Appeal No: VA15/5/017

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

TOURNAFULLA WINDFARM (ROI) LIMITED **APPELLANT**

AND

COMMISSIONER OF VALUATION **RESPONDENT**

In relation to the valuation of
Property No. 2199131, Utility at Tournafulla Wind Farm, Killaculleen, Glengort, Newcastle, Co. Limerick

B E F O R E

Carol O'Farrell – Barrister-at-Law	**Chairperson**
Barry Smyth – FRICS FSCSI MCI Arb	**Deputy Chairperson**
Eoin McDermott – FRICS FSCSI ACI Arb	**Deputy Chairperson**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE4th DAY OF JULY, 2023

THE APPEAL

1. By Notice of Appeal received on the 9th day of September 2015 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV') of the above relevant property (hereinafter referred to as 'Tournafulla') was fixed in the sum of €1,911,000. The appeal is against the decision made by the Respondent's on an appeal made by the Appellant under section 30 of the Valuation Act 2001 ('the Act') to the Respondent in relation to Tournafulla.

2. The sole ground of appeal set out in the Notice of Appeal is that the assessment is excessive and bad in law and should be reduced on the ground that it does not correctly take account of the issues raised in the representations made to the Respondent or in the subsequent first appeal to the Respondent which included, *inter alia*, a reduced load factor, increased percentage of non-rateable items, increased operating costs and depreciation, adjustments to the sinking fund calculation and an increased proportion of the tenant's share.

3. The amount the Appellant considered ought to have been determined as being the NAV of Tournafulla was revised from €895,800 as stated in the Notice of Appeal to €1,485,000 at the appeal hearing.

THE HEARING

4. The Appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 8th and 9th October 2019 and the 8th day of November 2019 and the 17th February 2022. At the hearing the Appellant was represented by Mr. Owen Hickey SC instructed by Ms. Emma English Solicitor of SSE and Mr. Keith Norman B.Sc., FRICS of GeraldEve LLP was called to give expert evidence on behalf of the Appellant. The Respondent was represented by Mr. David Dodd BL instructed by the Chief State Solicitor and Mr. Liam Hazel M.Sc., B.Sc., Dip. Acc & Fin., MSCSI, MRICS, MIPAC (CV), ACIArb of the Valuation Office gave expert evidence on behalf of the Respondent.

5. The rating authority, Limerick City and County Council, appeared as an interested party represented by Ms. Rosemary Healy-Rae BL instructed by Mr. Gerard Reidy Solicitor and Mr. Brian Bagnall FRICS, FSCSI of Bagnall Doyle MacMahon was called to give expert evidence. The rating authority is by virtue of s.36(2)(b) of the Act entitled to be heard, and adduce evidence at, the hearing of the appeal on the grounds that it will be directly affected by the Tribunal's decision on the appeal.

6. In accordance with the Rules of the Tribunal, the parties had exchanged their respective précis of evidence (including supplementary précis) prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief (in the case of Mr. Hazel and Mr. Bagnall following some amendments) and gave oral evidence.

7. This appeal was heard at the same time as the appeals in March Wind Limited v Commissioner of Valuation VA15/5/013 and Knockastanna Wind Farm (ROI) Limited v Commissioner of Valuation VA15/5/014.

8. The Tribunal delayed the issue of this Judgment to await the decision of the Court of Appeal on the appeal from the Judgment and Order of the High Court in *Commissioner of Valuation v Hibernian Wind Power Limited (2021) IEHC 49 ('Hibernian').*

9. This Judgment is not intended to be an exhaustive record of the evidence and legal submissions advanced by the parties, but the parties can be assured that all of the evidence and argument presented was fully considered by the Tribunal in coming to its decision.

THE PROPERTY AND ITS REVALUATION HISTORY

10. Tournafulla is owned by the Appellant which is a wholly owned subsidiary of SSE plc.

11. Tournafulla is located in the townlands of Gelgort South, Glenmore West and Templeglentine East approximately 2 kilometres south of the village of Templeglentine and approximately 12 kilometres east of Abbeyfeale in County Limerick.

12. The wind farm was built in two phases and comprises 18 wind turbines each with a capacity of 1.5MW. The five turbines constructed in Phase I commenced operations in April 2007. The thirteen turbines constructed in Phase II commenced operations in early May 2008. The total installed generating capacity ('TIGC') of the wind farm is 27 MW and has a cable connection to the EirGrid electricity transmission and distribution network.

13. Prior to the development of Tournafulla, the Applicant made a successful application to participate in the REFIT 1 Competition.

14. On the 10th November 2006 a Power Purchase Agreement was made between Airtricity Limited (now trading as SSE Airtricity) and the Appellant for a minimum term of 15 years in respect of 12 turbines. Pursuant to this PPA Airtricity Ltd agreed to take and pay for all net electrical output from Tournafulla for 15 years. The PPA electricity price was fixed at €62.95/MWh and clause 4.2 provided that the electricity price was to increase annually by 2%. The parties also agreed a 5-year price review to ascertain whether the price payable pursuant to the PPA is in accordance with terms available in the market for contracts of a similar type and duration. There is no provision in the PPA entitling the Appellant to receive compensation payments for constraint from SSE.

15. The output from Tournafulla connects into Tarbert sub-station in the north and Clashavoon sub-station in the south. The wind farm has firm financial access to the grid. Firm financial access means that if a generator is constrained on or off, it is eligible for compensation in the manner set out in the Trading and Settlement Code.

16. The Valuation Order made by the Respondent for the revaluation of Limerick City and County specified the 1st of March 2012 as the valuation date and the 31st of December 2014 as the publication date.

17. On the 10th day of June 2014, the Respondent issued a proposed valuation certificate under section 24(1) of the Act indicating a valuation of €1,425,000. Representations were made to the valuation manager concerning the proposed valuation. Following consideration of those representations, the valuation of Tournafulla was increased to €2,066,000 and the final valuation certificate issued on the 17th day of December 2014 in that amount.

18. On the 6th of February 2015 the Appellant appealed to the Respondent against the valuation under s. 30 of the Act. On the 6th of August 2015 the Appeal Manager allowed the appeal and reduced Tournafulla's valuation to €1,911,000.

19. The key components of Tournafulla's list value are as follows:

Standard Revenue NAV/MW	€73,000
Capacity Factor	33%

Subject Capacity Factor		32%
Adjustment		0.97
NAV/MW		€70,788
MW (TIGC)		27MW
Costs/MWh		€15.00
Sinking Fund		20 years
Tenant's Share		30%
NAV	€1,911,000	

THE DISPUTED ISSUES

20. The disputed issues concern the average annual net energy output which the hypothetical landlord and tenant negotiating the rent would assume a reasonably competent operator would be capable of achieving at Tournafulla at the valuation date, the period over which the sinking fund should be applied and how the divisible balance should be apportioned.

21. The Appellant contended for a load (capacity) factor of 29.9%, a sinking fund over 15 years and a 35% tenant's share of the divisible balance. The Respondent contended for a higher capacity factor of 31.62%, a sinking fund over a 20-year period and a 30% tenant's share of the divisible balance. The Notice Party supported the Respondent's position save that it contended for a tenant's share of 20%.

THE RELEVANT STATUTORY PROVISION

22. This appeal was determined under the provisions of the Valuation Act 2001. S.48 of the Act requires the value of Tournafulla to be determined by estimating the net annual value of the property and s.48(3) of the Act sets out the factors to be considered in calculating the net annual value as follows:

> *"Subject to Section 50, for the purposes of this Act, "net annual value" means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes and charges (if any) payable by or under any enactment, are borne by the tenant."*

THE APPELLANT'S EVIDENCE

23. Mr. Keith Norman, a partner in the firm of Gerald Eve LLP, is a Fellow of the Royal Institution of Chartered Surveyors (FRICS) and has since the 1990s specialised in providing valuation and other advice in respect of oil refineries, chemical works, pipelines and other types of power stations including nuclear, biomass, wind, coal and gas. Mr. Norman has advised the owners and operators of wind farm in England, Scotland, Wales Northern Ireland, and the Republic of Ireland since the mid-1990s as well as trade bodies in the UK such as Energy UK and the Renewable Energy Association.

Mr Norman has specialised since 1995 in the receipts and expenditure method of valuation (hereinafter "R & E") of energy industry assets in the UK and demonstrated a detailed understanding of the valuation issues during the course of his evidence. The Tribunal is satisfied of his relevant expertise and experience.

24. Mr. Norman confirmed that Tournafulla comprises 18 wind turbines and has a total installed generating capacity (TIGC) of 27 MW with a cable connection to the EirGrid electricity transmission and distribution network for the southwest of Ireland. Tournafulla was constructed in two phases. Phase 1 comprised 5 turbines with a capacity of 7.5 MW and Phase 2 comprised 13 turbines with a capacity of 19MW. The wind farm was commissioned in 2008.

25. Mr. Norman outlined his valuation methodology which he confirmed was based upon the Appellant's acceptance of the Tribunal's determination in *Limerick West Wind Farm Ltd v Commissioner of Valuation Appeal Reference VA15/5/012 ('Limerick West')* concerning Rathcahill Wind Farm that the revenue should be €78.29MW/h and acceptance of the variables applied in the valuation of Rathcahill Wind Farm (i.e. the sinking fund period, tenant's chattels, and the tenant's share of the divisible balance).

26. Mr. Norman's approach to the assessment of Tournafulla's net energy production differed from that of Mr. Hazel. The basic premise of his valuation approach was that at the valuation date the hypothetical tenant would take a yearly tenancy which had a reasonable prospect of continuance on the assumption, firstly, of an unconstrained capacity factor and, secondly, in the knowledge that significant constraint was going to be imposed for a period of time to facilitate major improvement and upgrade works to the transmission and distribution network into which Tournafulla feeds.

27. Mr. Norman stated that EirGrid launched the GRID25 Strategy Project (inserted as Appendix 6 of his Précis, N/A to public) in 2008 to announce its intention to invest €4 billion in the transmission network. The GRID25 Project outlined the major works required to uprate the transmission network across Ireland to facilitate and support the growth of wind farms and renewables generally. The Project envisaged the installation of 1,150 kilometres of new transmission lines as well as the upgrading and reinforcing of approximately 2.3 kilometres of exiting transmission lines. The GRID25 report referred to large parts of the southwest transmission network being upgraded to accommodate the growth of renewable energy and page 19 of the report explained that

> "*upgrading existing lines generally requires taking the lines out of service for lengthy periods of time to make changes to conductors and / or the structures supporting them".*

28. The electrical output of Tournafulla and two other SSE wind farms, Dromada and Athea, connect into the transmission line from Tarbert sub-station to Clashavoon sub-station to the south. That transmission line did not have sufficient capacity to transfer the volume of generation produced by these wind farms during the financial years from 2014/2015 to 2016/2017 (hereinafter referred to as 'the constraint years'). As a result, the capacity factors of these wind farms were reduced during the constraint years while

the associated transmission reinforcements (i.e., planned upgrades or new infrastructure) (ATRs) to the network were being carried out. Neither Rathcahill nor Knockastanna, SSE's two other Limerick wind farms, was affected by network constraint because Rathcahill feeds into the Rathkeale 110KV sub-station and Knockastanna feeds into the Ardnacrusha 110KV sub-station.

29. Mr. Norman stated that at the valuation date the hypothetical tenant taking a tenancy of Tournafulla would have known about the GRID25 Strategy and the ATRS required to be undertaken and so would reflect constraint in his rental bid. He produced a letter of the 20th February 2012 from EirGrid to Dromada Wind Farm Limited detailing the ATRs required to be carried on the transmission network before Dromada wind farm could be considered for firm access and he pointed out that those ATRs were going to equally impact the Tournafulla and Athea wind farms. While that letter inferred that the ATRs would be carried out between 2012 and 2015, there was subsequent slippage in the timetable as network constraints were imposed from 2014 restricting the output of Tournafulla.

30. As Tournafulla was fully commissioned from May 2008 records were available of the output achieved prior to the constraint years. The average output achieved between 2011/2012 and 2013/2014 was 74,843/MWh (capacity factor 31.64%). Mr. Norman considered this good evidence of Tournafulla's long-term unconstrained output. He next adduced evidence of Tournafulla's actual output during the constraint years as follows:

2014/2015 - 57,300 MWh
2015/2016 - 65,800 MWh
2016/2017 - 61,000 MWh

the average of which was 61,400 MWh indicating that Tournafulla's capacity factor was materially lower at 25.96% during that period.

31. For the purpose of reflecting in his valuation the hypothetical tenant's awareness that Tournafulla's output would be lower than normally anticipated, Mr. Norman assumed that the hypothetical tenant would take a long-term view of say 10 years, 3 of which would be affected by network constraint and 7 years of which would not. He determined a ten-year average output of 70,811 MWh (capacity factor 29.91%) by taking the average of the actual output figures for each of the constraint years and the average of the actual unconstrained output for 7 years as follows:

Load Factor - average 2011/2012 to 2012/2013	*74,844*	*31.64%*
Restricted Load Factor (constraint years)	*61,400*	*25.96%*

Year	*Output MW/h*	*Year*	*Output MW/h*
1	*74,844*	*6*	*61,400*
2	*74,844*	*7*	*74,844*
3	*74,844*	*8*	*74,844*
4	*61,400*	*9*	*74,844*
5	*61,.400*	*10*	*74,844*

32. Mr. Norman next addressed the question whether the hypothetical tenant would disregard network constraint when making his rental bid because Tournafulla has firm access to the grid which would entitle him to compensation for any loss of income arising from constraint. He considered that the hypothetical tenant would not disregard network constraint for three reasons. Firstly, constraint payments would be a rare occurrence in respect of a REFIT supported wind farm because market revenue plus constraint payments have to exceed REFIT payments for the compensation to be payable. Secondly, Mr. Stephen Gallagher, a director of SSE Airtricity Limited, by letter of the 7th October 2019 confirmed that the market revenue plus constraint payments obtained by SSE in respect of Tournafulla in the years 2014/15, 2015/16, 2016/17 and 2017/18 did not exceed the REFIT reference price multiplied by actual output so any constraint payments received did not affect the Appellant's ultimate income. Thirdly, compensation payments are made to the licensed supplier and not to the generating company unless the parties' power purchase agreement (PPA) provides for such payments to be shared between them.

33. From the hypothetical tenant's perspective, Mr Norman concluded that the potential for compensation would not have been a material issue at the valuation date and he made the additional observation, to underline his point that at that contract price constraint payments would be a rare occurrence in respect of a REFIT supported wind farm, that the deemed PPA price of €78.29/MWh gives the hypothetical tenant not just the REFIT reference price but the whole of the balancing payment

34. He did not agree with Mr. Bagnall's view that if compensation is not payable, the constrained output should be assessed over the longer 15-year REFIT period rather than over what might be considered to be the term of the hypothetical tenancy. Mr Norman said that he had never come across any instance where an assumption had been made that the hypothetical term should be considered to be of 15 years or 20 years duration. He was aware that the Land's Tribunal in England had referred to the period being one of '*several years'* and that in practice for the purpose of valuing specialist assets he would generally adopt a period of between 5 and 7 years but in this case, he considered it reasonable to assume a term of 10 years.

35. Mr. Norman pointed out that Tournafulla's PPA, despite being made with Airtricity Limited, could not properly be characterised as a non-arm's length agreement as SSE are legally bound to agree PPA prices in accordance with transfer pricing legislation. He also confirmed that the PPA did not contain any provision for the apportionment of constraint payments between the generating company and the supply company.

36. Mr Norman stated that he had analysed Tournafulla's operating costs and agreed €15.00 per MWh with Mr. Hazel. At the Tribunal's request, he provided details of the operating costs to the Tribunal.

37. With regard to the sinking fund provision, Mr. Norman disagreed with the Respondent's characterisation of the sinking fund as a payment made by the tenant to the landlord on an annual basis. On the basis of the Tribunal's decisions in *Hibernian* and *Limerick West* he calculated the sinking fund over a 15-year period. He said the tenant has a statutory

obligation to set aside monies in a sinking fund to ensure that he is able to replace worn out assets because by virtue of s.48 he takes a tenancy for several years under which he has a contractual obligation to maintain the Property in its actual state. The sinking fund had to be sufficient to facilitate replacement of the turbines and other mechanical and electrical plant. If a hypothetical tenancy is determined before the fund is accumulated, the incoming tenant would continue to build up the sinking fund in the subsequent years. In his view the period for building up the sinking fund is a commercial decision for the hypothetical tenant.

38. In terms of the divisible balance Mr. Norman considered that care had to be taken not to be overly reliant upon the size of the landlord's capital investment when calculating the tenant's share because the annual operating costs the hypothetical tenant will incur upon entering into a tenancy for a period of several years which, in the case of Tournafulla is a sum just under €3,000,000 per annum, while assuming the risks of operating the wind farm, is a critical factor. A tenant would not take on such a major undertaking unless he is sufficiently rewarded for his expertise, working capital, investment, and business risk. The landlord by contrast no longer has any ongoing business connection with the property and receives a fixed income from the letting. The landlord has no construction risk as the wind farm is already built, he has no market risk as the wind farm is let; he does not have to incur the operating costs or assume the risk of turbine breakdown. He observed that a 50% tenant's share had been adopted in the valuation of telecom networks of BT, UPC, Meteor, O2 and Vodafone all of which, as in the case of wind farms assets, involve significant capital investment by the landlord.

39. For the purpose of his valuation Mr Norman adopted the Tribunal's apportionment of the divisible balance as to a tenant's share of 35% in the appeals by *Hibernian and Limerick West* which he considered reasonable and in accordance with the Guidance Note of the Institute of Revenues Rating and Valuation on 'The R&E Method of Valuation for Non-Domestic Rating' ('the Guidance Note'), pointing out that there will always be a degree of subjectivity and valuer's judgment in the computation of the tenant's share

40. Under cross examination Mr. Norman rejected the proposition that the hypothetical tenant's risks were significantly reduced by EirGrid's investment in the ATRs as to warrant an adjustment to the apportionment of the divisible balance pointing out that network improvements were primarily designed to facilitate grid access for new windfarms and that curtailment and constraint as identified in the Tribunal's decisions in *Hibernian* and *Limerick West* would continue to be underlying risks. Mr. Norman commented that network constraint requiring a programme of ATRs to be carried out was not a specific issue for the hypothetical tenant of either Grouselodge wind farm (*Hibernian*) or Rathcahill wind farm (*Limerick West*) and that network constraint has to be distinguished from the general risks of constraint and curtailment which are always present even after ATRs are carried out.

41. When asked whether he should have adopted a longer hypothetical term of 15 or 20 year or 20 years for a specialist asset, he replied that the hypothetical tenancy is for a term of several years. It is neither an indefinite tenancy nor a fixed term tenancy. He

referred to the Lands Tribunal decision in *British Gas Trading Ltd v Hardman (VO)* which viewed the hypothetical term as being approximately 7 years and the decision of the Lands Tribunal of Hong Kong in *China Light & Power Company Ltd v Commissioner of Rating and Valuation [1996] RA 475* which considered that the term could be between 3 to 5 years and had settled on 4 years as being the probable duration of the tenancy. Mr. Norman stated he was not aware of any precedent or caselaw which affirmed a term that stretched to a period of 15 or 20 years. In his view the hypothetical term should be viewed as a period of between 5 and 7 years which is the period used by valuers for valuing regulated networks in the UK. The fact that the turbines have an estimated life of 20 years and the windfarm is supported by the REFIT for 15 years did not mean that a hypothetical tenant would have a tenancy for either of those periods as a new tenant could come in at some point in time. He pressed home the point that the life of the gas fired power station in the *British Gas Trading* case was longer than that of a wind farm and that the electricity distribution network in the *China Light & Power* case had an even longer life than the gas fired power station. He accepted the point put to him on behalf of the rating authority that a valuer should consider the nature of the property being valued when considering appropriate duration but was not prepared to accept the proposition that the duration of the term should be viewed as commensurate with the duration of the REFIT Scheme or the estimated design life of a wind turbine.

42. As to Mr. Bagnall's proposition that there should be a sliding scale for the apportionment of the divisible balance to reflect the size of a wind farm, Mr. Norman made three observations. Firstly, he noted that the Tribunal's departed in *VA15/5/058 Slievereagh Power Limited v Commissioner of Valuation Appeal Reference ('Slievereagh')* from the 35% tenant's share of the divisible balance that was applied in *Hibernian* and *Limerick West* based on the unique circumstance of a single turbine connected to a weak 10KV network. Secondly, he saw no justification for a sliding scale for larger turbine sites as he considered the risk of one turbine failing on a six-turbine site to be the same as two turbines failing on a twelve-turbine site. He did not accept the principle of 'economy of scale' because he considered costs and risks to be the same. Thirdly, based on his experience of valuing wind farms of varying sizes of up to fifty turbines, no differentiation had ever been made between larger and smaller wind farms with respect to the apportionment of the divisible balance.

THE RESPONDENT'S EVIDENCE

43. Mr. Hazel adopted his Précis after making an amendment. At the outset he referred to the statutory duty on the Respondent and the Tribunal to ensure that the Property's valuation is correct and achieves equity and uniformity as the scheme of the Valuation Acts seeks to avoid any ratepayer bearing too little or too much of the rates burden.

44. He said that the Appellant accounts for 2012 to 2014 were furnished to the Respondent but that Tournafulla's output figures for the years 2010/2011 and 2011/2012 were not received until the 16th September 2019. Mr. Hazell said that accounts that came into existence after the valuation date would not be available to the hypothetical landlord and tenant after the valuation date. He referred to the guidance offered in paragraphs 5.6, 5.9 and 5.11 of the Guidance Note of Institute of Revenues Rating and Valuation on

'The R&E Method of Valuation for Non-Domestic Rating' ('the Guidance Note') as to the accounts to which regard should be had when valuing a property by the R& E method and to the use of a business plan or the accounts of similar ventures when valuing a new venture where there are no previous years accounts.

45. In Mr. Hazel's view the general risk of dispatch down for network reasons should be accounted for in the tenant's share of the divisible balance. He stated that the Grid25 stratagem would have informed the hypothetical tenant not only that there would be increased disruption to the transmission network for a period of time but also that following completion of the ATRs the network would be more secure, and the risk factors would abate as there would be less constraint.

46. Mr Hazel pointed out that the Appellant had confirmed that any network constraint was expected to be resolved no later than 2018 and that Tournafulla's output in 2012 was 80,815 MWh. As the hypothetical tenancy is an annual tenancy with a reasonable prospect of continuance and a sinking fund is paid over the 20-year life of the asset, he was of the view that there would be little impact on the hypothetical tenant's rental bid if the 2012 capacity factor of 34.14% was taken over a period of 20 years to include the constraint years because the resultant average capacity factor would either be 32.91% or 32.50%.

47. Mr. Hazel next addressed the importance of Tournafulla's firm access. He considered that the hypothetical tenant would be aware when negotiating an arms-length PPA that if Tournafulla were to be dispatched down by the system operator, he would be eligible for constraint payments. He said that a PPA made between unrelated parties in respect of a Kilkenny wind farm with a MEC of 4.6MW provided for the payment by the supply company to the generating company of 85% of net constraint payments received provided the wind farm is continuously constrained down for a period in excess of 14 consecutive days from the dispatch instruction requiring the constraint. He said another PPA between a different generating company and a different supply company of the 23rd February 2009 in respect of a wind farm in Wicklow containing an identical clause in respect of constraint payments. Based on these PPAs (which were not produced in evidence), he contended that constraint would not be a relevant consideration in the mind of the hypothetical tenant at the valuation date because he would know of his entitlement to receive constraint payments as recompense for loss of output. He also observed that the *SEM Committee Report* records constraint payments of €144,100,000 in the 2015/2016 period.

48. In support for his argument that the hypothetical tenant would not be concerned with constraint at the valuation date Mr. Hazel referred to EirGrid's general customer information document entitled "Dispatch Balancing and Constraints" which states:

> "*Subject to the Trading and Settlement Code and Firm Access, Constraint payments keep generators financially neutral for the difference between the market schedule and what actually happened when generating units were dispatche*d."

49. Mr. Hazel stated that the Grid25 stratagem would have informed the hypothetical tenant not only that there would be increased disruption to the transmission network for a period of time but also that, following completion of the ATRs, the network would be more secure as constraint would be reduced.

50. Mr. Hazel stated that that the correct approach to the sinking fund is outlined in paragraphs 5.30 and 5.31 of the Guidance Note. In his view a sinking fund should be spread over the life of the asset, which he said in accounting terms is a period of 20 years. He stated that it is a commercial matter for the tenant to ensure that funds are available after 15 years. He contended that after exiting REFIT wind farms do not shut down but continue to earn revenues at the market rate. He referenced the first commercial wind farm in Ireland at Bellacorick in County Mayo which was commissioned in 1992. The same turbines are in position, but significant maintenance is required. He also identified another non-REFIT wind farm in County Cavan which was 18 years in operation when the valuation list was published on the 17th September 2019 and which produced average revenues over a 3-year period of €67.58/MWh and to a non-REFIT wind farm in County Roscommon which was 20 years in operation when the valuation list was published on the 17th September 2017 and which produced average revenues over a 3-year period of €66.40/MWh. At the Tribunal's request he ascertained that the Cavan wind farm had incurred average annual operating costs of €25.21 and the Roscommon wind farm had incurred average annual operating costs of €23.10. From these facts Mr. Hazel concluded that wind farms can achieve significant revenues after exiting REFIT and a sinking fund should be spread over a period of 20 years.

51. On the apportionment of the divisible balance, Mr. Hazel stated that the sliding scale proposed by Mr. Bagnall was not unreasonable given that large scale wind farm projects, in which there has been greater capital investment, have less risk than smaller windfarms. He stated that the key factor is the capital investment made by the landlord and, in his view, a tenant's share of 20% is more than justified. He said that the evidence did not justify a tenant's share of 35% because the tenant has guaranteed revenues which may be increased annually by reference to the Consumer Price Index over a 15-year period, has priority dispatch onto the grid and knows that the GRID25 strategy will make the transmission network more secure.

52. As to his valuation, he said that Tournafulla valued solely on the basis of accounts for year ending the 31st of March 2012 with an adjusted revenue of €78.29/MWh and operating costs of €15.00/MWh, a sinking fund calculated over 15 years and a divisible balance of 65%:35%, would have a NAV of €1,839,000. The Property valued on the accounts from the 1st April 2012 to the 31st March 2014, applying a sinking fund over 15 years and a divisible balance of 65%:35% in favour of the tenant would have a NAV of €1,627,000. Mr. Hazel contended that the list value of €1,911,000 is not excessive and more than reasonable because adopting revenues of €78.29/MWh, operating costs of €15/MWh, a sinking fund spread over 20 years and a 30% tenant's share would result in a NAV of €2,229,000.

53. Under cross examination Mr. Hazel accepted the distinction between routine and recurring expenditure for repairs and the setting aside of a sinking fund for renewals

but refused to accept that the sinking fund should be spread over any period other than the useful life of the asset. He did not agree that there is a recognised valuation practice of assuming 4, 5, 6 or 7 years as being the probable duration of a hypothetical tenancy. When asked if he could cite any authority for the proposition that the term of a hypothetical tenancy could extend beyond 10 years, he was unable to do so.

54. When it was put to him that by estimating average capacity factors over periods of 15 and 20 years, he was conflating the sinking fund period with the duration of the hypothetical term, Mr. Hazel stated that the hypothetical tenancy is a letting from year to year and is of indefinite duration. As to the calculation of the divisible balance he confirmed that the Respondent was not arguing for it to be calculated as a percentage of the tenant's capital. Though acknowledging that the hypothetical tenant would know of the pending transmission network constraint at the valuation date and would anticipate a fall-off in energy output because of the infrastructural deficits, Mr. Hazel did not accept that there was no real prospect of constraint payments arising but instead insisted that constraint would make no difference to the tenant because Tournafulla has firm access. When it was pointed out to him that the Lands Tribunal in *China Light & Power Co Ltd v Commissioner of Rating and Valuation (No 1) [1997] 4 HKC 461,* which is cited in the Guidance Note, had approved the use of hindsight to achieve greater accuracy without making any reference to the use of hindsight for confirming trends, Mr. Hazel relied on the Tribunal's decision in *VA17/5/107 Westclare Wind Farm Ltd v Commissioner of Valuation* that the occupier's accounts for the three year prior to the valuation date provide a reliable basis for a valuation.

THE RATING AUTHORITY'S EVIDENCE

55. Mr. Bagnall is a qualified chartered surveyor with 40 years valuation experience in all areas of property and also specialises in rating assessments. He made observations on the three disputed issues which he hoped would be of assistance to the Tribunal.

56. Pointing to Mr. Hazel's evidence that a wind farm constructed over 20 years ago is still generating electricity and that the average SMP for the period from January 2008 to December 2014 was €60.02/MWh, it was his view that it would be imprudent to adopt a 15-year sinking fund as there is still substantial income to be derived when a wind farm exits REFIT. Annual SMP revenue of €60.02 per MWh would produce a surplus of €45/MWh assuming standard operating costs of €15.00/MWh remain stagnant. Whilst the landlord might consider it desirable to recover all his capital expenditure in a 15-year period, Mr. Bagnall did not consider it reasonable for the landlord to have such an expectation in a competitive environment. In his experience and, in particular when valuing quarries, sinking funds were calculated over the life expectancy of the plant. He said that after 20 years the sinking fund would be in place and the extra money would be available for additional turbine maintenance.

57. By way of background to the issue of divisible of balance Mr. Bagnall referred to the economies of scale that can be achieved by wind farms with a greater number of turbines. He considered that smaller wind farms facing higher risk would expect a higher

proportion of the divisible balance than the larger wind farms such as Athea and Tournafulla.

58. He posited a sliding scale of divisible balances by reference to either the number of turbines or the total installed generating capacity (TIGC) of a wind farm as follows:

Windfarm		
Turbines	Landlord	Tenant
1-3	60%	40%
4-6	65%	35%
7-10	70%	30%
11-14	75%	25%
>15	80%	20%

TIGC	Landlord	Tenant
0-5	60%	40%
6-15	65%	35%
16-20	70%	30%
21-24	75%	25%
>25	80%	20%

59. Mr. Bagnall was firmly of the view that, with the comfort of scale, the hypothetical tenant of a large wind farm would accept a lower profit. He said the chance of a turbine failing to operate is slim but accepted that an operator is exposed if he only has a single turbine whereas the consequences of single turbine failure on a wind farm having a TIGC of between 15 and 20MW is not as serious. He suggested a 60%:40% split of the divisible balance is reasonable for operators of a wind farm having between 1 and 3 turbines because they are exposed to greater risk. He said there has to be some reflection of the lower risk for larger scale windfarms in the divisible balance and suggested that a 20% tenant's share is an acceptable return for the tenant of a windfarm having either a TIGC of 25MW or more or 15 or more turbines given the substantial income earned at €78.29/MWh to cover the operating expenses.

60. Mr. Bagnall sought to bolster this argument by reference to return on capital. He stated that turbines represent 70% of the capital costs of a wind farm project. In terms of investments costs based on €1,430,000/MW the landlord or developer would expect a percentage rental return on capital of 6.86% which was not significantly greater than the 6% capital return an investor could expect in 2012 from an investment in Grafton Street. In his view SSE would not have developed a large wind farm for a 3.76% return on capital (based on the landlord's share in Mr Norman's valuation) given that SSE could obtain a double return on the same investment anywhere else in the country. He advised that his 6% prime retail rental yield for 2012 (which was the lowest yield for that sector) was obtained from the bi-monthly CBRE Research Report of September 2012 and that the rental yield for prime offices at that time was 7%. In his view an investor in a wind

farm project would expect a minimum return on that investment of between 6% and 8%. He asserted that the tenant's share in the valuation of Athea (on the Appellant's valuation), being profit after operations expenses and being almost three times that of the tenant's share in Knockastanna wind farm, underlines economy of scale and indicates that a tenant's share of 20% of the divisible balance is appropriate.

61. Mr. Bagnall considered it reasonable to assume that the hypothetical tenant in reliance upon information available at the valuation date would adopt the estimated capacity factor of 34.87% as representing the expected long-term mean (at the P50 exceedance level) of net energy output. He observed that the capacity factors of Knockastanna at 38%, Grouselodge at 34% and Limerick West at 39.50% were all higher. He agreed with Mr. Norman that transmission network constraint would have been known to the hypothetical tenant at the valuation date. His initial interpretation of the SSE letter of the 7th October 2019 was that constraint payments were made to SSE under the firm access agreement, but he later clarified that he was satisfied on hearing Mr. Norman's evidence that no payments were made and that Mr Norman was correct in saying that constraint would have been a factor in the mind of the hypothetical tenant. He accepted that the supplier, SSE, had not received any constraint payments for the constraint years but he nonetheless remained of the view that it was reasonable to assess Tournafulla's output figure over the 15-year period of REFIT. In cross-examination Mr. Bagnall accepted he is not an expert on constraint payments and that his knowledge of those payments was limited. He accepted that he did not know if constraint payments were paid or not, but he said that in his view the hypothetical tenant would have regard to the impending constraint.

62. Mr. Bagnall accepted the proposition that if REFIT reference prices are increased by reference to CPI, operating costs should follow the inflation trend. He also accepted that it would be prudent and cautious for the tenant to set aside the sinking fund over a shorter period of 15 years but in a real market situation where more than one tenant is bidding for the tenancy and knows based on SMP prices that a windfarm can continue to generate good income during the 5 year period after exiting REFIT, he believed the period of 15 years would be whittled and moved out to 20 years by stronger rental bids. He was not swayed otherwise when it was put to him that the quarterly SMP figures in the SEM dashboard which fluctuated between a high of €58 (final quarter 2014) and a low of €37 (3rd quarter in 2016) affirmed the prudential approach to the sinking fund period. Mr. Bagnall viewed the operation of a wind farm as a business decision and did not consider that there were unusual risks inherent in that decision. When asked, he was unable to point to any example of a sliding scale being applied for the apportionment of the divisible balance based on the scale of facilities and said he relied upon his own instinct as a valuer. Also, during cross-examination, when asked about the appropriateness of using investment yields in both retail and office development to determine how the divisible balance should be apportioned in the valuation of a wind farm, he explained that he was not utilising investments yields as a valuation methodology but was trying to show that in the real world a developer of a wind farm would want a better return than that equating to 65% of the landlord's share of the divisible balance.

THE LEGAL SUBMISSIONS

63. The Tribunal has read the written submissions filed on behalf of the Applicant, Respondent and the Rating Authority and does not intend to repeat the arguments in substantial detail particularly given how the appeal evolved. However, the salient points are summarised below.

The Appellant's Submissions

64. In the case of wind farms, which were described by the Respondent as "*homogenous*", the sinking fund is to all intents and purposes "*res judicata*" and no departure from the Tribunal's precedent is warranted. The hypothetical landlord and tenant of a REFIT supported wind farm would both be interested in a reasonable and prudential approach to the period of sinking fund and the Tribunal ought to apply the 15-year period for the same reasoning as set out in *Hibernian* and in *Limerick Wes*t. The Tribunal's approach in *Hibernian* in relation to identifying repair and maintenance expenditure and the sinking fund provision as two separate tranches of expenditure does not breach of s.48 of the Act.

65. In terms of the duration of the hypothetical term, Ryde on Rating at para. 158 states

> "*The rent to be estimated is such a rent as might reasonably be expected for the hereditament if let from year to year and is therefore not such a rent as might be obtained for it if let for a term of years"*.

There are exhaustive authorities all of which accept that the hypothetical term is of indefinite duration. Intuitively valuers take a term of several years, generally in single figures. There is no authority for assuming a hypothetical term of 10 or 15 years. Mr. Norman acknowledged that 10 years is outside the envelope and had only adopted that period in the context of negotiating a settlement.

66. The Tribunal was referred to its previous decisions in *Hibernian, Limerick West* and *Knockawarriga* on its apportionment of the divisible balance on a 65%:35% basis and it was submitted that no adequate or sufficient evidence was adduced on this appeal to warrant a different approach to this apportionment. *Slieveragh* is to be distinguished from the facts of this appeal as the Tribunal adjusted the tenant's share to 40% of the divisible balance because the tenant was entirely dependent upon the availability and operating reliability of a single turbine connected to a local distribution network operating at 10KV. That decision cannot be relied upon as a justification for saying that the divisible balance should be adjusted downwards for wind farms having a greater number of turbines.

The Respondent's Submissions

67. The Tribunal is obliged to achieve equity and uniformity in the NAVs fixed for wind farms in the same rating authority area so that each ratepayer pays a fair share of the rates burden.

68. In *Hibernian* the Tribunal clarified that the risks associated with the wind farm business have to be reflected in the tenant's share of the divisible balance. The REFIT scheme has 'derisked' the SEM for renewable electricity generators by providing them with a minimum fixed price for each unit of electricity exported to the grid over a 15 year period and EirGrid is required by the EU Renewable Energy Directive (2009/28/EC) to prioritise renewable energy generation. The only remaining risks are constraint and bad wind years. The purpose of the tenant's share of the divisible balance is to reward the tenant for his industry and cover such risks as may happen in the future such as constraint.

69. The Appellant adduced good documentary evidence to show that the network constraint was known prior to the valuation date and so it would have been a factor in the mind of the hypothetical tenant when negotiating the rent.

70. The hypothetical tenancy is a tenancy from year to year and so of indefinite duration. Mr. Norman is mistaken in saying that a period of 3 to 5 years or 10 years should be assumed.

71. A property must be assumed to be vacant and to let and it cannot be assumed that the hypothetical landlord and tenant would agree the rent by reference to the Appellant's actual PPA which is personal to the Appellant and does not contain a constraint payment provision.

72. The transmission network constraint would not affect the hypothetical tenant's rental bid because the evidence establishes that arms' length PPAs contain provisions obliging the supplier to pay 85% of constraint payments to the generator. Mr. Norman confirmed his awareness of such clauses. The hypothetical tenant would not experience loss of revenue because he would negotiate a PPA containing a similar constraint payment provision entitling him to 85% of those payments.

73. Decision Paper CER/08/236 is about the calculation of the R-Factor in determining the PSO levy and not the rules concerning constraint payments. The Decision Paper was published in 2008 and no evidence was adduced confirming that it continued to apply in 2012. It is a summary of a more detailed document which underpins the SEM Settlement and Trading Code. Page 15 of the Decision Paper clarifies that under market arrangements suppliers are compensated when acting as intermediaries for generators for constrained generation and this copper fastens or underpins the evidence which indicates that in arms' length transactions generators will negotiate a compensation clause entitling them to payment of 85% of any constraint payments.

74. The letter of the 7th October 2019 indicates that SSE obtained constraint payments during the constraint years and so the Tribunal should disregard Mr. Bagnall's evidence to the contrary. As Tournafulla has firm access to the grid the hypothetical tenant would

be eligible for constraint payments. The tenant would know that the investment planned to be made under the Grid25 Strategy would make the transmission network safe and secure with fewer incidents of constraint and dispatch down after the constraint years and thereby ameliorate the tenant's risks.

75. The sinking fund ought to be applied over the working life of the asset which is 20 years. A tenant is not obliged to return a better or more advanced item to the landlord. Pursuant to s.48, the tenant's obligation is to repair the property so as to maintain it in its actual state and the spreading of costs over the period of the REFIT scheme is contrary to s.48. A tenant would not agree to pay a landlord more than that would be required to be paid on an annual basis as to do otherwise would not make commercial sense and would be contrary to section 48 and the rating hypothesis. There is no authority to support a sinking fund over a period of less than the life of the asset. Mr. Norman's point that the sinking fund is not paid to the landlord but is accumulated by the tenant and that when the tenancy ends the incoming tenant takes over the sinking fund begs the question why a tenant would pay into the fund over the course of 15 years when an incoming tenant would continue to build up the fund.

76. The parties have agreed operating cost of €15.00/MWh. The Tribunal is not taking the correct approach to operating costs because it is taking the Appellant's accounts as the starting point and adjusting costs for wages and maintenance costs, which means that each wind farm has a different starting point. The Tribunal, the Respondent and every valuer estimating the reasonable operating costs of the hypothetical tenant at the valuation date should arrive at the same figure if the exercise is done correctly. The Guidance Note says it is necessary to project receipts and expenditure as the rent is to be determined for the year commencing at the valuation date. The Respondent's approach is consistent with the Guidance Note as it used the data from the accounts of all the wind farms in the rating authority area to come to a reasonable estimate of operating costs.

77. The proper calculation of the percentage of divisible balance is described in the Guidance Note at paragraph 5.47. The tenant's share is intended to cover interest on tenant's capital, remuneration for industry and compensation for risk. On the basis that the landlord provides most of the capital and the tenant's capital contribution is virtually negligible, it is the landlord who bears most of the risk. A tenant's share of 10% would be more than justified. A tenant's share of 20% is more than reasonable. A landlord's share of 65% is too low as it imposes an inequitable burden on other rate payers in the rating authority area. REFIT provides price certainty to generators for the very purpose of taking risk out of the market for new entrants and the priority dispatch rule ensures that energy produced from renewable resources achieves priority onto the grid ahead of fossil fuel generators are significant risk abatement factors.

The Rating Authority's Submissions

78. The Rating Authority supported the Respondent's submissions subject to some additional comments.

79. In terms of the R & E calculation the revenue figure of €78.29/MWh is accepted. Though the valuers for the Appellant and Respondent have agreed €15.00/MWh, Mr. Bagnall's evidence is that €15.00/MWh may not be appropriate in respect of all wind farms due to economies of scale but if economies of scale are factored into the divisible balance on this appeal, the Rating Authority will be satisfied. There could be concern that costs will be manipulated by parties to an appeal and so costs should be appropriately analysed for the purpose of determining the rent upon which the hypothetical landlord and tenant would agree. In *Westclare* the Tribunal stated at paragraph10.5

> " … *the application of €15.00/MWh to all wind farms would mean that de minimis windfarms, which in many cases have proportionately larger operating costs, would be subsidizing large scale wind farms which may benefit from economies of scale. The cost advantages that certain enterprises obtain due to their scale of operation should not be disregarded. Each property has to be independently assessed and correctness must not be sacrificed to uniformity*."

80. It is reasonable to vary the divisible balance-based wind farm size, either by reference to the TIGC or the number of turbines as outlined in Mr. Bagnall's spreadsheet. Economy of scale is relevant to the hypothetical tenant's rental bid. The Tribunal recognized the concept as regards the divisible balance in *Slievereagh*, an appeal concerning a single turbine. Obviously, the tenant's capital is very low and, though Mr. Norman has stressed that the hypothetical tenant undertakes the business risks, the level of return the landlord would expect from his significant investment must also be considered. Mr. Bagnall's gave evidence that for larger investments, a higher return would be expected. The Tribunal is at large to determine this issue as no decision as yet has been issued in respect of the larger wind farms in the rating authority area.

81. The onus is on the Appellant to prove that the determination of the Respondent is incorrect. That onus has not been discharged.

FINDINGS OF FACTS

82. From the evidence adduced by the parties, the Tribunal finds the following facts.

83. The output from Tournafulla connects into Tarbert sub-station in the north and Clashavoon sub-station in the south. The wind farm has firm access to the grid.

84. In 2008 EirGrid's original long-term strategy known as 'GRID25' for the development of Ireland's electricity grid was published. The strategy was subsequently updated. EirGrid by letter dated the 20th February 2012 advised SSE of the individual ATRs associated with Dromada Wind Farm. The ATR works required to uprate the local transmission network into which Tournafulla connects were planned by EirGrid prior to the valuation date.

85. In the years 2014/2015, 2015/2016 and 2016/2017 market revenues did not exceed the REFIT price. No compensation payments for constraint were made by SSE to the Appellant in respect of Tournafulla.

DISCUSSION AND CONCLUSIONS

86. On this appeal the Tribunal's task is to estimate the rent which the hypothetical tenant might reasonably be expected to give for Tournafulla at the 1st March 2012 subject to the obligations mentioned in s. 48 of the Act as a tenant from year to year. This exercise requires the making of assumptions, contrary to the true facts, that Tournafulla was vacant and to let at the valuation date by a willing landlord, and that such a letting could be achieved.

87. It is common case that no market rental evidence is available for wind farms and the parties agreed that the appropriate approach to estimating the NAV of Tournafulla is to adopt the R & E method of valuation.

88. There is agreement between the parties on certain component elements of the valuation. The REFIT reference price in 2012 was €68.078 per MWh and the balancing payment was €10.211 giving a total guaranteed REFIT price of €78.29. The Appellant's actual income is delimited by its PPA price, but private commercial arrangements made in the real world must be ignored. The hypothetical tenant would seek to negotiate a new PPA in 2012 to secure the best possible PPA price to reflect market conditions. The Tribunal accepts that the agreed revenue per MWh figure of €78.29/MWh reflects the potential of Tournafulla.

89. The disputed issues concern the capacity factor, the duration of the sinking fund and the apportionment of the divisible balance. The parties had different views on the figure to be adopted for the annual net energy output of Tournafulla.

90. Mr. Norman considered that regard could be had to post valuation date accounts to evaluate the impact of the ATRs that were anticipated at the valuation date. The Respondent's position, placing heavy reliance on paragraph 5.11 of the Guidance Note, was that the use of hindsight was impermissible. Paragraph 5.11 reads:

> *"In the case of new ventures where previous accounts do not exist, information of assistance may be found in*
>
> *(a) any business plan prepared for the new occupier (although the possibility of over-optimism should be taken into account).*
>
> *(b) the accounts of similar ventures.*
>
> *It may be feasible to value such properties by comparison with similar properties by using estimated receipts and expenditure based upon the account of similar properties. The use of hindsight i.e. the consideration of accounts for years following the valuation date, may be used* as *a means of confirming trends discernible at the AVD".*

91. While it is an accepted principle of valuation that the valuer stands at the valuation date looking forward into the future with reasonable foresight, rather than looking back with hindsight, post-valuation date facts and events are not automatically irrelevant. The use of post valuation date accounts requires evidence that the anticipated future event was known at the valuation date and evidence to quantify or measure the impact of that event on the value of the property.

92. The Respondent relied on *Barking Rating Authority v Central Electricity Board [1940] 3 All ER 477, CA* wherein the Court of Appeal confirmed the general principal that an R & E valuation is to be carried out on accounts for the years prior to the valuation date. The Central Electricity Board was not in the same position as the Appellant is on this appeal in that it did not seek to have admitted into evidence any of its accounts after the valuation date applicable under UK legislation and the right to have regard to post valuation date accounts in respect of events that were anticipated at the valuation date was not explored. In the circumstances that decision is of no assistance to the Tribunal on the issue arising on this appeal.

93. The Tribunal is satisfied that hindsight may be used to show the financial effect of an anticipated future event provided there is evidence to establish that the event was known to the hypothetical tenant at the valuation date and there is evidence to quantify or measure the impact that the event had on the value of the property.

94. The fixing of a relevant period for calculating output loss is not an exercise which can be done with mathematical precision on empirical evidence. It is a speculative exercise. The best estimate ought in principle to provide the appropriate figure. The Tribunal is satisfied that Mr. Norman approached the assessment of output, as outlined above in paragraphs 28 and 29 above, in a reasonable and equitable manner. In making his calculation, he used inputs that were entirely objective, namely: the annual average unconstrained output extracted from the accounts for the period 2011/2012 to 2012/2013 and the average annual constrained output extracted from the accounts for the period 2014/2015 to 2016/2017. The use of empirical data lends weight to his approach.

95. There is no disputing that the hypothetical tenant would know that significant works were required on the transmission line and would factor that into the rental bid. The average output for the constraint years (61,400 MWh) represents approximately 82% of the unconstrained output. Averaging the figure over ten years gives a final figure of 70,811 MWh, some 94.6% of the unconstrained output (74,844 MWh). If Mr. Norman had chosen a shorter time period than ten years, the reduction would have been greater.

96. As to the sinking fund issue, the Court of Appeal in *Commissioner of Valuation v. Hibernian Wind Power Limited Ltd [2023] IECA 121* upheld the decision of the High Court that "… *the terms of section 48(3) make it clear that the expense of replacing the turbines must be averaged out over the entirety of their 20-year design life"*. Accordingly, the sinking fund is to be calculated over a period of 20 years.

97. The Guidance Note makes clear that the tenant's share of the divisible balance must be

"*sufficient to induce a tenant to take a tenancy of the Property and to provide a proper reward to achieve profit, an allowance for risk and a return upon the tenant's capital*."

By whatever method the tenant's share is calculated, it is necessary to "*stand back and look*" at the result to decide whether the outcome of the calculation is reasonable. The valuers calculated the tenant's share as a percentage of the divisible balance and the Tribunal considers that to be the correct approach to estimating the tenant's share. How much the percentage ought to be is a question of fact to be decided by the Tribunal. The key issue is whether the tenant's share should be higher than the 20% proposed by the Rating Authority or the 30% adopted by the Respondent to reflect the risks associated with the wind energy business.

98. There are risks inherent in operating a wind farm. Those risks should not be underestimated simply because the tenant's capital contribution is low. Any person proposing to operate a wind farm needs to understand the amount of potential revenue the wind farm can generate and have confidence in their ability to generate that revenue in order to be able to cover the operating costs and to pay the rent. Nobody can predict with 100% certainty the amount of wind that will drive a turbine over any given period of time. No wind or low wind speeds means a loss of revenue. The tenant risks also include site and equipment failure or warranty risks, but even assuming those risks are well managed, the other major risks after a wind farm has been constructed are how much power it will produce year on year and whether there will be a sharp fall in electricity prices.

99. The effort expended by the tenant in operating the wind farm and the risks associated with that business need to be reflected in a reasonable annual profit. The REFIT 1 Scheme undoubtedly helps the hypothetical tenant to manage the risk of being a wind energy supplier. In *Hibernian* and *Limerick West*, the Tribunal determined that the divisible balance should be apportioned as to tenant's share 35% and landlord's share 65%. The Tribunal is not persuaded to adjust the apportionment of the divisible balance away from the 35% as to the tenant's share and in the Tribunal's judgment, the tenant's share in the circumstances of this appeal should be 35% of the divisible balance**.** The Tribunal notes that the Respondent in an agreement made with the Appellant in April 2019 agreed to a tenant's share of 35% in respect of Athea wind farm, the subject property of the appeal by March Winds Limited.

100. The Tribunal decided in *Hibernian* that the valuation methodology adopted by the Respondent was flawed. In *Commissioner of Valuation v. Hibernian Wind Power Limited Ltd [2022] IECA 49* the High Court held that "*the R & E method does not allow an averaging exercise of receipts and expenses of the sort carried out* (by the Respondent) *either by reference to accounts of wind farms in County Limerick or elsewhere".* That finding was upheld by the Court of Appeal in its Judgment of the 22nd May 2023. That Court observed at para. 67:

> *"If windfarms were indeed entirely homogenous, there might be some validity in the Commissioner's approach. But they are not. Outputs differ. Costs differ. Those differences do not necessarily indicate any deviation from normally efficient operation and simply averaging the prices and costs of different operators does*

not establish a benchmark for efficient operation. That is, in my view, a fundamental flaw in the Commissioner's position."

Later at para. 70 of its Judgment the Court stated:

"The Commissioner's suggested approach is also fundamentally inconsistent with the R & E method which, after all, the Commissioner accepts is the appropriate valuation method to apply in the circumstances here."

Accordingly, the operating costs are to be assessed from an analysis of the wind farm operator's accounts making appropriate adjustments where necessary.

101. The Tribunal took a point of its own motion about the adoption of operating costs of €15.00 per MWh having raised it with the parties in the early course of the appeal hearing to give them the opportunity to comment upon it. Mr Norman gave evidence that he adopted that figure because it was approved by the Tribunal in *Limerick West*. Mr Hazel adopted it because it was derived from the average operating costs of ten wind farms in Limerick and he asked in his Précis that it be noted that "... *the Tribunal agreed with Commissioner's and Appellant's approach in VA15/05/012 Limerick West Windfarm Ltd regarding operating expenses of €15.00/*MWh". In *Limerick West,* the operating costs assessed from the accounts of that wind farm and used by the appellant's expert valuer in his R & E valuation were just over €15/MWh which is why the figure of €15/MWh was approved by the Tribunal. It is not clear what led Mr Hazel to make the incorrect assumption that the Tribunal had approved the Respondent's approach to assessing operating costs based on the average operating costs of ten wind farms.

102. The parties were informed that the Tribunal's reasons for not approving operating costs of €15 per MWh for every wind farm were set out in its previous determinations in *VA/17/5/108 Westclare Wind Farm Limited v Commissioner of Valuation* and relate to the size of the wind farm or the actual costs in the wind farm operator's accounts.

103. The Tribunal made clear that it was not saying that costs of €15.00 per MWh should not be adopted in the valuation of Tournafulla if the accounts provided a solid evidential basis for that figure. The parties confirmed their awareness of those decisions but neither party wished to change their stance.

104. At the request of the Tribunal both Mr. Norman and Mr. Hazel furnished details of the Appellant's operating costs for three years prior to the valuation date and were informed that the Tribunal intended to review the operating costs to satisfy itself that €15.00 per MWh was the appropriate figure to adopt in estimating the value of Tournafulla.

105. The Tribunal considers that it is not bound to accept evidence that is uncontradicted or unchallenged or to accept a figure submitted as an agreed figure unless there is evidence upon which the Tribunal can be satisfied that the figure is correct or within a satisfactory range or margin of error based on the evidence before it. The Tribunal considers that a specialist body it is entitled to look at the evidence presented in the light of its own expertise which is an important part of the decision-making process and to respectfully

take the view that expert valuers have adopted an incorrect approach because, if it were otherwise, unfairness or injustice could be occasioned to the body of ratepayers. Further, the Tribunal strives for consistency in its decision-making but previous decisions on questions of fact and opinion are not regarded as evidence of value in subsequent appeals. Figures derived from the accounts of one windfarm do not necessarily transport to another.

106. It was common case that the operator's accounts are integral to valuing a property by the R & E method and the starting point in any R & E valuation. The Tribunal sees no reason to question the statements of practice in the Guidance Note which, correctly in the Tribunal's view, acknowledge that available accounts have to be carefully analysed to determine whether they provide a reliable basis for valuation (para. 5.5); that accounts have to be examined to ascertain whether they reflect the trading experience of the actual occupier; that the number of years for which the accounts need to be considered depends upon the nature of the venture (para. 5.9); that a period of three years' accounts prior to the valuation date should give sufficient information on specific expense items.

107. Though furnished with details of the Appellant's operational costs from 2009 to 2014 the Tribunal had regard only to the operating costs for the three financial years ending the 31st December 2012.

108. The Operating Costs Analysis furnished by Mr Norman indicated average annual operating costs of €18.47 per MWh for the three period ending the 31st December 2012 whereas the average annual figure put forward by Mr. Hazel for the three period ending the 31st December 2012 was €6.21 per MWh which is very different from the €15.61 figure attributed to Tournafulla when the average operating costs of each of the ten Limerick windfarms were assessed and from which the average of the averages (i.e. €12.89 per MWh) was derived and then uplifted to €15 per MWh for adoption in the valuation of each of the ten wind farms.

109. Mr. Norman included salary costs of €145,800 per annum, maintenance contract costs for 2009/2010 and 2010/2011 and long-term service agreement (LTSA) costs of €260,595.34 and outage costs of €743,591.49 for 2011/2012, none of which were taken into account by Mr Hazel. Mr Norman explained that outage 3C is also part of the LTSA costs.

110. The Tribunal sat on the 17th of February 2022 to hear the evidence of both valuers on the disputed maintenance and salary costs. Each valuer furnished a Supplementary Précis in advance of that hearing, which were subsequently adopted under oath.

111. Mr Norman gave evidence that the annual maintenance contract costs for Tournafulla in 2009/2010 and 2010/2011 were capitalised in the Appellant's accounts and that this treatment did not accord with generally accepted accounting practice and principles as they should have been expensed through the profits and loss account in the financial year in which they were incurred under the contract.

112. Mr Norman adduced in evidence without objection from the Respondent a copy of the Tournafulla 1 Contractual Services Agreement made between the Appellant and GE Energy (Ireland) Ltd ('GE'), the Parts and Maintenance Agreement made between the Appellant

GE Energy (Ireland) Ltd ('GE') on the 21st December 2006, copies of letters dated the 1st and 7th November 2019 he had received from Fraser Mason, Senior Commercial Finance Manager SSE, explaining why maintenance costs were lower in 2009/2010 and 2010/2011 when compared to subsequent years and to a letter of the 15th June 2021 from Chris Bready, Onshore Wind Investment Manager SSE which explained the historical accounting treatment of maintenance as well as salary costs and why the Appellant was not in a position to produce receipts for maintenance works.

113. The Tournafulla 1 Contractual Services Agreement confirms in clause 5.2.2.4 the total of the Fixed Fee and Variable Fee of €189,550 payable for each Contract Year and the Parts and Maintenance Agreement confirms in Article 5.2.1 the annual maintenance fee payment of €430,700. Mr Norman explained that following the expiry of those Agreements Tournafulla 1 fell under a fleet wide maintenance agreement with GE from the 3rd April 2012 and Tournafulla 2 from the 8th May 2012 pursuant to which maintenance works were paid for by the Appellant as and when they arise. He gave evidence that the maintenance costs for 2011/2012 were actual costs incurred for ongoing maintenance under the fleet wide agreement. A copy of the Fleetwide Parts and Services Agreement (revision 31/3/2014) was also adduced by Mr Norman in evidence. He explained that SSE were unable to locate a copy of the original agreement and that he was informed that the revision agreement was on the same terms as the original agreement. He said the Appellant's maintenance costs were evidenced by the Parts and Maintenance Agreement and the costs incurred under the fleet wide maintenance agreement are evidenced in the Appellant's management accounts. He accepted that there were no major outages at the wind farm in 2009/2010 or in 2010/2011. In his opinion outages can occur every three years and operating costs would be underestimated if maintenance costs were assessed solely on a fixed contract price.

114. Mr Hazel accepted the annual maintenance contract figure in the Parts and Maintenance Agreement but considered those costs for 2009/10 and 2010/11 should be disregarded as based on his experience of valuing wind farms maintenance costs in the early years of a wind farm are nominal. He accepted under cross examination that he had not adduced any evidence to prove nominal maintenance costs in the early operational years. He said the items of expenditure identified as LTSA (3C), Capitalised Maintenance Contract Cost and Outage (3C) for the period 2011/12 should not be allowed because they were not underpinned by evidence. He said outages were not recurring events and the occurrence of outages is a risk which is considered with other risks when apportioning the divisible balance. He had not previously come across a fleet wide maintenance agreement as individual wind farm operators normally enter into maintenance contract specific to that wind farm.

115. He accepted when it was put to him that the operator's accounts are the starting point on an R & E valuation but in his view, Mr Norman treated the accounts as the starting and finishing point without making adjustments for expenses such as outages.

116. Operation and maintenance costs constitute a sizeable share of the total annual costs of any wind farm. Costs are incurred for scheduled maintenance and unscheduled maintenance. There can be significant variations from year to year because wear and tear

increases on the turbines as they age. Mr Hazel omitted the contract maintenance costs which was a curious and illogical position to adopt given that most of the wind farm properties appealed to Tribunal have warranty and maintenance packages for periods of 15 years with the wind turbine manufacture who supplied and installed the turbines.

117. Fixed annual maintenance contract costs were incurred by the Appellant from the 3rd April 2009 to the 2nd April 2011 and ought to have been shown as an expense in the Appellant's Profit and Loss account for those financial years. Those costs are reasonable in amount, and it is clearly appropriate to take them into account to obtain a fair view of the operating costs of Tournafulla. It is important to observe that an expense does not cease to be an expense simply because it did not feature in the operator's Profit and Loss accounts.

118. The Tribunal can see no reason why the 2011/12 LTSA (3C) and Ongoing maintenance (3C) figures [€260,595.34 and €60,737.34 respectively] should not be taken into account. That year Outage (3C) costs of €743,591.49 (in respect of which credit adjustments were made in the following two years of €114,040.51 and €17,606.20 respectively) were incurred. No outage costs appear in the accounts for the previous two years or the two subsequent financial years. Mr Hazel did not adduce any evidence to justify the Tribunal disregarding these items of expenditure. As pointed out by the High Court and the Court of Appeal in *Hibernian* there are many "*variables that affect the operation (and therefore the output and cost base) of individual windfarms*" and there can be any number of reasons why the operating costs of one wind farm may be different from another. The Tribunal does not accept that outage costs are reflected in the tenant's share of the divisible balance. If that were the case, consideration would have to be given to increasing the tenant's share. Outages may be infrequent and can occur for many reasons. Some are of short duration, others are longer. They are part and parcel of wind farm operations.

119. The hypothetical tenant considering what rental value can reasonably be attributed to the Tournafulla would have access to the operator's accounts post the commissioning date and it is unlikely that regard would only be had to the most recent year of outgoings, particularly where the level is, without explanation, considerably higher or, alternatively, considerably lower than previous years because to do so would be to disregard the risk of future variation, a fact of business which is evidenced by the accounts. Whilst averaging may not always be an appropriate approach to solving valuation problems, it smooths variations in figures to produce a compromise position such as might be expected to be arrived at by two parties negotiating a new letting.

120. Mr Norman gave evidence of how salary costs were assessed for Tournafulla. He explained that prior to 2012/13 salary costs were not apportioned between individual wind farms but treated as corporate (head office) cost in the accounts of SSE Renewables (Ireland) Ltd. During 2012/13 a decision was made by SSE to recharge salary costs to the various wind farm entities to reflect their operating costs more accurately. Salary costs covers both services provided by staff in the management and operation of the wind farm as well as indirect services provided by central and corporate staff. He said that prior to 2012/13 SSE allocated €5,400 per MW to each wind farm entity which yielded €145,800 for Tournafulla. He took as a basis for a cross check the average of the 2012/13 and 2013/14

salary figures which he calculated at €166,763 and was satisfied that his adopted figure of €145,800 was consistent and not excessive.

121. Mr Hazel said there was no evidence of actual salary costs. He pointed out that there are no on-site facilities for employees and that maintenance is carried out by third party contractors and as Mr Norman had included both salary costs and maintenance contract costs, this in his view amounted to a double count. He said the contract price covered not just maintenance but also wind farm management services and the achievement of performance targets.

122. Mr Norman disagreed with Mr Hazel's assertion that many wind farm operate without employees. He said even though maintenance can be outsourced once a wind farm is built the operator needs resources to manage that business in terms of site security, stock inventory, health and safety, outages, monitoring output, managing the REFIT PPA, the wind farm finances, and meetings with the maintenance contractor. He referred to Exhibit B of the Parts and Maintenance Agreement to illustrate the support obligations that had to be provided by the Appellant.

123. Mr Noman did not accept that provision for salary would amount to a double count in circumstances where there is a maintenance contract in place. He said there was no double counting as a matter of fact. A maintenance contractor is paid pursuant to a contract for the carrying out of specific maintenance works. The cost of an employee is for carrying out other work not covered by the maintenance agreement that is necessary for the management of the business.

124. The Tribunal accepts that prior to 2012/2013, the Appellant's parent company provided and paid for staff services to the Appellant and accounted for those costs in their own accounts rather than recharging them to the Appellant. The fact that the Appellant has no employees and has a maintenance agreement does not mean that the hypothetical tenant would not have an employee. A wind farm operator can employ in-house staff as well as specialist asset management consultants to co-ordinate operations. The Tribunal accepts Mr Norman's evidence that wind farm maintenance agreements impose two-way obligations and that, aside from maintenance, there are other business matters to be attended to and continually managed such as finance, ongoing compliance with permissions and permits, safety, security, community relations and benefits and land-owner agreements all of which require an appropriate level of staff to handle the workload. The Tribunal considers the annual figure of €145,800 for salary costs for a 18-turbine, 27MW installed capacity wind farm to be reasonable and representative of the level of expenditure on which the hypothetical landlord and tenant would proceed.

125. Salary and maintenance costs are necessary outlays, and the Tribunal accepts that the adjustments made by Mr Norman to incorporate these expense items in his cost analysis were appropriate and that the figures adopted for those items are reasonable. The hypothetical tenant may not incur precisely the same salary or maintenance costs as the actual occupier, but the expenditure as shown in the occupier's accounts would provide him with useful information regarding anticipated future costs. A hypothetical tenant would assess his profits looking forward from the valuation date in terms of the revenue

that he believes he can generate and the costs that he would expect to incur and does so having the benefit of knowing the level of trade undertaken previously at the wind farm from his analysis of the occupier's accounts.

126. If it were to be accepted that salary costs and maintenance costs should be excluded as Mr Hazel contends it begs the question, why his average three year figure of €6.21 per MWh should be uplifted €15.00 per MWh. In valuing Tournafulla Mr Hazel had no little or regard to the Appellant's operating costs prior to the valuation date. It was clear that he was advancing and adhering to the "corporate position" that operating costs were to be assessed not on the basis of the occupier's accounts but as an averaging exercise based on the accounts of all other windfarms in County Limerick in the face of what seems to the Tribunal to be quite contrary to the R & E method of valuation as properly understood and applied. This coloured his evidence to an extent. There were times when it was clear that he was challenging figures in the Appellant's accounts to have them excluded rather than acknowledging that such costs do arise and seeking to have them adjusted either upwards or downwards as the case may be. An expert whose evidence is measured and objective, acknowledging the points which can be made on both sides, and who is prepared to give ground when matters appear in a new light as a result of questioning, will enhance his credibility rather than undermine it.

127. The High Court in *Hibernian* stated:

> *"The R&E method does not allow an averaging exercise of receipts and expenses of the sort carried out here, either by reference to accounts of wind farms in County Limerick or elsewhere."*

The High Court also pointed out that the hypothetical potential tenant would not have access to the confidential accounts of other wind farm operators and would be

> "*unable to formulate a rental bid based on averages of receipts and expenditures of similar undertakings".*

This latter finding was endorsed by the Court of Appeal at paragraph 69 of its judgment were Collins J. stated:

> *"There is also a fundamental difficulty in the Commissioner's approach insofar as it relies on confidential financial and commercial information relating to other windfarms that Hibernian is not in a position to access or review. In my view, it is no answer to this point to say, as the Commissioner says, that the hypothetical tenant would have access to such information. The ratepayer has a right to investigate and, if appropriate, to challenge the basis of the Commissioner's valuation. That right is significantly impaired if such valuation depends on information to which the Commissioner, but not the ratepayer, has access."*

128. The Tribunal considers that the average operating costs of €18.47 over the 3-year period prior to the valuation date should have been adopted for the purpose of the R & E valuation.

129. The Tribunal is satisfied that the Appellant has established that the valuation of the Tournafulla is excessive. The Tribunal's valuation is set out on the attached Appendix incorporating our conclusions on the issues raised by this appeal (N/A to public)

DETERMINATION

130. Accordingly, the appeal is allowed and the Tribunal decreases the net annual value of the Property as stated in the valuation certificate and on the valuation list to €1,597,000

And the Tribunal so determines.

NOTIFICATION OF RIGHT OF APPEAL

In accordance with section 39 of the Valuation Act 2001 any party who is dissatisfied with the Tribunal's determination as being erroneous in point of law may declare such dissatisfaction and require the Tribunal to state and sign a case for the opinion of the High Court

This right of appeal may be exercised only if a party makes a declaration of dissatisfaction in writing to the Tribunal so that it is received within 21 days from the date of the Tribunal's Determination and having declared dissatisfaction, by notice in writing addressed to the Chairperson of the Tribunal within 28 days from the date of the said Determination, requires the Tribunal to state and sign a case for the opinion of the High Court thereon within 3 months from the date of receipt of such notice.