriate to calculate depreciation. Assuming we're using 2035 as the end of economic life of the subject property, we would get approximately a 33-year total life, a 20-year effective life and approximately 61% total depreciation (rather than the average of 21.2% overall physical depreciation as calculated

by Federal utilizing Marshall Valuation Service cost tables).[14] (Tr. p. 844-845) Herman added that, to the best of his recollection, the Federal appraisals of all other power plants, including nuclear plants in Illinois, generally used economic age-life depreciation method. (Tr. p. 848-850)

Herman calculated that the estimated total depreciation of 21.2% applied in the Federal appraisals would imply a nearly **100-year useful life** given the facility's effective age of 20 years, which did not appear to be credible, supportable, or consistent with Pomykacz's own estimate of the useful life of the subject property. He explained that using simple math, a 20-year-old plant with 21.2% total depreciation implies approximately 1% depreciation per year and therefore a 100-year useful life. (Tr. pp. 850–851)[15]

Turning to the differences in the 2022 and 2023 Federal reports, Herman testified that the 2023 Federal report assumed the subject buildings would be reused and repurposed once the existing equipment ceased operation but did not identify this as an extraordinary assumption or hypothetical condition. (Tr. p. 854) Herman opined that whether the Kendall plant would be shut down and/or repurposed should have been treated as an extraordinary assumption because, depending on whether the buildings shut down with the equipment or survived to be repurposed for decades, two different values would result. Using the shorter economic life for all of the property regardless of building type rather than considering separately those buildings with a shorter expected useful life would impact overall value. (Tr. p. 854-856)

Herman next testified that the 2023 Federal report addressed the federal legislation called the Inflation Reduction Act, which was passed in August 2022 and therefore unknown as of January 1, 2022, valuation date. That Act provided a massive incentive for renewable energy. Approximately $369 billion worth of incentives was allocated, primarily through investment tax credits allowing up to 40% of capital costs to be recovered. This was intended to spur the energy transition from fossil-fuels to renewables. (Tr. p. 857-859) He testified that the Inflation Reduction Act, in his opinion, was providing replacement generation for fossil-fuel plants scheduled to be shut down by 2045. (Tr. p. 859) As to how that relates to the discussion about CEJA and its impact on the repurposing or replacing fossil-fuel plant like the Kendall plant, Herman explained that there have been some discussion about whether Kendall plant would continue to operate past its scheduled closing date in the event PJM decides that the plant is needed to meet current electricity demands due to shortage of power-generating facilities in Illinois. Herman opined that Kendall plant continuing to operate past the scheduled closing date is not likely, Herman concluded it is fair to say that the market is going in the direction of renewable energy and away from fossil-fuel due to a huge injection of capital by the federal government to ensure that happens and that the grid stability occurs by alternative energy. (Tr. p. 858-860)

Herman continued his testimony regarding the recent trend in Illinois of transitioning slowly from non-renewable to renewable energy. Citing an article in his report dated September 3, 2020 called *Clean Energy Illinois*, Herman noted that as of 2020, coal and natural gas power generation has decreased while the renewable power generation has increased. (Tr. p. 861-863)

[14] 20-year effective age divided by 33-year total life equals approximately 61% depreciation using the age/life method of calculating depreciation.
[15] 20-year effective age divided by 21.2% depreciation equals 94 years of total life.

When asked about how CEJA affects Kendall plant specifically, Herman testified that in speaking with the plant manager, Ted Lindenbusch, and the person in charge of environmental compliance, Jim Ross, they each confirmed that from the moment CEJA was enacted, it had an immediate impact on Kendall plant. Right away, they were mandated under CEJA to operate under strict emission caps with regard to six different emissions: NOx, SO2, carbon monoxide, particulate matter, lead, and carbon dioxide equivalents. They've had to throttle down or shut down some generators in the past. So this was an immediate impact of CEJA legislation on this plant and every other plant subject to it. (Tr. pp. 794, 864-865) Herman added that he did not include a competency or USPAP violation criticism in his 2023 review report because the 2023 Federal report included a discussion of CEJA, unlike the Federal's 2022 report which entirely omitted any discussion of CEJA. (Tr. pp. 869-870)
Herman summarized CEJA impact in three ways: 1) It mandates an immediate emissions ceiling that reduces power generation, which in his view amounted to external obsolescence caused by the legislation. 2) It will result in an untimely shutdown of the Kendal plant around 2035, and 3) It is not likely that the Kendall buildings would be reused and repurposed. (Tr. pp. 872-873)

Herman then testified to additional points of criticism of the Federal appraisal. He stated that the Federal appraisal depreciated the overall site improvements using the published schedule for commercial properties (Marshall Valuation Service) rather than a separate site-improvement schedule based on the shorter life expectancy associated with such improvements. He gave the example of items such as asphalt paving which commonly have much shorter useful lives, with parking lots typically being repaved every five to seven years. (Tr. pp. 870-871) Herman further noted that the Federal report cited a wrong heat rate output of 7,130 Btu per kilowatt-hour for the Kendall plant with no citation or empirical support for that number. (Tr. p. 871)

Herman further testified that the Federal report's projection of future increases in electricity demand, as a reason why Kendall plant will be repowered was extremely problematic. Citing data centers, the rise of artificial intelligence, and the "electrification of everything" does not support the conclusion that the subject property will remain operational in any form. Specifically, Herman noted that generative artificial intelligence was first introduced in November 2022, after the January 1, 2022 valuation date, and that the impact of the data-center and artificial-intelligence demand for more electricity came *subsequent* to the valuation dates. (Tr. p. 874-875) He testified that the Federal report's statement that there was a significant chance that existing generation facilities like the subject would be required to continue operating past the targeted phaseout date even if in violation of CEJA regulations was problematic and potentially misleading. He cited FERC data for the proposition that, historically, only a negligible percentage of plants operate past their announced shutdown under reliability arrangements with PJM or the system operator requests. Even then it's only temporary. (Tr. pp. 875-877) Herman testified that, based on the Inflation Reduction Act's investment in renewables, the more accurate statement is that there was a **minimal** chance the subject would be required to operate past 2035, given the new supply of power coming online to replace future closures of gas and coal plants. (Tr. pp. 877-878) Herman pointed out that the Federal report contained no examples at all of power generation facilities whose buildings had been reused and repurposed with new technology in order to continue operating as a power generating facility after the generating equipment had been retired. (Tr. p. 880) At this point, counsel for the taxpayer concluded his direct examination of this witness.

Cross-examination of Robert Herman by counsel for the taxing bodies:

Under cross-examination, conducted by taxing bodies' counsel, Herman agreed that the emissions ceiling was established by averaging calendar years 2018, 2019, and 2020. (Tr. p. 894-895) He clarified that the baseline limits established from the 2018 through 2020 calendar average remain the same, and that compliance is measured against a rolling, or trailing, 12-month average compared to that three-year baseline. This rolling average is recalculated month by month as the last of the rolling 12-month period drops off and the new month is added. (Tr. p 895-896) Herman testified that the emissions ceiling runs until 2035, or 2040 depending on how long the plant runs if it meets the emissions cap set forth in the legislation. (Tr. p. 896) He agreed that privately-owned natural gas plants are required to close by January 1, 2045, and that publicly-owned gas plants, such as the Springfield plant, have until 2050. (Tr. p. 896)

Herman was then asked whether it is better for an appraiser to rely on data from the "Atherton fax" which was transmitted *after* the subject property was completed, or the REAC cost tables that were compiled *before* the subject property was fully constructed. Herman reiterated that in this instance, he believed the REAC numbers were more reliable. Herman reiterated that the REAC cost tables are more reliable as they consist of highly detailed and broken-out data obtained directly from the finance personnel at the Kendall plant, in contrast to the Atherton fax consisting of a 3-page summary of data compiled by an unknown author—as Atherton was merely the transmitter of the faxed document. (Tr. pp. 899-900 see also Tr. pp. 799-801) Additionally, the faxed document was devoid of any breakdown of detailed line-item costs or an explanation of what is included in the costs. (See Tr. pp. 799-801)

Herman agreed that Marshall Valuation Service contains cost data on heavy industrial buildings, with adjustments for ceiling heights such as 65-foot, 50-foot, and 30-foot ceilings, and cranes. He also agreed that MVS could be used to "cost" the subject's heavy industrial buildings with their 65-foot ceilings (Tr. p. 902) He stated that he had used Marshall for *replacement* cost information but not for *reproduction* cost, describing Marshall as a replacement cost manual, and testified that he generally does not use MVS age-life tables or depreciation tables. He also agreed that not all of his appraisals use straight-line depreciation. (Tr. pp. 907-908)

Herman acknowledged that the decision to close a power plant is, in some instances, a business decision, but stated that in other instances, closure is mandated by a governmental authority through the use of police-power. He confirmed his position that the State of Illinois would require the subject, a fossil-fuel plant, to shut down. (Tr. p. 902-903) Herman was then asked whether the plant's natural gas generation technology could be replaced by biogas or biodiesel, and whether the current machinery and equipment could be replaced with biogas to achieve the same 1,260-megawatt capacity. Herman repeatedly answered that he did not know. (Tr. pp. 903-904) He stated that ethanol does not produce electricity and that small modular reactors are not in existence at this time and are more of an emerging technology. (Tr. p. 904)

Herman agreed with the notion that generally, heat rates from gas plants have decreased over time because of improved technology. (Tr. p. 905) He stated that the current heat rate of a late-model natural gas plant is a little over 6,000 Btu's per kilowatt-hour, and agreed that the subject's is about 7,300. (Tr. p. 906) He also agreed it was possible that new technology developed between 2022 and 2040 that could reduce the heat rate of gas plants further. However, he

qualified his answer that given the focus shift away from fossil-fuels toward renewable sources of power, he's not sure what the incentive or the objective would be to invest resources in technology to reduce heat in a fossil-fuel plant. (Tr. pp. 906-907) Herman added that, given the Illinois legislation, renewables are the future. When asked whether CEJA could be repealed, Herman stated that although he is not a lawyer or a legislator, his understanding is that any law can be repealed or amended under certain circumstances. (Tr. p. 908-909)

On the subject of entrepreneurial incentive, and with reference to *The Appraisal of Real Estate, 15th Edition,* Herman stated that he did not think the concept was applicable in all circumstances noting that the text itself describes some circumstances in which it may not be applicable. (Tr. p. 911) He agreed that it is important for the appraiser to address, consider, and determine whether entrepreneurial incentive is applicable at all. The determination of whether it is 0%, 1%, or 50% should always be *market derived and supported by data*. (Tr. p. 911-912) Herman explained that, in his experience, the investors he's worked with do not add an entrepreneurial incentive to their cost approach. Instead, when the investors decide whether or not to build a power plant, it is based upon their direct and indirect costs, and they do it by using a discounted cash flow of the income approach. They use a "hurdle rate," or a "yield cap," and they make a determination based on what their internal hurdle rates are or whether this specific investment will achieve that amount. For example, investors don't say this is a $300 million project, but we're going to add entrepreneurial profit. They simply look at the total direct and indirect costs and then run a cash flow against their internal rate of return or desired discount rate. (Tr. pp. 913-915) This is an income approach view of the world. It's all based on their desired rate of return on investment. If you added another number to their cost approach, it would contradict their income approach. They determine their cost and then the appraiser is brought in. The investors want appraisers to advise them on a line item called "property taxes" because they're making their financial modeling and they want to know the amount to put in that line item as an expense. (Tr. pp. 916-917)

Herman next testified that in the instances where he appraised a piece of property on a cost approach alone, he did not automatically include entrepreneurial incentive, but he basically established the cost of the entire project. In doing so, he addressed the issue of entrepreneurial incentive and considered whether there is market evidence to support it. Herman expounded that in his review report, he talks about the electric power market in northeastern Illinois and what's occurred, but he's not opining on a percentage of entrepreneurial incentive. His criticism of the Federal report is they didn't support their 12% addition for entrepreneurial incentive with any *market consideration*. (Tr. p. 918) He acknowledged that he relies, at times, on confidential information received from clients to broaden his sample size, but stated that he cannot disclose or use that information in a manner that would breach his confidentiality agreements. (Tr. pp. 919–920)

The taxing bodies' counsel then sought to use a document, marked for identification as Taxing Bodies' Exhibit No. 9, and described as a comparison of the real-property-identified items in the May 31, 2002 maximum price and the January 1, 2002 maximum price. Counsel stated that he had created this document from the REAC report numbers and the Atherton fax numbers. (Tr. p. 920-923) The ALJ ruled that the said document, having been created by counsel and not previously presented in evidence or disclosed, would not be admitted into evidence but could be used to refresh the witness's recollection or to attempt to impeach the witness. The ALJ observed

that the best evidence would be the original documents rather than recreated numbers. (Tr. p. 924) The taxing bodies' counsel elected to withdraw the exhibit and to address the line items in his post-hearing brief. Herman confirmed that he had testified the prior day that he spent a lot of time comparing the REAC report to the Atherton fax and that he found it extremely confusing to reconcile. (Tr. p. 925)

Herman stated that he is familiar with the term "duck curve" which takes its name from the shape of the lines on the graph and that it analyzes the period in which peak solar production is compared with peak demand. (Tr. pp. 925-926) He agreed that solar production peaks during midday and afternoon while the demand for electricity does not peak at that time except on extremely hot days. The peak demand occurs in the evening, and that peak solar production will not necessarily occur at the time the grid has peak demand. (Tr. pp. 926-928) Asked where the grid turns when solar production does not coincide with demand, Herman testified that 54% of Illinois power is generated by nuclear plants operating as base-load plants at approximately 95% capacity around the clock, that gas and coal together account for about 30%, and that renewables account for about 15%. (Tr. pp. 928-929) He described battery storage as one solution being implemented, including in Illinois, and added that battery storage projects are being constructed and operational. He stated that if demand for electricity increased significantly before 2045, Illinois might export less power and use more internally. (Tr. p. 932)

Directed to a chart of his report reflecting the gross generation of power at the Kendall plant, Herman agreed that the plant has a nameplate capacity of 1,260 megawatts and calculated that the plant's maximum annual capacity, computed as 1,260 megawatts multiplied by 24 hours and 365 days, is 11,037,600 megawatt-hours assuming that the plant operated at 100% capacity which it does not. (Tr. pp. 936-937) He agreed that the average gross generation of power during calendar years 2018 through 2020 was 6,971,233 megawatt-hours, well below the maximum capacity figure. Further, in year 2021 and 2022 (after CEJA was enacted), the gross generation was 57% and 48%, respectively, of the 3-year average ceiling. (Tr. pp. 937-940) Herman explained that the ceiling is not predicated on the amount of generation, but rather it is based upon the number of pounds of various carbon emissions and other chemicals, a kind of environmental output, so that when those caps are hit, is when Kendall plant has to curtail production. (Tr. p. 940) Herman stated that the emissions ceiling went into effect in late 2021 following the law's passage on September 15, 2021. He explained further that the 3-year emission average is the cap, and the power plant has to adjust their power generation accordingly to stay under the cap. (Tr. p. 943-944) He agreed that if the plant's capacity factor were in the 40% or 50% of maximum capacity range, there was a better likelihood it would not exceed the caps, explaining that generating less power is obviously one way of staying under the environmental caps. (Tr. pp. 944-945) At this point, counsel for the taxing bodies concluded his cross-examination of the witness.

Redirect examination of Robert Herman by counsel for the taxpayer:

On redirect examination by the appellant's counsel, Herman explained that he proceeded under the assumption that the 6% allocation to real property that REAC made when the plant was 95% complete as of January 1, 2002 assessment date would not change once the plant was 100% built. Using data from the REAC report contained in the Federal report, and based on a review of the remaining costs to be spent, 6% of total cost would not change. (Tr. p. 947) Herman testified

earlier that "[a] review of the incomplete items as of January 1, 2002, was primarily associated with the indirect cost or personal property items. One would not expect this percentage allocation to the various components to change." (Tr. pp. 811-815)

Directed to his 2022 review report (Appellant's Exhibit No. 1), Herman read his ultimate conclusion concerning the Federal Appraisal report—that based upon the significant deficiencies noted, methodology as employed by Federal does not produce a credible assignment result. He testified that nothing in the testimony of Mr. Pomykacz the prior day changed this opinion, and that he reached the same conclusion in his 2023 review report. (Tr. pp. 949-950)

In response to questions from the ALJ for a clarification concerning what market data an appraiser would examine to support an entrepreneurial incentive conclusion, Herman gave examples from prior assignments. Herman discussed the valuation of an apartment building intended for condominium conversion in which he spoke with condominium-conversion participants about the ranges of rate of return they were considering. He then performed an analysis of buildings that had been purchased and their final sell-out as a check. (Tr. pp. 950-951) As to power plants, Herman testified that he focused in his report on the northeastern Illinois gas market. The Jackson Generation and Three Rivers plants (plants similar to the Kendall plant) started construction prior to CEJA and were replacing existing coal plants being retired rather than increasing capacity. He explained that many such plants are built under an Engineering, Procurement and Construction (EPC) turnkey contract that includes developer profit. The question is whether any *additional* profit above the EPC profit has not been captured, so that an appraiser would avoid double counting. The subject was built with an EPC contract. (Tr. p. 953)

The Kendall County Board of Review submitted its "Board of Review Notes on Appeal" for each of the tax years on appeal disclosing the total assessment for the subject property for both tax years 2022 & 2023 of $28,445,678. For the 2022 tax year, the subject's assessment reflects a market value of $85,141,209 or $572.49 per square foot of gross building area, land included, when using the 2022 three-year average median level of assessment for Kendall County of 33.41% as determined by the Illinois Department of Revenue. For the tax year 2023, the subject's assessment reflects a market value of $85,396,812 or $574.21 per square foot of gross building area, land included, when using the 2023 three-year average median level of assessment for Kendall County of 33.31% as determined by the Illinois Department of Revenue. Along with its Notes on Appeal, the Kendall County Board of Review submitted the 2022 Federal Appraisal report for each tax year on appeal but did not participate in the hearing before the PTAB.

Summary of Trial Exhibits identified for the record:

Following the conclusion of all testimony, the ALJ summarized the exhibits presented by both parties. The appellant's (taxpayer's) exhibits were identified as follows: Appellant's Trial Exhibit No. 1, the REAC 2022 report; Appellant's Trial Exhibit No. 2, the REAC 2023 report; Appellant's Trial Exhibit No. 3, an excerpt from the Federal report, pp. 108 through 114; Appellant's Trial Exhibit No. 4, the Kroll report from 2022; Appellant's Trial Exhibit No. 4A, the Kroll Amended 2022 report addressing the Federal errata sheets; Appellant's Trial Exhibit No. 5, the Kroll 2023 report; and Appellant's Trial Exhibit No. 5A, the Kroll Amended 2023 report addressing the Federal errata sheets (Tr. pp. 958-959)

The intervenor's (taxing bodies') exhibits were identified as follows: Intervenor's Trial Exhibit No. 1, the Federal appraisal report with the additional errata sheets; Intervenor's Trial Exhibit No. 2, the 2023 Federal report with attached errata sheets; Intervenor's Trial Exhibits Nos. 3 and 4 for identification were withdrawn by counsel and not made part of the record; Intervenor's Trial Exhibit No. 5 for identification, the Executive Summary of the 2025 Resource Adequacy Study, was offered into evidence and ruled inadmissible by the ALJ but scanned into the file as part of the record in the event of administrative review; Intervenor's Trial Exhibit No. 6, the Equinix Datacenter exhibit was offered into evidence and ruled inadmissible by the ALJ at the hearing but scanned into the file as part of the record in the event of administrative review; Intervenor's Trial Exhibit No. 7 for identification, the REAC appraisal identified by counsel as the 2002 appraisal authored in 2003, was offered into evidence and ruled inadmissible by the ALJ but scanned into the file as part of the record in the event of administrative review; and Intervenor's Trial Exhibit No. 8, the approximately 180-plus page transcript of Mr. Kelly's testimony before the Property Tax Appeal Board in 2005, along with the prior PTAB decision regarding the subject property of which the ALJ took judicial notice and permitted both parties to use in support of their post-hearing briefs. (Tr. pp. 959-962)

Findings and Conclusion of Law

The appellant contends overvaluation as the basis of the appeal. When market value is the basis of the appeal, the value of the property must be proved by a preponderance of the evidence. *National City Bank of Michigan/Illinois v. Illinois Property Tax Appeal Board,* 331 Ill.App.3d 1038 (3rd Dist. 2002) The Board finds a preponderance of the evidence in this record supports a reduction in the subject's assessments for both 2022 and 2023 tax years. The Board further finds the best evidence of the subject's market value for each of the tax years on appeal are the appraisals prepared by Alan Geerdes, MAI & AI-GRS, with an opinion of total market value conclusion of the subject real estate of $39,650,000, land included, (or assessed value of $13,247,065) as of January 1, 2022, and a total market value of $35,260,000, land included, (or assessed value of $11,745,106) as of January 1, 2023.[16]

In support of their respective positions before the Property Tax Appeal Board, the appellant (taxpayer) submitted two appraisal reports for the 2022 & 2023 tax years on appeal prepared by Alan R. Geerdes of Real Estate Analysis Corporation (REAC), and the intervenors (taxing bodies) submitted two appraisal reports for the 2022 & 2023 tax years on appeal prepared by Mark Pomykacz of Federal Appraisal, LLC. In addition, the taxpayer also submitted two review appraisals for the 2022 & 2023 tax years prepared by Robert Herman of Kroll LLC critiquing the Federal appraisal reports. Both Geerdes and Pomykacz developed only the cost approach to value, and both appraisers determined that reproduction cost is the appropriate method of determining the cost new for the subject property due to the specific assignment of valuing only the real estate components rather than the entire "going concern" of the Kendall plant. The sales comparison approach and the income approach to value were considered but not developed or

[16] Procedural rule Sec. 1910.50(c)(1) provides that in all counties other than Cook, the three-year county-wide assessment level as certified by the Department of Revenue will be considered. 86 Ill.Admin.Code Sec. 1910.50(c)(1) For Kendall County, the Department of Revenue has determined the 2022 three-year average median level of assessment of 33.41%, and the 2023 three-year average median level of assessment of 33.31%.

relied upon by either party's appraiser due to lack of sufficient or reliable market data. The appraisers also agreed that the highest and best use of the subject property, as improved, as of the effective dates of the appraisals is for its continued use as it was built, a natural-gas-fired electricity generation facility, as this use is physically possible, legally permissible, economically feasible, and any other use would not be maximally productive. With respect to land value, the parties stipulated that all appraisals in the record support a market value of $3,303,900 or $45,000 per acre of land area which reflects an assessed land value of $1,101,300 for both tax years on appeal. Given the stipulation by the parties as to what items constitute assessable real property and non-assessable personal property, the only issue in these proceedings is the fair cash value of the ***real property improvements*** at the subject site.

In valuing the real property components of the Kendall plant utilizing the cost approach, the appraisers diverge significantly with regard to four main topics: 1) The effect of Illinois Climate and Equitable Jobs Act ("CEJA") on the remaining life, depreciation, and, ultimately, the market value of the subject property. 2) The percentage of the total trended construction costs properly allocable to the subject's real-property components. 3) The amount or percentage of indirect costs to properly be allocated to subject's real property, and 4) The amount/percentage, if any, is appropriate to include for "entrepreneurial incentive."

Issue #1: Effect of CEJA on the market value of the subject property:

The Board first considers the issue of the effect of CEJA on the overall remaining life, depreciation, and, ultimately, the value of the subject property. On this topic, the Board finds it extremely problematic that the 2022 Federal appraisal report is completely devoid of any consideration, discussion, or even mention of CEJA. As to the Federal's 2023 appraisal, the Board finds that the Federal's conclusion that CEJA contributes "zero" to the overall depreciation and value of the subject property unpersuasive, and unsupported. The Board agrees with Robert Herman (taxpayer's review appraiser) that these are not simply technical or stylistic deficiencies but raise a fundamental question with regard to the methodology employed by Federal appraisers in these assignments.

The Illinois Climate and Equitable Jobs Act became law on September 15, 2021. All witnesses agree that CEJA was in effect at the time of all applicable value dates. All witnesses also agree that CEJA requires Illinois to be 100% carbon-free with respect to electric power plants by closing all fossil-fuel plants like the Kendall plant no later than 2045. Finally, all witnesses agree that CEJA establishes emissions limits and heat output ceilings on all fossil-fuel plants in Illinois. The Board finds the evidence in the record established that CEJA's significance to the subject property and ultimately its market value was twofold: First, in the near term, it placed ceilings on heat output of the generating machinery and equipment as well as carbon emissions limits on six critical "pollutants" resulting in limiting the amount of time the plant is able to operate on a daily, weekly, and yearly basis, thus reducing its ability to generate electrical power and profit. Second, in the long term, as noted by Geerdes and Herman, CEJA's phaseout framework contains critical milestones in the form of emission limits and the likely range of time when the plant in its current state would be mandated to cease all operations. The Board finds that the mandates imposed by this Illinois legislation directly impact the Kendall plant's remaining economic life, depreciation, and, ultimately, the value of the subject property. The plant manager, Lindenbusch, testified at length that the task of compliance with CEJA

regulations requires daily monitoring of heat output as well as six types of emissions outputs and comparing these daily outputs to a 12-month "rolling" (ongoing) average benchmark. As the facility output approaches the heat and/or emissions caps, the plant must curtail production of electricity *regardless of whether it could otherwise operate profitably*. Lindenbusch testified that compliance often resulted in reduced dispatch, lower power production, and lower electricity sales. The evidence disclosed that on multiple occasions, the Kendall plant curtailed generation output and even shut down a generation unit to avoid exceeding the emissions limits. He further testified that shutting down and then re-firing the generation units increases maintenance costs and decreases profits by making the plant more costly and less efficient to operate.

The unrebutted testimony of the plant manager further established that there is no technology in place that would reduce the plant's heat output below the CEJA-mandated 7,000 Btu's per kilowatt hour. At present heat rate output, the plant manager testified that the Kendall plant would be forced to shut down operation by January 1, 2040. Additionally, if the plant fails to reduce carbon emissions by 50%, it would be forced to shut down even earlier, by 2035. Herman (review appraiser) testified that there is no incentive to invest in research and development of new technology that would reduce heat output and carbon emissions because fossil-fuel plants are mandated to cease operations in any event by 2045 regardless of whether its useful economic life extends past that date. Herman's opinion on this point was not challenged.

As Herman explained, federal laws such as the Inflation Reduction Act are trending toward renewable energy production and away from fossil-fuel plants by offering substantial grants and tax incentives for renewable energy production. Coupled with the fact that Illinois law mandates closure of all fossil-fuel plants by no later than 2045, there is no incentive, as Herman explained, for research and development of new technology to lower emissions and/or heat output. Herman testified to his review of confidential information memoranda by investors and/or owners of gas-fired power plants in Illinois which point to CEJA's likely closure dates and that potential buyers and sellers take into account CEJA's impact into any business decision or transaction. The Board finds Herman's testimony persuasive on this matter.

Despite acknowledging in general terms that environmental regulations have an impact on a power plant's valuation, the 2022 Federal appraisal report inexplicably fails to even mention CEJA. Whether the omission was negligent or intentional, the Board finds the lack of consideration of this critical legislation in Federal's 2022 appraisal problematic because it calls into question the Federal appraiser's methodology utilized in analyzing depreciation/obsolescence regarding the subject property and, thus, severely undermines the opinion of value conclusion for the 2022 tax year.

As to Federal's 2023 appraisal, although Federal's 2023 appraisal report includes a discussion of CEJA, the conclusion is that CEJA has "zero" impact on the value of the plant's real estate components. The Board finds Pomykacz's testimony and conclusion with respect to CEJA in the 2023 Federal appraisal inconsistent with his own published article, *"The Appraisal of Power Plants."* Pomykacz acknowledged on cross-examination that according to his own published article, new environmental regulations can directly impact power plants; that stricter pollution regulations can result in power plants needing to make costly upgrades; stricter regulations can force power plants to reduce operations or even retire; and that **all three of these could potentially be sources of obsolescence**. (Tr. p. 676) Notwithstanding acknowledging that a

potential buyer would factor in the risk of early plant closure due to governmental regulations, Pomykacz concluded there in no functional or external obsolescence because, in his opinion, the risk of plant closure due to CEJA was insignificant. Pomykacz testified that there is "zero" expectation of a closure of this plant because the closure would not occur until 2040, which is beyond what he opined is the useful (economic) life expectancy of the subject's real property components. Therefore, Pomykacz made no adjustment for the risk of early forced closure of the Kendall plant. (Tr. p. 683-684) The Board finds illuminating Pomykacz's acknowledgement on cross-examination that a reader of his 2022 appraisal report would not know or have any reason to believe that he considered CEJA at all in his 2022 appraisal of the subject property or that he fully analyzed all forms of obsolescence. (Tr. pp. 561, 563)

Both 2022 & 2023 Federal appraisals reference functional obsolescence and external obsolescence only in general terms and are devoid of any meaningful analysis as to how or whether these forms of depreciation relate to the subject property. This is in direct contrast to Pomykaz's published article "*The Appraisal of Power Plants*" from which he read into the record that "[f]unctional obsolescence is common at power plants and is often easily spotted." (Tr. p. 644) Moreover, Pomykacz acknowledged on cross-examination that an appraisal report *must* analyze fully all forms of depreciation, (physical, functional, and external), and if obsolescence exists, the failure to quantify and deduct it would mean the value conclusion does not reflect market value. (Tr. p. 642) In spite of this, without conducting any meaningful analysis, Pomykacz concluded zero functional obsolescence, zero external obsolescence, zero impact from any government regulations, and zero depreciation for these factors. The Board further finds Pomykacz's reasoning for his conclusions of "zero" obsolescence and "zero" impact of CEJA inconsistent with Pomykacz's own testimony that super-adequacy is an example of functional obsolescence frequently found at power plants which must be identified, quantified, and properly analyzed. (Tr. pp. 645, 662) Therefore, the Board finds Pomykacz's conclusion on this matter unsupported and contradicted by the evidence in this record.

Pomykacz explained that his opinion of zero functional obsolescence is based on the assignment being to appraise only the real estate components of the Kendall plant rather than the entire power plant, i.e., "going concern." However, the super-adequacies relating to the subject property, e.g., 65-foot clear ceilings, very heavy framing, overhead crane service, etc., exist regardless of whether the assignment is to appraise the real estate components of the subject plant only or the entire going concern. Therefore, the Board gives little weight to this reasoning.

With regard to Pomykacz's suggestion that at the end of its useful economic life, the Kendall plant's site and buildings would most likely be reused or "repowered" for continued electricity generation, the Board finds this notion neither supported by evidence in the record nor logical. Pomykacz testifies that once the equipment has outlived its economic life, replacement equipment or upgrades to the old equipment will likely be made so that the plant itself will be "repowered" **and remain as a power generating facility** (Tr. pp. 442-443) The Board finds that the evidence in this record established that the subject property would not support any other renewable energy source. As Herman testified, neither a wind farm nor a solar farm would require any building enclosures for obvious reasons, and that hydrogen-powered plant would have to be paired with a generating asset which is currently non-existent in northern Illinois. Also non-existent in northern Illinois is a large enough water source for hydro-electric power generation. The Federal appraisal reports contained no examples of fossil-fuel power generation

facilities whose buildings had been repurposed or repowered with new technology to continue operating as a renewable energy power generating facility after the generating equipment had been retired. Additionally, Herman disputed the suggestion that another power producer could repurpose the buildings with minimal change and continue operating as a power-generating plant. Herman explained that given the mandated shutdown of all gas and coal plants by no later than 2045, no rational investor would spend an amount he estimated to be as high as $2 billion to build another fossil-fuel plant that would operate for only about seven years and could not recover its capital investment. (Tr. p. 837-838) The Board finds Herman's opinion reasonable and logical that the notion of repurposing or repowering the subject property for continued operation as a renewable energy power plant past 2045 is implausible.

With regard to the issue of the end of economic (useful) life of the subject property prior to the mandatory closure of the Kendall plant in 2045, the Board finds Federal's methodology of deriving physical depreciation less reliable than the methodology employed by REAC. Federal appraisers relied solely on the Marshall Valuation Service (MVS) and applied the average service life tables of various commercial buildings to derive two life categories for two differing types of buildings, one having a 35-year useful life and another having a 55-year useful life. Depending on useful life, two depreciation rates were applied by Federal using the MVS cost schedule to arrive at a blended (average) physical depreciation of 21.2%. (Tr. p. 829-830) The problem with the Federal approach, as Herman explained, is that most of the subject's real estate improvements are highly specialized, i.e., custom-built to be used in conjunction with unique turbines/generators with 65-foot clear ceilings, very heavy framing, overhead crane service, and piping penetrations, in order to house very heavy turbines and generators. (Tr. p. 831-832) The buildings and site improvements at the Kendall plant are integrated with the operation of the machinery and equipment, not independent of the operations of the plant. This was the basis of Herman's disagreement with the Federal appraisal which relied solely on the MVS cost schedules that apply to average industrial buildings to calculate depreciation of the subject property. As Herman explained, there really isn't any secondary purpose for these buildings. When the plant shuts down, the physical characteristics of most of the square footage at the subject property do not have features that the general industrial marketplace wants or can use because they were built around a very specific process. Such super-adequacies would not be reflected in the MVS depreciation tables upon which the Federal appraisal is solely based.

Pomykacz acknowledged that he applied physical depreciation using MVS depreciation schedules for general commercial properties such as hotels, apartments, and big box stores which fails to capture or reflect *power-plant* building depreciation. (Tr. p. 651) Pomykacz agreed that the MVS life expectancy guidelines on which he relied to develop total useful life of the subject property do not address and do not identify the impact of environmental laws or regulations such as CEJA that are specific to an industry like power generation. (Tr. p. 658-659) Pomykacz further agreed that the depreciation schedules on which he relied do not reflect any "superadequacies specific to power plant buildings" and do not reflect "any value loss attributable to external obsolescence." (Tr. p. 662) Pomykacz agreed that, aside from the Marshall depreciation schedule, Federal Appraisal contains no other evidence supporting his 21.2% depreciation conclusion for 2022 or his 22.8% conclusion for 2023. (Tr. pp. 662-663) The Board therefore finds less persuasive Federal's reliance solely on the MVS schedule to calculate physical depreciation without accounting in any meaningful way for any form of obsolescence.

Additionally, the Board finds that Pomykacz's opinion that the Kendall plant's expected closure in 2045 is beyond the subject property's economic/useful life appears to conflict with the appraiser's estimate of the subject's physical depreciation percentage. As Herman explained, given the subject property's effective age of approximately 20 years, and based upon Federal's estimated total depreciation of 21.2%, this would imply a nearly **100-year useful life for the subject property** which nobody is suggesting. (Kroll Reports at KP-22-0145 and KP-23-0166 and Tr. pp. 850-851) Herman explained that using simple mathematics, along with the well-known and accepted appraisal principle of calculating depreciation via the age/life method, taking the subject property's approximate effective age of 20 years old and dividing this number by Pomykacz's conclusion of blended total depreciation of 21.2% results in the total life of the subject property of approximately 94 years. (Tr. pp. 850–851) This is in direct conflict with Pomykacz's estimated total life expectancy for the subject property of either 35 years or 55 years, depending on the building. To be clear, no appraiser has ever suggested that the subject property has an economic life of nearly 100 years, however, it illustrates the apparent contradiction of the Federal appraisal that the subject property would outlive its economic life prior to its forced closure date in 2045.

Conversely, the Board finds that REAC appraiser (Geerdes) correctly incorporated CEJA into his economic age-life analysis. Geerdes testified that the typical forms of depreciation are physical deterioration, functional obsolescence, and external obsolescence, and that he used the "economic age-life depreciation method" which is among the most widely used depreciation technique for power plants as confirmed by Pomykacz in his published article. (Tr. pp. 649-650) Under this depreciation method, Geerdes first estimated the effective age of subject improvements and then divided the effective age by the estimated total economic life of the improvements, thus yielding the percentage amount of total depreciation. Although REAC appraisal reflects the use of the same Marshall Depreciation Schedule life expectancy table to assess total potential economic life, Geerdes did not stop his analysis at that point because those tables do not account for industry-specific obsolescence. (Tr. p. 324-325, 329-331)

Geerdes concluded that there would likely be functional obsolescence indicated at the subject property due to technological advances gained from the date of its completion 20 years ago as the real property is constructed for the machinery and equipment that's in place. Any technological advances in the machinery and equipment would affect the construction of the real property components housing the equipment, which would be a form of obsolescence. Furthermore, although Geerdes relied on MVS for *life expectancy*, he did not rely on Marshall's *depreciation tables* because those tables are extremely vague, there is no differentiation between property types, there is no accounting for depreciation resulting from laws or regulations in place, it does not reflect any super-adequacies or losses in value due to functional or economic obsolescence that would be specific to power plant buildings, and it does not reflect any excess construction costs associated with the power plant buildings.

To assess the impact of CEJA on the remaining life and depreciation affecting the subject property, Geerdes calculated depreciation with CEJA in place and then, separately using a hypothetical condition, as if CEJA was not in effect. He employed the same approach in both his 2022 and 2023 appraisal reports. For the January 1, 2022 valuation date, Geerdes testified that with CEJA in place, the total economic life was 38 years because the Facility was completed in 2002 and would be required to cease operations by 2040. Therefore, given the subject's

effective age as of January 1, 2022 of 20 years old, REAC calculated 52.6% total accrued depreciation for the subject property, i.e., effective age (20) divided by total economic life (38), results in total accrued depreciation of 52.6%. (Tr. p. 322) Geerdes then deducted the depreciation amount from total trended costs new to arrive at the depreciated value of real property of the subject improvements. Similarly, for the January 1, 2023 valuation date, Geerdes applied the same depreciation method to arrive at the total accrued depreciation as of January 1, 2023 of 55.3%.

The Board finds that the REAC's methodology takes into account all forms of depreciation. These depreciation percentages flow directly and logically from the CEJA-driven remaining economic life conclusions. They are not speculative but are rather supported by the evidence in the record, grounded in enacted law, confirmed by plant operations personnel, and supported by the independent review appraisal conducted by Kroll, LLC. Moreover, as a test of his methodology, Geerdes also calculated the difference between the values "with CEJA" and "without CEJA." The Board finds that the REAC's breakdown of the impact of CEJA, the consideration of all forms of depreciation, and the analysis and conclusion of value is better supported and is a more accurate measure and indicator of fair cash value for the subject property as of each date of value than the appraisal report submitted by Federal Appraisal, LLC.

Issues #2 & #3: The percentage of the total trended construction costs and the amount of indirect costs properly apportionable to the subject's real estate:

The second and third points of contention between the parties' appraisers are closely related in terms of evidence and testimony in the record as they both relate to the subject's total maximum construction costs and the proper allocation of the total construction costs towards the real property components only. The Board gives more weight to REAC's allocation of 6% of total costs toward the real property components as this allocation is more consistent with the parties' pre-hearing stipulation of what constitutes real property, and is more consistent with historic determination contained in prior REAC appraisals regarding the same subject property that was confirmed by the Property Tax Appeal Board for the 2001 tax year appeal under Docket No. 01-00965.001-I-3. The Federal appraiser allocated approximately 7.1% of total original costs to real property (compared to REAC's allocation of 6%). While the nominal difference of 1.1% appears small, as Herman noted, when expressed as a percentage of a percentage of total costs, it represented approximately 18% difference in the allocated dollar amounts between the REAC and the Federal reports. (Tr. pp. 807-809)

Prior to the hearing, the parties stipulated that the real property classified improvements at the subject property were established by the decision of the PTAB issued in Docket No. 01-00965.001-I-3. The evidence in this record disclosed that while both appraisers begin with virtually identical total original plant costs, the difference in allocation was driven in part by the appraisers' differing treatment of the approved change orders related to the completion of the plant in 2002 and the additional structures put in place between 2002 and 2022. While Federal relied on the "Atherton fax" figures which reflected approximately $35 million toward indirect costs and allocated a portion of that amount toward real property in addition to the original construction cost amount, REAC did not allocate any of the $35 million "change order" amounts from the Atherton fax to real property due to the fact that none of the $35 million was related to real property costs. (Tr. pp. 285-289, 291-292)

REAC's analysis started with the total projected costs (i.e., "Maximum Price") for each line-item of property at the completed plant in 2002, which REAC then trended to January 1, 2022, and January 1, 2023, using the same Handy-Whitman trend factor as utilized by Federal for each line item. The original maximum cost numbers and allocation amounts were supplied to REAC directly by representatives of the Kendall plant who were available for direct consultation and communication. Therefore, the relationship of costs allocable to real property versus personal property items remained consistent (6% of the total trended cost) with the original allocations determined by Kelly, the original REAC appraiser.

Conversely, while Federal similarly started with the same total projected costs (i.e., "Maximum Price") it applied additional amounts for costs from data contained in a faxed document from the attorney for the taxpayer that was directed to the county assessing official. This faxed document consisted of a three-page breakdown of what Atherton "believed" constituted direct costs of construction at the time. The main problem with Federal's reliance on the "Atherton fax" is that this document was never authenticated as to its contents. In other words, there is no evidence in the record as to whether the data was duplicative of the total projected costs (i.e., "Maximum Price"), whether it included all direct and indirect costs attributable to items classified as real property, or whether additional or different documents had been provided to the assessing officials subsequent to the transmittal of the faxed document that might have changed or altered the information. Additionally, the compiler of the data was never identified and, thus, it is impossible to decipher or reconcile the data contained in the faxed document to the original construction costs as noted by the review appraiser. Consequently, the Board finds the lack of reliability, accuracy, and the unknown origin of the data within the faxed document problematic.

As Herman clarified further, the REAC costs were very well detailed and broken out. In conjunction with reading the prior PTAB decision, he could track the numbers and understand what items were included and not included and how they were categorized. Conversely, Federal costs are based in part on a completely different type of document and are devoid of detailed breakdown of what is and is not included in the data. For the above reasons, the Board finds that REAC's apportionment of 6% of total costs toward the real property is better supported, more credible, and more reliable than the methodology employed by Federal.

Turning to the issue of indirect costs to be allocated toward the subject's real property, for similar reasons, the Board finds REAC's allocation more credible and persuasive than that of Federal. The evidence in this record disclosed that as of January 1, 2002, the actual and total costs to construct the real estate components of the Kendall plant (other than the structures that were later added between 2002 and 2022) were provided to the original REAC appraiser, Michael Kelly, directly by the property owner.[17] Kelly's appraisal report contains an addendum with a schedule of all categorized and itemized total *direct and indirect* costs allocated to the real estate portion of the subject property. Kelly testified before the PTAB in the prior appeal under Docket No. 01-00965.001-I-3 regarding his methodology and source of data. That testimony was previously found to be persuasive, supported, and was affirmed by the PTAB. In that decision, the PTAB found that Kelly worked with actual cost documents and data supplied to

[17] The PTAB took judicial notice of the appraisal report of Michael Kelly which is part of the record in the appeal before the PTAB under Docket No. 01-00965.001-I-3.

him directly by the company's accounting and tax department officials. (PTAB decision under Docket No. 01-00965.001-I-3 pp. 39-40) Geerdes relied on the identical data as Kelly and applied the same methodology utilized by Kelly to the additional structures built between 2002 and 2022. Geerdes testified that the original trended cost totals included all direct and indirect costs attributable to items classified as real property which was not challenged by the taxing bodies.

The divergence in the final cost calculations between REAC and Federal appraisals is that Federal appraisers relied on a secondary source of data (the Atherton fax) to include "approved change order" amounts. These amounts were excluded by both Kelly and Geerdes because they included indirect costs related to *personal*, not *real* property. Geerdes specifically identified three categories of significant indirect costs that were allocated toward personal (not real) property: Dynegy Completion Security, Start-up Labor and Spare Parts, and Pre-completion revenues. Based on his review of Kelly's testimony in the 2005 hearing, Geerdes explained that costs from these three categories were entirely attributable to personal, not real, property. (Tr. pp. 288-292) REAC's 2022 and 2023 appraisals each allocate approximately 6% of total indirect costs to real property (and the remaining 94% of indirect costs to personal property). By contrast, Federal uses an entirely different approach resulting in an allocation of 20.5% of total costs to both real and personal property. Rather than simply trending the known indirect costs from the 2002 REAC appraisal, Federal calculated indirect costs as a percentage of total costs by dividing the total indirect costs by the total of all costs, thus yielding an indirect cost percentage of 20.5%. See Trial Exhibits TB-22-0053 & TB-23-0053 (Federal appraisal reports). The flaw in Federal's calculation of indirect costs was explained by Herman who clarified that REAC included an allocation of indirect costs as they relate only to real estate for the additional structures added between 2002 and 2022. Federal, on the other hand, derives its ratio from the *entire plant* - both real and personal property combined - and then applies that ratio as an "add-on" to the real property direct costs from the faxed document thus yielding a significantly higher percentage of indirect costs. (Tr. pp. 811-816)

The Property Tax Appeal Board finds Geerdes' testimony, methodology, and data collection regarding indirect costs and actual total construction costs better supported and more reliable than the data relied upon by the Federal appraiser. Consequently, the Board finds that REAC appraisal reports offer stronger support for the subject's value calculation than the Federal appraisals.

Issue #4: The inclusion of entrepreneurial incentive:

Under cross-examination, Pomykacz was asked to read the following excerpt from his own written publication, *Defining and Supporting Entrepreneurial Profit, Entrepreneurial Incentive, and External Obsolescence* written by Mark Pomykacz: "Estimating entrepreneurial profit, entrepreneurial incentive, and external obsolescence continues to be a continuous issue. Those appraisers who incorporate estimates of entrepreneurial profit, entrepreneurial incentive, and external obsolescence find the task of empirically supporting their estimates to be problematic." (Tr. pp. 617-619) He also agreed that it is always a goal in any appraisal to support the inclusion of entrepreneurial incentive with market evidence. (Tr. p. 619). As agreed by all three appraisers, the task of empirically supporting the incorporation of estimates of entrepreneurial

incentive is often "contentious" and "problematic" as the supporting market evidence is difficult to obtain from the investors of similar properties.

Both appraisers agree that "entrepreneurial incentive" is a market-derived figure that represents the amount an entrepreneur expects to receive for his or her contribution to a project and risk. Both appraisers also agree that this term is distinguishable from "entrepreneurial *profit.*" Both appraisers further agree that entrepreneurial incentive must be supported by market evidence. (Tr. p. 620) However, the appraisers disagree in terms of the application of entrepreneurial incentive in the cost approach to valuing the subject property. Geerdes did not add any amount for entrepreneurial incentive. He explained that for a special purpose owner-occupied property such as a power plant, the "incentive" is derived from operating the plant and selling electricity. Adding a separate amount to the costs for entrepreneurial incentive on top of construction cost is duplicative of the operating return already embedded in the total going-concern value of the plant which was not the assignment of this appraisal. Additionally, Geerdes noted in his appraisals that the addition of entrepreneurial incentive must be supported by market evidence from specific projects that are similar to the subject property which is often difficult to obtain. Review appraiser Herman similarly opined that the addition of entrepreneurial incentive without market evidence to support it would undermine the reliability of the cost approach. The Board finds no market evidence was presented in the record to support Federal's inclusion of entrepreneurial incentive.

Pomykacz, on the other hand, added 12% to the total costs as entrepreneurial incentive. He explained his reasoning is based on his experience of working with investors and developers of power plants like the Kendall plant over the last two decades and having completed hundreds of appraisals of power plants. In his experience, there is an "expectation of profit/entrepreneurial incentive ranging from a low of 12% to a high of 30%, with a typical expectation ranging from about 18% to 20%." In this appraisal, Pomykacz "conservatively" included an estimated entrepreneurial incentive at the lowest end of the range at 12%.

The Board finds that the Federal appraisal reports contains no analysis of specific property returns actually achieved by developers of comparable properties, nor does it cite to or reference any external data source, paired sales analysis, market survey, or published study that would support the 12% amount as was acknowledged by Pomykacz under cross-examination. (Tr. p. 631) The Board finds that Pomykacz's experience is not a substitute for market evidence from specific projects that are similar to the subject property to support the addition of entrepreneurial incentive to the costs of the subject property.

Consequently, the Board finds that Federal's addition of 12% of construction costs as entrepreneurial incentive unsupported by substantive evidence. On this record, the Board gives more weight to the testimonies of Geerdes and Herman as there is no market data or any evidence in this record to support the addition of entrepreneurial incentive to the overall construction costs.

In conclusion, the Taxing Bodies contend that the market value of the Kendall Facility real property improvements was $79,000,000 as of January 1, 2022, and $71,700,000 as of January 1, 2023, based on the **final, revised** appraisal report and expert testimony by Mark Pomykacz MAI ASA & AI-GRS with Federal Appraisal, LLC. The Federal conclusions were independently

reviewed and deemed unsupported and not credible by Robert Herman, MAI, Managing Director of Kroll, LLC, who prepared an Appraisal Review report for each year on appeal. The taxpayer, Kendall Power Company LLC contends the market value of its real property improvements was $36,350,680 as of January 1, 2022, and $31,962,682 as of January 1, 2023, based on the expert appraisal report and testimony of taxpayer's appraiser, Alan Geerdes, MAI, AI-GRS, of Real Estate Analysis Corporation.

Overall, on this record, the Board finds more persuasive the appraisal reports submitted by Alan Geerdes of REAC as to the market value of the real estate components of the subject property for tax years 2022 & 2023 on appeal. Only REAC fully analyzed CEJA's effect on the day-to-day operations of the Kendall plant both in short term and long term, both of which have a direct impact on the subject's depreciation and, thus, overall value of the subject property on appeal. Furthermore, the Board finds that REAC's development of its real property cost allocation was better supported by actual construction cost data and is more credible and reliable than the methodology employed by Federal that relied in large part on a 3-page faxed document that was confusing, unverifiable, and inconsistent with the actual construction cost numbers.

The Board further finds that the REAC appraisals are more consistent with the prior multiple appraisals of the subject property by Mark Kelly of REAC as well as the findings of the Property Tax Appeal Board under Docket Number 01-00965.001-I-3. Therefore, the Property Tax Appeal Board finds that the subject property had a market value of $39,650,000, land included, as of January 1, 2022, and $35,260,000, land included, as of January 1, 2023. Since market value has been determined, the three-year median level of assessments for Kendall County of 33.41% and 33.31% for tax years 2022 & 2023, respectively, as determined by the Illinois Department of Revenue shall apply. (86 Ill.Admin.Code 1910.50 (c) (1))

This is a final administrative decision of the Property Tax Appeal Board which is subject to review in the Circuit Court or Appellate Court under the provisions of the Administrative Review Law (735 ILCS 5/3-101 et seq.) and section 16-195 of the Property Tax Code. Pursuant to Section 1910.50(d) of the rules of the Property Tax Appeal Board (86 Ill.Admin.Code §1910.50(d)) the proceeding before the Property Tax Appeal Board is terminated when the decision is rendered. The Property Tax Appeal Board does not require any motion or request for reconsideration.

Chairman

Member

Member

Member

Member

DISSENTING:

C E R T I F I C A T I O N

As Clerk of the Illinois Property Tax Appeal Board and the keeper of the Records thereof, I do hereby certify that the foregoing is a true, full and complete Final Administrative Decision of the Illinois Property Tax Appeal Board issued this date in the above entitled appeal, now of record in this said office.

Date: October 20, 2026

Clerk of the Property Tax Appeal Board

IMPORTANT NOTICE

Section 16-185 of the Property Tax Code provides in part:

"If the Property Tax Appeal Board renders a decision lowering the assessment of a particular parcel after the deadline for filing complaints with the Board of Review or after adjournment of the session of the Board of Review at which assessments for the subsequent year or years of the same general assessment period, as provided in Sections 9-215 through 9-225, are being considered, the taxpayer may, within 30 days after the date of written notice of the Property Tax Appeal Board's decision, appeal the assessment for such subsequent year or years directly to the Property Tax Appeal Board."

In order to comply with the above provision, YOU MUST FILE A PETITION AND EVIDENCE WITH THE PROPERTY TAX APPEAL BOARD WITHIN 30 DAYS OF THE DATE OF THE ENCLOSED DECISION IN ORDER TO APPEAL THE ASSESSMENT OF THE PROPERTY FOR THE SUBSEQUENT YEAR OR YEARS. A separate petition and evidence must be filed for each of the remaining years of the general assessment period.

Based upon the issuance of a lowered assessment by the Property Tax Appeal Board, the refund of paid property taxes is the responsibility of your County Treasurer. Please contact that office with any questions you may have regarding the refund of paid property taxes.

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