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**IN THE SUPREME COURT OF THE STATE OF OKLAHOMA**

KINGFISHER WIND, LLC,

Plaintiff/Appellee,

v.

MATT WEHMULLER, CANADIAN  
COUNTY ASSESSOR, and CAROLYN  
MULHERIN, KINGFISHER COUNTY  
ASSESSOR,

Defendants/Appellants.

Case No. DF-119837

(Canadian County Case No. CV-2016-241,  
Consolidated with Kingfisher County Case  
No. CV-2016-61)

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**BRIEF OF AMICI CURIAE IN SUPPORT OF KINGFISHER WIND, LLC**

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COME NOW Amici Curiae, Arbuckle Mountain Wind Farm, LLC, Redbed Plains Wind Farm, LLC, Red Hills Wind Project, L.L.C., Little Elk Wind Project, LLC, Origin Wind Energy, LLC, Red Dirt Wind Project, LLC, Rocky Ridge Wind Project, LLC, Thunder Ranch Wind Project, LLC, Blackwell Wind LLC, Mammoth Plains Wind Project, LLC d/b/a Mammoth Plains Wind LLC, Minco Wind III, LLC, Minco Wind IV, LLC, Seiling Wind, LLC, Seiling Wind II, LLC, Great Western Wind Energy, LLC and Rock Falls Wind Farm, LLC (“Amici Curiae”), by and through their counsel, Hartzog Conger Cason, LLC, and submit this amicus curiae brief in support of the position of Appellee, Kingfisher Wind, LLC (“Appellee/Kingfisher Wind”).

### INTRODUCTION

1. Amici Curiae, upon proper motion to the Court, have been granted leave to file an amicus curiae brief in support of Kingfisher Wind with respect to a judgment entered by the Canadian County District Court on August 5, 2021.

2. The appeal in this case, filed on September 7, 2021, presents the legal question of whether the right to claim certain federal and state production tax credits (“PTCs”) should be included in the “fair cash value” of Kingfisher Wind’s tangible personal property for purposes of ad valorem taxation. The PTCs at issue are inflation-adjusted, per kilowatt-hour tax credits available for the first ten years of electricity production from qualified energy resources, including wind energy. Because the development of new wind energy facilities is cost prohibitive, wind project developers, owners, and/or operators often allocate the PTCs to a tax equity partner in exchange for financing needed to construct, develop, or operate the wind project. In this common scenario, the benefit of the PTCs flows directly to a project’s tax equity partner and is not “income” of the wind project.



3. In assessing ad valorem taxation on Kingfisher Wind’s tangible personal property, consisting of facilities and equipment used to generate and transmit wind energy in Canadian and Kingfisher Counties (the “Property”), the Canadian and Kingfisher County Assessors (the “Assessors”) included the value of the intangible PTCs that had been allocated to Kingfisher Wind’s tax equity partner. As the Oklahoma Constitution exempts **all** intangible property from ad valorem taxation, Okla. Const. art. 10, § 6A, the Assessors’ inclusion of the PTCs impermissibly inflated the Property’s fair cash value.

4. Amici Curiae own and/or operate a significant number of wind farms throughout Oklahoma, spread across numerous counties. State and/or federal PTCs were utilized in the development of these wind farm projects, which would otherwise have been cost prohibitive. Like Kingfisher Wind, Amici Curiae have filed district court appeals from the various Assessors’ “fair cash value” assessments, seeking *de novo* review pursuant to 12 Okla. Stat. § 2880.1. In each of the cases listed below, Amici Curiae have urged the district courts to exclude the PTCs from the fair cash value of the wind projects’ tangible personal property:

*Redbed Plains Wind Farm, LLC v. Bari Firestone, Grady County Assessor*, CV-2018-120 (District Court of Grady County) (consolidated with Case Nos. CJ-2019-165, CV-2020-139, and CV-2021-93); *Arbuckle Mountain Wind Farm LLC v. Kerry Ross, Carter County Assessor*, CV-2021-65 (District Court of Carter County); *Arbuckle Mountain Wind Farm, LLC v. Scott Kirby, Murray County Assessor*, CV-2021-38 (District Court of Murray County); *Red Hills Wind Project, LLC v. Roger Mills County Assessor*, CV-2021-11 (District Court of Roger Mills County) (currently on appeal on a separate issue); *Little Elk Wind Project, LLC v. Krystle Uecke, Washita County Assessor*, CV-2021-49 (District Court of Washita County); *Origin Wind Energy, LLC v. Scott Kirby, Murray County Assessor*, CV-2021-34 (District Court of Murray County); *Red Dirt Wind Project, LLC v. Carolyn Mulherin, Kingfisher County Assessor*, CV-2018-94 (District Court of Kingfisher County) (consolidated with Case Nos. CV-2019-67, CV-2020-60, and CV-2021-53); *Rocky Ridge Wind Project, LLC v. Krystle Uecke, Washita County Assessor*, CV-2019-40 (District Court of Washita County) (consolidated with cases CV-2020-36 and CV-2021-48 (Washita County) and transferred cases CV-2019-13 and CV-2020-11 (Kiowa County)); *Thunder Ranch Wind Project, LLC v. Darla Dickson, Garfield*

*County Assessor*, CV-2021-73 (District Court of Garfield County); *Thunder Ranch Wind Project, LLC v. Susan Keen, Kay County Assessor*, CV-2021-60 (District Court of Kay County); *Thunder Ranch Wind Project, LLC v. Mandy Snyder, Noble County Assessor*, CV-2019-16 (District Court of Noble County) (consolidated with CV-2020-28 (Noble County) and transferred cases CV-2019-38 (Kay County), CV-2020-44 (Kay County), and CV-2020-99-03 (Garfield County)); *Thunder Ranch Wind Project, LLC v. Mandy Snyder, Noble County Assessor*, CV-2021-23 (District Court of Noble County); *Blackwell Wind, LLC v. Susan Keen, Kay County Assessor*, CJ-2020-137 and CJ-2021-84 (District Court of Kay County); *Mammoth Plains Wind Project LLC d/b/a Mammoth Plains Wind LLC v. Jennifer McCormick, Dewey County Assessor*, CJ-2020-21 (District Court of Dewey County) (consolidated with CJ-2020-41 (Blaine County)); *Mammoth Plains Wind Project LLC d/b/a Mammoth Plains Wind LLC v. Jennifer McCormick, Dewey County Assessor*, CJ-2021-22 (District Court of Dewey County); *Mammoth Plains Wind Project LLC d/b/a Mammoth Plains Wind LLC v. Rian Parker, Blaine County Assessor*, CJ-2021-22 (District Court of Blaine County); *Minco Wind III, LLC v. Matt Wehmuller, Canadian County Assessor*, CJ-2020-385 (District Court of Canadian County) (consolidated with CV-2021-271 (Canadian County) and CJ-2020-159 (Grady County)); *Minco Wind III, LLC v. Edward Whitworth, Caddo County Assessor*, CJ-2021-61 (District Court of Caddo County); *Minco Wind IV, LLC v. Matt Wehmuller, Canadian County Assessor*, CV-2021-272 (District Court of Canadian County); *Minco Wind IV, LLC v. Matt Wehmuller, Canadian County Assessor*, CJ-2020-386 (District Court of Canadian County); *Minco Wind IV, LLC v. Edward Whitworth, Caddo County Assessor*, CJ-2021-60 (District Court of Caddo County); *Seiling Wind, LLC v. Jennifer McCormick, Dewey County Assessor*, CJ-2020-22 (District Court of Dewey County); *Seiling Wind, LLC v. Jennifer McCormick, Dewey County Assessor*, CJ-2021-19 (District Court of Dewey County); *Seiling Wind II, LLC v. Jennifer McCormick, Dewey County Assessor*, CJ-2020-23 (District Court of Dewey County); *Seiling Wind II, LLC v. Jennifer McCormick, Dewey County Assessor*, CJ-2020-23 (District Court of Dewey County) (consolidated with CJ-2021-18 (Dewey County)); *Great Western Wind Energy, LLC v. Christi Pshigoda, Ellis County Assessor*, CJ-2021-16 (District Court of Ellis County); *Great Western Wind Energy, LLC v. Mistie Dunn, Woodward County Assessor*, CV-2021-48 (District Court of Woodward County); and *Rock Falls Wind Farm, LLC, et al. v. Robin Herod, Grant County Assessor*, CV-2018-11 (District Court of Grant County) (consolidated with CV-2019-9 (Grant County), CV-2018-55 (Kay County), CJ-2019-143 (Kay County), CJ-2020-16 (Grant County), and CJ-2020-134 (Kay County)).

5. Amici Curiae have a direct interest in this appeal because the above cases turn in part on the question of whether the right to claim PTCs is intangible property, exempt from ad valorem taxation under Oklahoma law, or whether the tax credits may be included in the

fair cash values of the wind projects' tangible personal property. Additionally, as Amici Curiae have extensive knowledge of and experience in the Oklahoma wind energy industry, Amici Curiae offer the following brief as an aid to the Court with respect to the policy considerations and potential economic consequences of allowing state and/or federal PTCs to be included in tangible personal property's fair cash value for purposes of ad valorem taxation.

### ARGUMENT AND AUTHORITIES

#### **I. Ad Valorem Taxation of Tangible Personal Property.**

Under Oklahoma's Ad Valorem Tax Code (the "Code"), "[a]ll taxable personal property, **except intangible personal property** ... shall be listed and assessed each year at its fair cash value at the price it would bring at a fair voluntary sale, as of January 1." 68 Okla. Stat. § 2817(A) (emphasis added). "Fair cash value" is defined as "the value or price at which a willing buyer would purchase property and a willing seller would sell property if both parties are knowledgeable about the property and its uses...." 68 Okla. Stat. § 2802(19). The Code further defines the three widely accepted methods of determining fair cash value of taxable property: the income and expense approach ("determining the present value of the projected income stream"); the sales comparison approach ("the collection, verification, and screening of sales data, stratification of sales information for purposes of comparison and use of such information to establish the fair cash value of taxable property"); and the cost approach (a method "involving an estimate of current construction cost of improvements, subtracting accrued depreciation and adding the value of the land."). 68 Okla. Stat. §§ 2802(21), (26), and (15).

For purposes of ad valorem taxation, the Code defines "personal property" as tangible items including "all goods, chattels and effects"; certain improvements on land; dormant and

other stock of nurserymen; types of livestock; household furniture and effects; libraries; vehicles and other equipment; certain machinery and materials used by manufacturers; all “goods, wares, and merchandise” severed from the realty; abstractors’ books and records; certain agricultural implements or machinery; and tanks and storage for oil, gas or other liquids, as well as pipelines, railroad tracks, and telephone lines. 68 O.S. § 2807. The “personal property” definition includes a catch-all for “[a]ll other property, having an actual, constructive or taxable situs in this state, and not included within the definition of real property.” 68 O.S. § 2807(13) (emphasis added). Notably missing from the definition of taxable “personal property” are tax credits.

## **II. All Intangible Personal Property is Exempt from Taxation.**

“All property in this state, whether real or personal, *except that which is specifically exempt by law*, and except that which is relieved of ad valorem taxation by reason of the payment of an in lieu tax, shall be subject to ad valorem taxation.” 68 Okla. Stat. § 2804 (emphasis added). Section 6A of Article 10 of the Oklahoma Constitution clearly dictates that “intangible personal property *shall not be subject to ad valorem tax* or to any other tax in lieu of ad valorem tax within this State.” Okla. Const. art. 10, § 6A (emphasis added).

### **a. Overview of Incentives Used to Encourage Wind Energy Development.**

Historically, the costs to construct renewable wind energy facilities significantly outweigh the typical return on investment based solely on income from the sale of energy. Consequently, these facilities would not be built but for certain financial incentives designed to encourage and support these investments. These development incentives include federal tax credits, in the form of the Renewable Electricity Production Tax Credit (the “Federal PTC”) and the investment tax credit (“ITC”). The ITC allows for an upfront reduction in construction

cost by providing a tax credit equal to thirty percent (30%) of the actual construction costs. ROA, Doc. 61, Trial Tr. Vol. I at 115:15-22. As provided above, the PTCs at issue are inflation-adjusted, per kilowatt-hour tax credits available for the first ten years of electricity production from qualified energy resources, including wind energy. *Id.* at 115:19-116:3. The State of Oklahoma also offered state tax credits in the form of the Zero Emissions Facilities Production Tax Credit (“State PTC”) and renewable energy credits (“REC”). *Id.* at 116:4-20.

In addition to these federal and state tax benefit incentives, there are also other intangible benefits imbedded in Power Purchase Agreements (“PPAs”), pursuant to which the power purchaser may be incentivized to pay a premium above the market price for energy generated from wind energy facilities in order to meet their self-imposed renewable portfolio standards. *Id.* at 116:21-117:18. Often, wind energy facilities that opt for the ITC federal tax benefit will also enter into a PPA that is significantly above the market price in order to justify the financial investment in the development of the project. *Id.*; *see also id.* at 192:2-193:10.

Without the financial incentives of federal and state tax credits, wind energy facilities would not be an economic investment. Critically, however, the rights to these financial incentives are clearly a form of intangible property that are specifically exempt from ad valorem taxation under the Oklahoma Constitution.<sup>1</sup>

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<sup>1</sup> In this case, the district court correctly found that the financial benefits associated with the PPAs entered into by Kingfisher Wind are intangible property exempt from taxation. *See* ROA, Doc. 49, 8/5/21 Memorandum Opinion at p. 2 (“It should be noted that in that ruling the Court found that several other contracts, entered into by the Plaintiff for the sale of the electricity, etc., were in fact ‘intangible assets.’”). That ruling has not been challenged in this appeal and constitutes the law of the case in this proceeding.

**b. Tax Credits Are Intangible Personal Property.**

In *Stillwater Hous. Assocs. v. Rose*, the Oklahoma Court of Civil Appeals held that “tax credits are intangible personal property exempt from [ad valorem] taxation.” 2011 OK CIV APP 51, ¶ 12, 254 P.3d 726, 729, *cert. denied* (Mar. 28, 2011). When *Stillwater Housing* was decided, Section 6A did not plainly exempt all intangible property from taxation, but rather exempted a narrow list of intangible items, including “[a]ccounts and bills receivable, including brokerage accounts, and **other credits**, whether secured or unsecured.” *Id.* at ¶ 5 (emphasis added). In reaching its decision, the court in *Stillwater Housing* relied upon the analysis of this Court in *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Division of Southern Union Company, for Tax Years 1998, 1999, & 2000* (“MGE”), wherein this Court construed the term “credits” in Section 6A of Article 10 of the Oklahoma Constitution to include “tax credits.” *Id.* at ¶ 12 (citing *MGE*, 2008 OK 94, ¶ 20, 234 P.3d 938, 947 n.18). Thus, while the court’s analysis in *Stillwater Housing* is supportive of Kingfisher Wind’s position that PTCs are intangible and exempt from ad valorem taxation, it is nevertheless notable that the *Stillwater Housing* court made such a ruling at a time when property was held exempt from ad valorem taxation *only* if it fit squarely within the listed items of “intangible personal property.” Since *Stillwater Housing*, Section 6A was amended by a vote of the people to remove the narrow set of examples and plainly provide that all intangible personal property is excluded from ad valorem taxation. Okla. Const. art. 10, § 6A (amended 2012). The Final Ballot Title for State Question No. 766, which led to the amendment of Section 6A, defines intangible personal property as “property whose value is not derived from its physical attributes, but rather from what it represents or evinces.” Final Ballot Title for State Question No. 766, submitted by E. Scott Pruitt, Attorney General (July 9, 2012). As explained

herein, the PTCs at issue in this appeal are not defined by the physical attributes of the wind energy facilities, but rather are calculated based on the energy output and operations of the wind energy facilities. Ultimately, these PTCs represent a tax equity investor's future ability to offset income tax liabilities unrelated to the operations of the wind energy facility.<sup>2</sup> Accordingly, the right to claim PTCs is intangible in nature and should not be taxed as tangible personal property.

**III. The *Stillwater Housing* Holding Applies to the PTCs at Issue in This Appeal.**

Even if the Oklahoma people had not voted to amend Section 6A of Article 10 of the Oklahoma Constitution to exempt *all* intangible personal property from ad valorem taxation, the *Stillwater Housing* holding clearly applies to exempt from taxation the State and Federal PTCs utilized by Kingfisher Wind and Amici Curiae. In *Stillwater Housing*, the subject tax credits were issued to the owner of a housing development by the Oklahoma Housing Finance Agency, pursuant to 26 U.S.C. § 42. *Stillwater Hous.*, at ¶ 2. The court found that the purpose of the tax credits was to incentivize investment in low-income housing projects. *Id.* Upon receipt, the owner of the housing development sold the low-income housing tax credits to limited partners “to generate private equity to complete construction of the housing complex.” *Id.* at ¶ 3. However, when the County Assessor analyzed the fair cash value of the housing development using the “income and expense” approach to valuation, the County Assessor

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<sup>2</sup> As further detailed herein, including the potential value of the PTCs would effectively subject Wind Farm A, which elected PTCs, to unfair tax treatment compared to Wind Farm B, which did not utilize PTCs. Where Wind Farm A and Wind Farm B have nearly identical tangible personal property (nacelles, turbines, etc.), there is no justification for inflating Wind Farm A's tangible personal property's fair cash value as the Assessors have done in cases pending across the State.

treated the tax credits as income to the property, even though the tax credits “flow[ed] through Owner directly to the limited partners.” *Id.* at ¶¶ 2-3. In this case, the Assessors have taken the same approach as to PTCs.

In holding that the low-income housing tax credits should not be treated as income to the owner of the housing development, the Court of Civil Appeals reasoned:

A tax credit is a government subsidy. Congress established the low income housing tax credit program ... to subsidize acquisition, rehabilitation, or new construction of rental housing for low income households. The amount of the tax credit is a percentage of the qualified basis of each qualified low-income building... It is therefore a subsidy of the investment, or capital, and not a rent subsidy. The tax credit is sold to investors, usually in a limited partnership, as a means of financing the acquisition, rehabilitation, or construction of the low income housing, and the investors receive a return of their capital by claiming the tax credit over a ten-year period. Accordingly, the **low income housing tax credit is not income and does not replace income.**

*Stillwater Hous.*, at ¶ 10 (emphasis added). Because Kingfisher Wind and Amici Curiae utilize the PTCs for renewable energy in the same way that the housing developer used the low-income housing tax credits in *Stillwater Housing*, the Court should apply the same reasoning and hold as a matter of law that the PTCs are intangible personal property and cannot be used for inflating the fair cash value of tangible personal property.<sup>3</sup>

**a. The Similarities Between the *Stillwater Housing Tax Credits* and the PTCs at Issue in this Appeal Require Similar Tax Treatment.**

During the development of Amici Curiae’s wind projects, developers utilized Federal PTCs, State PTCs, or both. According to a 2020 report drafted by the nonpartisan

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<sup>3</sup> Notably, the PTCs are not treated as “income” for federal or state income tax purposes. Likewise, the right to claim PTCs should not be deemed “income” for purposes of ad valorem taxation **where their sole purpose is to offset income tax liabilities.** By their very nature, PTCs are not “income.”



Congressional Research Service, the Federal PTC was first enacted as part of the Energy Policy Act of 1992 “to promote the ‘development and utilization of certain renewable energy sources.’”<sup>4</sup> The State PTC, codified at 68 Okla. Stat. § 2357.32A, has been in effect since January 2003, and its renewal coincided with the enactment of the Oklahoma Energy Security Act, which included a goal to increase the use of renewable energy within the state:

It is hereby declared the intent of the State of Oklahoma to increase the use of renewable energy in the state.... The renewable energy standard shall be a goal that fifteen percent (15%) of all installed capacity of electricity generation within the state by the year 2015 be generated from renewable energy sources.

17 Okla. Stat. § 801.4. As with the *Stillwater Housing* tax credits, created to “subsidize acquisition, rehabilitation, or new construction of rental housing for low income households,” the PTCs were enacted to serve the important societal purpose of encouraging development of new renewable energy sources and increasing reliance thereon. *Stillwater Hous.*, at ¶ 10; Sherlock, *supra* note 4; 17 Okla. Stat. § 801.4.

In developing wind energy facilities, the most common capital structure involves a tax equity financing agreement, pursuant to which a wind project developer allocates nearly all of the PTCs to its tax equity partner in exchange for financing. The Congressional Research Service reported that “[u]sing tax equity financing arrangements has allowed developers to monetize the tax benefits, essentially trading future tax benefits for upfront capital.” U.S. Congressional Research Service, *Tax Equity Financing: An Introduction and Policy Considerations*, p. 8 (R45693; Apr. 17, 2019), by Keightley, Marples and Sherlock.

Partnership flips are a common tax equity financing structure in renewable energy markets... The tax equity investor may

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<sup>4</sup> U.S. Congressional Research Service, *The Renewable Electricity Production Tax Credit: In Brief*, p. 9 (R43453; Apr. 29, 2020), by Molly F. Sherlock (Defs.’ Appx., Doc. 18).

provide upfront cash to the project company, in exchange for production or investment tax credits, depreciation, interest deductions, and operating income. During the initial phase of the project, the tax equity investor will receive most of the tax benefits, as well as the income or loss (often the share is 99%). The developer retains a small allocation of tax benefits and income (profit or loss). Once the tax equity investor has achieved a targeted internal rate of return (IRR), the partners' interests in the project company will flip, with the developer now receiving most of the tax benefits and income (profit or loss) associated with the project (typically 95%, leaving the tax equity investor with 5%)... Tax equity generally provides a portion of a project's capital needs – somewhere from 30% to 60%, depending on the specifics of the project.

*Id.* at p. 9. Further, “[r]ecognizing that tax equity transactions were being undertaken with respect to wind development, in 2007 the IRS released Revenue Procedure 2007-65, which established a safe harbor under which the allocation of tax credits in a tax equity partnership structure would not be challenged as long as certain ownership requirements were met. *Id.* at p. 8.

In Kingfisher Wind's case, tax equity partner MidAmerican Wind Equity Holdings, LLC (“MidAmerican”) entered into an Equity Capital Contribution Agreement (“ECCA”), which bound MidAmerican to provide an equity contribution of \$269 million in exchange for 100% of the Class A membership in the wind project. ROA, Doc. 61, Trial Tr. Vol. I at 48:9-22. Class A membership interests entitled MidAmerican to 99% of the allocated PTCs and 5% of the cash distributions from Kingfisher Wind. *Id.* The evidence at trial displayed MidAmerican's tax equity partnership as one that would allow MidAmerican to see a return of its capital investment over a period of ten years:

The way [the PTC and the accelerated depreciation were] utilized upfront is that a company like MidAmerican has a substantial tax obligation, which can be reduced if they are able to claim production tax credits against that cash obligation to reduce it. And also, in terms of applying taxable income, rolling

that up into their corporate position, the accelerated depreciation creates a tax loss which reduces their tax obligation as well. So MidAmerican and many other tax equity investors are willing to put capital upfront. They will pay money upfront for the right to receive those and claim those against the future tax obligations that they have.

*Id.* at 35:14-36:2.

Because the PTCs as utilized by Amici Curiae and Kingfisher Wind function as a return of capital for the financing provided by the wind projects' tax equity partners, it is improper for the cash value of the PTCs to be included in an "income and expense" approach to assessing the fair cash value of the wind projects' tangible personal property. For the identical treatment of the *Stillwater Housing* tax credits, wherein "[t]he tax credit is sold to investors, usually in a limited partnership, as a means of financing the acquisition, rehabilitation, or construction of the low income housing," the court similarly found that "investors receive a *return of capital* by claiming the tax credit over a ten-year period." *Stillwater Hous.*, at ¶ 10 (emphasis added). After finding that the *Stillwater Housing* tax credits functioned as a return of capital, the *Stillwater Housing* court plainly held that "the low income housing tax credit is not income and does not replace income." *Id.*

Comparing the PTCs with *Stillwater Housing*'s low income housing tax credits ("LIHTCs") reveals no material differences in form or function that would support a ruling that the value of the right to claim the PTCs should be included in the fair cash value of the wind projects' tangible personal property. As the *Stillwater Housing* analysis applies with equal force to the PTCs, the Court should plainly hold that the PTCs are intangible personal property exempt from any form of taxation.

Several other jurisdictions have similarly held that tax credits are not subject to ad valorem taxation. See *Williams v. The Muses, Ltd.*, 203 So.3d 558, 577 (La.App. 4 Cir. 2016)

(affirming lower court's finding that "the [low income housing tax credit] is not income and that the Assessor could not include the LIHTC in assessing the Complex using the income approach."); *Cottonwood Affordable Housing v. Yavapai*, 205 Ariz. 427, 72 P.3d 357, 359 (Tax 2003) ("The Court finds the credits constitute intangible property and should not be added to the value of Cottonwood's property or considered as part of Cottonwood's income stream."); *Woda Ivy Glen Ltd. P'ship v. Fayette Cnty. Bd. of Revision*, 121 Ohio St.3d 175, 902 N.E.2d 984, 992 n. 4 ("As for the tax credits themselves, we discern ample reason to disregard them as constituting a part of the value of the realty to the extent that tax benefits are transferred apart from any transfer of the underlying fee interest in the property."); *Cascade Court Ltd. P'ship v. Noble*, 105 Wash.App. 563, 20 P.3d 997, 1002 (2001) ("Tax credits are intangible personal property and thus are not subject to real property taxation."); *Bayridge Assocs. Ltd. P'ship v. Dep't of Revenue*, 321 Or. 21, 892 P.2d 1002, 1007 (1995) (holding that "tax benefits cannot be added to or included in the income from the properties" especially considering the credits had been sold); *Metro. Holding v. Milwaukee Review Bd.*, 173 Wis.2d 626, 495 N.W.2d 314 (1993); *Maryville Props., L.P. v. Nelson*, 83 S.W.3d 608, 617 (Mo.App.2002); but see *Rainbow Apartments v. Ill. Prop. Tax Appeal Bd.*, 326 Ill.App.3d 1105, 762 N.E.2d 534, 537 (2001).

**b. The trial court erred in rejecting the *Stillwater Housing* holding.**

In its Memorandum Opinion denying Kingfisher Wind's Motion for Partial Summary Judgment, the trial court opined that the *Stillwater Housing* court misapplied the law in holding that tax credits are intangible personal property. Specifically, the trial court analyzed a prior version of Section 6A of Article 10 the Oklahoma Constitution, which previously included descriptions of "intangible personal property" such as "[a]ccounts and bills receivable,

including brokerage accounts, and other credits, whether secured or unsecured.” Okla. Const. art. 10, § 6A.

The Court finds that by the placing of the word ‘credits’ in the paragraph it was placed in, it was meant to apply to the category of financial transactions best described as ‘accounts and bills receivable and deferral of payment obligations.’ The Court feels had the drafters of the constitution or the authors of the 2013 amendment desired that something as specific as a ‘tax credit’ be included in the exemptions, they would have plainly stated it as a ‘tax credit.’

ROA, Doc. 30, 7/26/19 Memorandum Opinion at 2. However, the trial court’s reasoning fails to consider that Section 6A, which previously attempted to define intangible personal property, today reflects the broader mandate that *all* intangible personal property is excluded from ad valorem taxation. Okla. Const. art. 10, § 6A. Further, the *Stillwater Housing* analysis went far beyond merely determining that the term “credits” as used in Section 6A included tax credits. Rather, the *Stillwater Housing* court thoroughly reviewed the nature and function of the LIHTCs and ultimately concluded that the tax credits were not income and did not replace income. *Stillwater Hous.*, at ¶ 10. Because the *Stillwater Housing* holding is sound and in line with Oklahoma law, and the PTCs utilized by Amici Curiae and Kingfisher Wind in obtaining financing are identical in nature to the LIHTCs in *Stillwater Housing*, this Court should hold that the right to claim PTCs is intangible personal property exempt from any kind of taxation in the State of Oklahoma.

**c. The common law supports a holding that PTCs are not tangible personal property.**

In *Globe Life & Accident Ins. Co. v. Okla. Tax Comm.*, this Court utilized the common law’s final-use analysis in determining whether magnetic tapes loaded with potential customer

lists should be considered tangible personal property under the Use Tax Code, 68 Okla. Stat. §§ 1401, *et seq.* 1996 OK 39, ¶¶ 1-2, 913 P.2d 1322, 1324.

The common law looks to *the personal property's end use or disposition* to determine whether it is tangible or intangible. The magnetic tapes' final disposition is *not* their possession – *a common-law bellwether of a thing's tangible nature*. The tapes were not acquired as a *finished program*. Globe has to load their content onto its computer to secure the *information*, i.e., mailing lists, which it purchased. Here, *information* (intellectual property) constitutes the very essence of the final use.

*Id.* at ¶ 16 (emphasis in original). In the wind-energy context, PTCs are generally allocated to tax equity investors as a return of their financial investment in the project. The final use or disposition of the PTCs is *not* their possession because the PTCs have no intrinsic “value.” The “value” of the right to claim PTCs is solely related to the ability of the claimant(s) to utilize the benefit of the PTCs on their tax return to offset income tax liabilities unrelated to the operation of the wind energy facility. Clearly, there is no logical reason to consider the *potential* value of the PTCs to be claimed as dollar-for-dollar income of the wind farm.

**IV. Various policy considerations support a holding that PTCs are intangible personal property that should be excluded from the fair cash value of tangible personal property.**

**a. Affirming the trial court's finding that PTCs are neither intangible nor tangible personal property would lead to disparate outcomes in pending litigation across the State.**

In its Memorandum Opinion dated March 6, 2020, the *Kingfisher Wind* trial court found that the PTCs are neither intangible property, nor “property” of any kind. ROA, Doc. 41, 3/6/20 Memorandum Opinion at 1-2. Instead, the trial court defined the PTCs as “incidental benefits received by the investors as a result of their participation in an investment made in the future production of the wind farm and should not be treated as ‘property.’” *Id.* at 2. While the trial court properly found that the value of the PTCs should not be included in the tangible personal

property's fair cash value, the trial court's ruling nevertheless breeds confusion as it stands. If this Court does not rule that the right to claim PTCs is intangible personal property exempt from ad valorem taxation, district courts across Oklahoma will have no clear guidelines for determining whether to include the value of the PTCs in a fair cash value analysis of tangible personal property. With the numerous cases pending at the district court level, it is imperative that the Court establish plainly that the PTCs are intangible personal property, exempt from any form of taxation within this state. If the district courts continue to approach this issue on a project-by-project basis, Oklahoma's court system will likely face an increase in ad valorem tax disputes, fewer settlements of the same, and disparate outcomes from which parties will be forced to appeal, all of which will inevitably lead litigants to this Court seeking the same clarity requested by Kingfisher Wind and Amici Curiae.

The risk of disparate outcomes is evident when comparing wind energy projects claiming PTCs versus projects electing instead to claim ITCs (and PPAs). As noted in the record of the testimony of Mr. Reilly, wind projects claiming ITCs usually pair the same with an above-market PPA to reach the approximate fifty percent capital threshold met by electing PTCs. ROA, Doc. 61, Trial Tr. Vol. I at 117:8-18. As the trial court properly held, PPAs are intangible contracts which are exempt from ad valorem taxation under the Oklahoma Constitution. ROA, Doc. 49, 8/5/21 Memorandum Opinion at 2; *see also* Final Ballot Title for State Question No. 766, submitted by E. Scott Pruitt, Attorney General (July 9, 2012) (noting that "licenses, franchises, and contracts" would no longer be taxed with the adopted measure to amend Section 6A of Article 10 of the Oklahoma Constitution). Thus, while PTCs and ITCs/PPAs were intended to provide similar tax benefits, including the right to claim PTCs in the fair cash value of tangible personal property would significantly inflate the tax liabilities

of a wind project claiming PTCs when compared to a wind project electing ITCs/PPAs. Such disparate and unfair treatment should not be enforced by the court system where the Legislature has not shown *any* intent to treat these tax incentives differently.

Holding that the right to claim PTCs is intangible personal property would also eliminate the risk that wind energy projects suffer disparate and arbitrary tax treatment based on how many more years, if any, the tax equity investors may claim the PTCs. If these tax credits are included in the fair cash value of a wind farm's tangible personal property, the value of a wind farm in year ten (the final year the PTC may be claimed) is drastically higher than the value of a wind farm in year eleven. This alone exemplifies that PTCs are intangible in nature and should not impact the fair cash value of a wind farm's tangible personal property. There is no logical reason to inflate the year-ten wind farm's fair cash value when compared to the *same tangible equipment one year later*. For these reasons, the right to claim PTCs should be excluded from the fair cash values of the wind energy projects' tangible personal property.

**b. The actual value of the PTCs is not tied to the wind project's tangible personal property.**

It would be improper to include the highest potential amount of the PTCs in the fair cash value of the wind project's tangible personal property because the actual value of the right to claim PTCs depends entirely on the tax equity partner's income tax liabilities. The PTCs are not "income," but rather, the right to *reduce* tax liability *if* such tax liability is equal to or exceeds the PTC amount. The stand-alone operation of a wind farm consists of generating electricity from turbines, routing the electricity through the grid, and selling the energy in the open market. The typical wind energy facility receives no cash flow from federal PTCs. ROA, Doc. 61, Trial Tr. Vol. I at 67:14-22. In *Randall v. Loftsgaarden*, the United States Supreme



Court held that federal tax benefits received by owners of certain securities could not be classified as “income” under “any reasonable definition” of that term. 478 U.S. 647, 656 (1986). The Court explained that such tax benefits, in the form of tax deductions or tax credits, “have no value in themselves; the economic benefit to the investor—the true ‘tax benefit’—arises because the investor may offset tax deductions *against* income received from other sources or use tax credits to reduce the taxes otherwise payable on account of such income.” *Id.* at 656-57 (emphasis in original).

In the event that any one of the tax equity partners in Amici Curiae’s wind projects did not have the income tax liabilities necessary to utilize the full amount of the PTCs, the actual value of the PTCs is reduced. Wind farms should not be required to pay ad valorem taxes on PTCs where the value of the PTCs is not ascertainable without analyzing the income tax liability of the claimant for the subject tax year. If the Court holds that the right to claim PTCs should be included in the fair cash value of the tangible personal property, Kingfisher Wind and Amici Curiae will be paying personal property taxes – in the highest possible amount of the tax credits – without evidence that *any* claimant is able to benefit in the full amount.

**c. Including PTCs in the assessment of the wind projects’ tangible personal property would impermissibly tax property in excess of its “fair cash value.”**

“Fair cash value” determinations seek to discover “the value or price at which a willing buyer would purchase property and a willing seller would sell property if both parties are knowledgeable about the property and its uses....” 68 Okla. Stat. § 2802(19). In direct contrast to the Assessors’ argument that a willing buyer would consider the benefit of future PTCs when purchasing a wind project’s tangible personal property, the economic reality is that a potential buyer would not necessarily obtain the benefit of the PTCs when purchasing a wind

farm's tangible personal property. When asked by the Assessors' counsel at trial whether a hypothetical buyer could claim the future PTCs after the sale, Robert Reilly explained:

[T]he tax credits no longer are associated with Kingfisher Wind. They have been sold to the Class A units, which are now owned by MidAmerican under the terms of the ECCA. So whoever now comes and buys Kingfisher Wind doesn't get the tax credits. They've been sold. They're gone.

ROA, Doc. 63, Trial Transcript Vol. III, 97:6-98:22. The same is true for many of the wind projects associated with Amici Curiae. Specifically, in order for a potential buyer to be entitled to claim the PTCs, the buyer would be required to purchase the tax equity class units from the tax equity partner. The purchase of the cash equity shares of the wind project would not entitle a buyer to receive the benefits of the PTCs per the terms of the tax equity agreement in place. Under the tax equity agreement, the PTCs continue to follow the allocation rules between the tax equity and cash equity classes of shares that existed prior to the hypothetical purchase. For this reason, it is not reasonable to conclude that a potential buyer evaluating a hypothetical purchase would consider the (unknown) value of the right to claim PTCs when 99% of the benefit would continue to flow to the owner of the tax equity shares.

In *Maryville Properties, L.P. v. Nelson*, the County Assessor argued that in order for LIHTCs to be intangible property, they must be 1) identifiable; 2) capable of private ownership; 3) marketable, "i.e. capable of being financed and/or sold separate and apart from the tangible property"; and 4) of value. 83 S.W.3d 608, 616 (Mo. App. W.D. 2002). Rejecting a strict transferability test, the court provided that "another important factor is the potential to add or detract from the value of the property, i.e. to affect the income of the property." *Id.* at 616. In finding that the LIHTCs did not have "direct effects" on the income of the property, the court made the important distinction that "although [the tax credits] would appear to add

value to a property, the literature dealing with these projects suggests that most prudent investors will stay in the project for fifteen years.” *Id.*

[T]hese factors result in a situation where there is little incentive to sell until the tax credits are exhausted ... and there is little incentive to buy the interest of the partner unless it can be done at a substantial discount. **The value of the tax credits is to the owner of the property and not to the property itself.**

*Id.* (emphasis added). The court characterized the LIHTCs as assets having direct monetary value, adding that “[t]heir restricted transferability does not destroy their essential status as intangible property having value primarily to their owner.” *Id.* (emphasis added).

The Supreme Court of Arizona similarly held that LIHTCs are intangible personal property and should be excluded from the value of otherwise taxable property. *Cottonwood Affordable Housing v. Yavapai County*, 72 P.3d 357, 359 (Ariz. 2003). The court reasoned:

LIHTCs are intangible because they are sums of money being paid by the federal government as an incentive to invest in the project and are not income flowing from the rental of the property. If a limited partner’s interest is sold the buyer will only receive the remainder of the credit, if any, and the seller may be subject to having the remaining credits recaptured. The tax credits will not significantly affect the marketability of the project, particularly if the property were to be resold at or near its tenth year of operation, because at that time the credits will have been exhausted and will play no significant part in any negotiations between a buyer and seller. If the interest is sold after any amount of time it will have to be sold at a steep discount. They do not add to the value of the property as their use is limited to ten years and the project will continue for a minimum of fifteen years. **Any value the credits may have is to the owner and not the property.**

*Id.* at 359 (emphasis added). “While the LIHTCs provide an incentive for an investor or developer to invest in and construct low income housing projects, they add little if anything to the long term value of the real property.” *Id.* at 360.

**V. A ruling that the PTCs may be included in the fair cash value of tangible personal property when assessing ad valorem taxation will severely impact the future of the Oklahoma wind industry.**

According to the U.S. Energy Information Administration, wind energy accounted for 35% of Oklahoma's in-state net generation in the year 2020, making Oklahoma the third biggest wind-energy producer in the country. U.S. EIA, Oklahoma State Energy Profile (Apr. 15, 2021). Further, wind energy consisted of nine-tenths of Oklahoma's total capacity from all renewable resources in the same year. *Id.* Due in large part to the State PTC in place since January 2003, Oklahoma has significantly increased its reliance on renewable energy resources over the last two decades and has become a national leader in wind-energy production.


The function of PTCs is to reduce the initial capital investment of otherwise cost prohibitive wind farm projects and encourage the development of the same. Amici Curiae would not have developed their combined seventeen wind farm projects without PTCs and the various tax equity partners providing the capital necessary to construct, develop, and/or operate the wind projects. The evidence offered during the *Kingfisher Wind* trial reflected a similar reality. ROA, Doc. 61, Trial Tr. Vol. I, 41:16-20 (“Q: Without MidAmerican’s commitment under the [ECCA], would the project have moved forward? A: No. The commitment of that capital was essential to being able to construct the facility.”). When each of Amici Curiae’s wind projects were developed, the law of the land as set forth in the Oklahoma Constitution and *Stillwater Housing* provided wind project developers with clarity as to the tax consequences associated with the PTCs. If the Court holds that the value of the right to claim PTCs can now be included in the fair cash value of a wind energy facility’s tangible personal property, wind facilities would be paying property taxes – out of their operating income – on

intangible items for which they receive no cash flow. *Id.* at 67:14-25. Forcing Amici Curiae to pay ad valorem taxes based on the maximum *potential* value of the right to claim PTCs, previously allocated to the tax equity partners, would significantly increase the costs to develop wind energy projects and render the future development of new projects entirely unfeasible and unlikely.

### CONCLUSION

Section 6A of Article 10 of the Oklahoma Constitution and Oklahoma's Ad Valorem Tax Code clearly exempt all intangible personal property from ad valorem taxation. Okla. Const. art. 10, § 6A; 68 Okla. Stat. § 2817(A). In *Stillwater Housing*, the Oklahoma Court of Civil Appeals properly held that tax credits are intangible personal property, exempt from ad valorem taxation. 2011 OK CIV APP 51, ¶ 12, 254 P.3d 726, 729, *cert. denied* (Mar. 28, 2011). As the Assessors have failed to show beyond reasonable doubt that the Legislature intended to tax the right to claim PTCs as tangible personal property, this Court should definitively hold that the right to claim PTCs is intangible personal property, exempt from ad valorem taxation.

Respectfully submitted this 31st day of May, 2022.



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**CERTIFICATE OF SERVICE**

This is to certify that on the 31st day of May, 2022, a true and correct copy of the above and foregoing instrument was mailed with postage thereon prepaid, to the following:

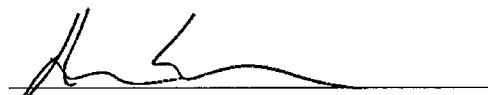
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