



ORIGINAL

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

FILED

MAY 31 2022

KINGFISHER WIND, LLC,)
)
Plaintiff/Appellee,)
)
V.)
)
MATT WEHMULLER,)
CANADIAN COUNTY ASSESSOR,)
)
Defendants/Appellants.)

JOHN D. HADDEN
CLERK

CASE NO. DF-119837

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**PLAINTIFF/APPELLEE KINGFISHER WIND, LLC'S
ANSWER BRIEF TO DEFENDANTS/APPELLANTS' BRIEF-IN-CHIEF**

Ad Valorem Tax Appeal from the Canadian County District Court
Case No. CV-2016-241
(Consolidated with Kingfisher County District Court Case No. CV-2016-61)
Hon. Jack D. McCurdy II

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KINGFISHER WIND, LLC**

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INTRODUCTION

The primary issue in this appeal is whether the value of federal income tax credits, commonly referred to as “tax credits,” “production tax credits,” or “PTCs” herein and in the record below, should be excluded from the valuation of Appellee, Kingfisher Wind, LLC’s (“Kingfisher Wind”) tangible personal property consisting of wind turbines and related equipment for ad valorem tax purposes. The District Court ruled that tax credits must be excluded from the valuation of the tangible personal property because (1) tax credits are neither tangible nor intangible property, and (2) the right to claim the tax credits was contracted to the tax equity investor for the wind farm project months before the assessment date. ROA, Doc. 49, p. 4. In reaching this decision, the District Court improperly rejected the application of *Stillwater Housing v. Rose*, 2011 OK CIV APP 51, ¶ 12, 254 P.3d 726, 729, *cert. denied* (Mar. 28, 2011), which unequivocally held that tax credits are not income and are exempt from taxation as intangible personal property under Article 10, Section 6A of the Oklahoma Constitution.¹ Appellants raise legal arguments challenging the District Court’s judgment but fail to establish that tax credits are taxable property in Oklahoma or that the judgment is against the clear weight of the evidence.

After weighing appraisal evidence presented by both parties, the District Court found the testimony of Kevin Reilly, Kingfisher Wind’s appraisal expert, excluding values of the tax credits and other intangible contracts, to be “the most logical and fair valuation.” ROA, Doc. 49, p. 5. The District Court’s reliance on Kingfisher Wind’s expert appraisal for its conclusion

¹The Oklahoma Constitution contains two sections numbered 6A. One relates to intangible personal property and the other deals with tangible property moving through the State (commonly referred to as the “freeport exemption”). The references to Article 10, Section 6A in this brief refer to that provision titled “Intangible personal property exempt from ad valorem or other tax.”

of fair cash value is supported by the clear weight of the evidence, and, though partially based on the erroneous legal conclusion that tax credits are not intangible personal property, reaches the correct result. The District Court's judgment should be affirmed.

SUMMARY OF THE RECORD²

Subject Property: Kingfisher Wind owned 149 Vestas V-100, 2-megawatt wind turbines and related equipment including a collector system, substation, and transmission lines ("Subject Property") located in Canadian and Kingfisher Counties, which was assessed by the Appellants Matt Wehmuller, Canadian County Assessor, and Carolyn Mulherin, Kingfisher County Assessor, ("Appellants") as tangible personal property for ad valorem tax purposes as of the January 1, 2016 assessment date. ROA, Doc. 61, Tr.Vol.I p. 28:2–29:2, 30:6-12. Construction on the Subject Property began in 2015 and was completed on March 29, 2016. ROA, Doc. 61, Tr.Vol.I p. 59:1-6.

Ownership Structure: In order to show tax credits are separate property from the tangible wind turbines and related equipment at issue, Kingfisher Wind introduced evidence at trial that the tax credits were contractually committed to a tax equity investor prior to the assessment date. ROA, Doc. 61, Tr.Vol.I p. 56:23–57:6, 57:13-17; Am. ROA, Doc. 1, Pl.'s Exs. 41, 44. In order to introduce this evidence, it was necessary to explain the ownership structure of Kingfisher Wind and the contractual relationships that existed on January 1, 2016, as follows.

Kingfisher Wind is the operating company and owner of the Subject Property. ROA, Doc. 61, Tr.Vol.I p. 47:15-18, 49:13-25, 59:25–60:3. FR Kingfisher Holdings II LLC ("FR

²To avoid repetition, inaccuracies in Appellants' Summary of the Record will be addressed by Kingfisher Wind in the context of its arguments below.

Holdings II”) is the holding company and owner of 100 percent of the membership interests of Kingfisher Wind, LLC. ROA, Doc. 61, Tr.Vol.I p. 47:10-14, 59:20-24. FR Kingfisher Holdings LLC (“FR Holdings”) is the cash equity investor of the Kingfisher Wind project, and, upon completion, owned 100 percent of the Class B membership interests in FR Holdings II. ROA, Doc. 61, Tr.Vol.I p. 33:4-13, 59:10-14; Am. ROA, Doc. 1, Pl.’s Ex. 44. MidAmerican Wind Tax Equity Holdings LLC (“MidAmerican”) is the tax equity investor of the Kingfisher Wind project, and upon completion owned 100 percent of the Class A membership interests in FR Holdings II. ROA, Doc. 61, Tr.Vol.I p. 33:14-17, 59:15-19; Am. ROA, Doc. 1, Pl.’s Ex. 44.

On January 21, 2015, FR Holdings, FR Holdings II, and MidAmerican entered into the Equity Capital Contribution Agreement (“ECCA”). ROA, Doc. 61, Tr.Vol.I p. 45:8-25, 46:1-6; Am. ROA, Doc. 1, Pl.’s Ex. 41. Attached to the ECCA was a negotiated form of the Limited Liability Corporation Agreement for FR Holdings II (“LLC Agreement”), which the companies were obligated to execute upon completion of the project. ROA, Doc. 61, Tr.Vol.I p. 57:18-25, 58:1-6; Am. ROA, Doc. 1, Pl.’s Ex. 44. The ECCA obligated MidAmerican to contribute \$269 million upon the completion of the project to acquire the Class A membership interests in FR Holdings II. ROA, Doc. 61, Tr.Vol.I p. 47:19–48:8; Am. ROA, Doc. 1, Pl.’s Ex. 41. The Class A membership interests carried the exclusive right to claim 99 percent of the federal tax credits associated with the Kingfisher Wind project. ROA, Doc. 61, Tr.Vol.I p. 48:9-22; Am. ROA, Doc. 1, Pl.’s Ex. 41. MidAmerican’s right to become the Class A member was created on January 21, 2015, and as of January 1, 2016, MidAmerican was contractually obligated to purchase the Class A membership interests upon completion of the project. ROA, Doc. 61, Tr.Vol.I p. 56:23–57:6, 57:13-17; Am. ROA, Doc. 1, Pl.’s Ex. 41. Furthermore, on

January 1, 2016, FR Holdings II was contractually obligated to transfer the Class A membership interests to MidAmerican upon completion of the project. ROA, Doc. 61, Tr.Vol.I p. 56:23–57:6, 57:13-17; Am. ROA, Doc. 1, Pl.’s Ex. 41.

Kingfisher Wind’s Contracts: On January 1, 2016, Kingfisher Wind was a party to three contracts related to the wind farm operations associated with the Subject Property—specifically, a financial hedge known as the Energy Hedge Agreement (“Energy Hedge”) and two purchase and sale agreements for Renewable Energy Certificates (“RECs”) generated from the production of energy from a renewable energy resource (“REC Agreements”). ROA, Doc. 61, Tr.Vol.I p. 29:18–30:1; Am. ROA, Doc. 1, Pl.’s Ex. 40.

Summary Judgment Motions: Kingfisher Wind appealed the assessment of the Subject Property to District Court pursuant to 68 O.S. § 2880.1, asserting that Appellants had assessed the Subject Property at a value greater than its actual fair cash value in violation of Oklahoma law. ROA, Docs. 3, 9. Before trial, the parties filed counter-motions for partial summary judgment on the issue of whether the tax credits and other incentives are intangible personal property exempt from ad valorem tax under Article 10, Section 6A of the Oklahoma Constitution. ROA, Docs. 15, 24. Kingfisher Wind also argued on partial summary judgment that its three contracts are intangible personal property exempt from ad valorem taxation and any value attributable to the contracts must be excluded from the valuation of the Subject Property. ROA, Docs. 15. Appellants conceded that the contracts are intangible personal property at the hearing on the parties’ motions. ROA, Doc. 30, p. 2. The District Court denied Kingfisher Wind’s motion as to the tax credits and sustained Appellants’ motion, finding that the tax credits are not intangible personal property and rejecting the application of *Stillwater Housing*. ROA, Doc. 30, p. 1-2. The District Court sustained Kingfisher Wind’s motion as to

the contracts, finding that the contracts are exempt from ad valorem taxation. ROA, Doc. 30, p. 2.³ Kingfisher Wind renewed its intangibles argument in a second motion for partial summary judgment and added alternative grounds for excluding tax credits from the valuation of the Subject Property, including that tax credits lack the fundamental characteristics of tangible personal property, and that tax credits are not income and must be excluded from the income stream of the Subject Property. ROA, Doc. 37. Appellants filed a second counter-motion for partial summary judgment arguing that tax credits are not property of any kind but rather are merely economic benefits of owning the Subject Property. ROA, Doc. 38. The District Court denied both parties' second motions and found that tax credits are neither intangible nor tangible and not property of any kind. ROA, Doc. 41.

Trial Testimony⁴: A bench trial was conducted before the Honorable Jack D. McCurdy, II, Canadian County District Judge, April 12-14, 2021. ROA, Docs. 61-63, Tr.Vol.I, II, III. The central issue for trial, as identified by the District Court in its ruling dated March 6, 2020, was the classification of the income tax credits and whether these tax credits should be included in the valuation of the Subject Property. ROA, Doc. 41.

Robert Hanna: Kingfisher Wind called Robert Hanna, its authorized signatory and representative, to testify about (1) the ownership and operations of Kingfisher Wind's tangible personal property and (2) the ownership structure of Kingfisher Wind including the tax equity financing structure. ROA, Doc. 61, Tr.Vol.I, p. 18:18-20, 20:2-9.

³Despite the District Court's ruling and Appellants' concession of this issue, Appellants' expert witness at trial improperly included the RECs and Energy Hedge in his appraisal of the Subject Property. ROA, Doc. 63, Tr.Vol.III p. 32:23-33:3.

⁴Kingfisher Wind refers to the witnesses Robert Hanna and David Payne by their last names for the rest of the brief but will refer to Kevin Reilly and Robert Reilly by their full names to avoid confusion.

Kevin Reilly: Kingfisher Wind presented the expert witness testimony of Kevin Reilly, an Accredited Senior Appraiser (“ASA”) with the American Society of Appraisers with a designation in the Machinery and Technical Specialties Group. ROA, Doc. 61, p. 101:1-11, 103:12-24. Kevin Reilly is a Managing Partner of the appraisal firm evcValuation LLC, who specializes in appraising power generation facilities of all kinds, including wind farms and solar plants. ROA, Doc. 61, Tr.Vol.I p. 101:1-11, 103:1-15, 107:1-2. Kevin Reilly’s appraisal report was admitted into evidence as Plaintiff’s Exhibit 46 without objection. ROA, Doc. 61, Tr.Vol.I p. 108:14–109:13; Am. ROA, Doc. 1, Pl.’s Ex. 46.

Kevin Reilly is a contributing author for the fourth edition of the appraisal textbook, *Valuing Machinery and Equipment: The Fundamentals of Appraising Machinery and Technical Assets* (“*Valuing Machinery and Equipment*”), which is considered the authoritative treatise for machinery and technical specialty appraisers. ROA, Doc. 61, Tr.Vol.I, p. 105:14-25, 106:1-9; Machinery & Technical Specialties Committee of the American Society of Appraisers, *Valuing Machinery and Equipment* (4th ed.), App’x Tab No. 5.⁵ Kevin Reilly’s qualifications as an expert in appraisal and appraisal review were accepted by the District Court without objection. ROA, Doc. 61, Tr.Vol.I p. 108:5-10.

David Payne: Appellants presented David Payne of Business Valuers and Appraisers as their expert witness at trial. ROA, Doc. 62, Tr.Vol.II p. 8:3-6. Mr. Payne is a certified public accountant (“CPA”) and appraiser who specializes in business valuations. ROA, Doc. 62, Tr.Vol.II p. 8:7-15, 144:25, 145:1-3. Mr. Payne’s only ASA designation is in business valuation. ROA, Doc. 62, Tr.Vol.II p. 20:14-19. The District Court permitted Mr. Payne to testify over Kingfisher Wind’s objection that he lacks necessary qualifications to testify about

⁵In their brief, Appellants refer to *Valuing Machinery and Equipment* as the “MTS Treatise.”

appraisal of machinery and equipment but permitted Kingfisher Wind to present expert witness Robert Reilly to rebut Mr. Payne's methodology. ROA, Doc. 62, Tr.Vol.II p. 22:19-25, 23:1-7; ROA, Doc. 63, Tr.Vol.III p. 10-103.

Robert Reilly: Robert Reilly, who is a certified review appraiser and has over 45 years of experience in the fields of appraisal, accounting, and finance, identified numerous errors in Mr. Payne's appraisal of the Subject Property when compared to standard appraisal practices. ROA, Doc. 63, Tr.Vol.III p. 12:11-25, 13:1-7. Robert Reilly has co-authored 12 valuation textbooks, including *Best Practices*, *Guide to Intangible Asset Valuation*, and *Guide to Property Taxation*. ROA, Doc. 63, Tr.Vol.III p. 13:11-14:2. He has also authored 40 chapters in other textbooks, and approximately 900 journal articles in appraisal, accounting, and taxation. ROA, Doc. 63, Tr.Vol.III p. 14:2-5. Robert Reilly's testimony criticizing Mr. Payne's methodology was unrefuted.

District Court Judgment: On August 5, 2021, the District Court granted judgment in favor of Kingfisher Wind and lowered the fair cash value of the Subject Property to \$175 million. ROA, Doc. 49. Appellants filed the instant appeal.

STANDARD OF REVIEW

An ad valorem tax appeal is a special statutory proceeding⁶ governed by the Oklahoma Ad Valorem Tax Code, 68 O.S. §§ 2801-2899.1, for the purpose of ascertaining whether a taxpayer is entitled to a refund of a tax paid under protest. *In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Division of Southern Union Company, for Tax Years 1998, 1999, & 2000* ("MGE"), 2008 OK 94, ¶ 17, 234 P.3d 938, 946 (citing *Ward*

⁶"Special proceeding" is a term used by the Supreme Court to distinguish certain civil actions from general civil actions by the manner of pleading, practice, and procedure prescribed by the law. *Ward Petroleum Corp. v. Stewart*, 2003 OK 11, ¶ 7, 64 P.3d 1113, 1115.

Petroleum Corp. v. Stewart, 2003 OK 11, ¶ 7, 64 P.3d at 1115). It was Kingfisher Wind's burden to produce competent evidence in the proceeding below to justify a change in value of the Subject Property for ad valorem tax assessment. *Park East Ltd. Co. v. Gordon*, 2004 OK CIV APP 1, ¶ 7, 82 P.3d 1031, 1033. The District Court ruled that Kingfisher Wind met this burden. ROA, Doc. 49, p. 5-6.

An appellate court reviews the District Court's judgment in this special proceeding to determine whether it is against the "clear weight of the evidence or is contrary to law or to established principles of equity." *MGE*, 2008 OK 94, ¶ 17, 234 P.3d at 946; *Kast Trust Farms v. Twyman*, 2019 OK CIV APP 74, ¶ 7, 453 P.3d 922, 924-25. Constitutional interpretation presents a question of law and is reviewed *de novo*. See *MGE*, 2008 OK 94, ¶ 17, 234 P.3d at 946. Mixed questions of law and fact are reviewed as questions of law. *Id.*

ARGUMENTS AND AUTHORITIES

I. THE DISTRICT COURT PROPERLY EXCLUDED TAX CREDITS IN ITS DETERMINATION OF THE FAIR CASH VALUE OF THE SUBJECT PROPERTY.

This case involves the valuation of Kingfisher Wind's tangible personal property consisting of wind turbines and related equipment. 68 O.S. § 2807(8). Tangible personal property is assessed at its fair cash value, estimated at the price it would bring at a fair, voluntary sale. See Okla. Const. art. 10, § 8(a)(1); 68 O.S. § 2817(A). "Fair cash value" or "market value" of property is defined in the Ad Valorem Tax Code (the "Code") 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 and if neither party is under any undue pressure to buy or sell" 68 O.S. § 2802(19). The Code recognizes the following three appraisal approaches for estimating fair cash value of taxable property: (1) the cost approach, which establishes fair cash value by estimating the current construction costs of

improvements (i.e., replacement cost new), minus accrued depreciation in the form of physical deterioration, functional obsolescence, or economic obsolescence; (2) the income approach, which estimates fair cash value by determining the present value of the projected income stream (i.e., future cash flow); and (3) the sales comparison approach, which establishes fair cash value by comparison to collected, verified, and screened sales data. 68 O.S. §§ 2802(15), (21), & (26); *Park E. Ltd.*, 2004 OK CIV APP 1, ¶ 9, 82 P.3d at 1033.

After considering the evidence presented at trial, the District Court concluded that the tax credits should be excluded from the value of the Subject Property because any willing buyer would be bound by the contract that committed the tax credits to the tax equity investor, MidAmerican, and would not receive the tax credits in its purchase of the Subject Property. ROA, Doc. 49, p. 4. In its ruling, the District Court made the following legal conclusions: the tax credits “are neither tangible nor intangible” and “are not specifically named in the list of intangible property found in the Constitution,”⁷ and “[do not] fall under any persuasive definition of tangible property.” *Id.*

Appellants challenge the District Court’s ruling on three grounds, which are readily disproven. First, Appellants assert that the tax credits are part and parcel of the tangible wind turbines and related equipment, but the evidence at trial showed they are a separate class of property exempt from ad valorem tax. Second, Appellants assert that the hypothetical willing buyer would be able to claim the tax credits after the hypothetical sale, but the evidence at trial showed the tax credits were contractually committed to a tax equity investor prior to the assessment date. Third, Appellants assert that a “real world buyer and seller” would consider

⁷Kingfisher Wind addresses its disagreement with this portion of the District Court’s ruling below in Proposition II.

the tax credits, but they produced no evidence at trial of “real world” comparable asset sale transactions for only wind energy tangible personal property. Kingfisher Wind addresses each argument in turn.

A. Tax credits are separate property from the tangible wind turbines and related equipment and are exempt from ad valorem taxation.

Kingfisher Wind presented testimony from expert appraiser Kevin Reilly who testified that independent of any judicial ruling on the classification of tax credits for ad valorem tax purposes, the scope of his engagement with Kingfisher Wind was to value only the tangible personal property. ROA, Doc. 61, Tr.Vol.I p. 178:18–179:19. Consistent with the scope of his engagement and standard appraisal practice and referenced treatises, he excluded all non-tangible components including the tax credits and other intangible contracts up front in his analysis. ROA, Doc. 61, Tr.Vol.I p. 118:24–119:8. Appellants, on the other hand, presented the testimony of a business valuator, Mr. Payne, who treats the tax credits and RECs as income in his income approach, thereby improperly enhancing the income projections of the tangible personal property and leading to his finding of no economic obsolescence. ROA, Doc. 63, Tr.Vol.III p. 32:23–33:3. Mr. Payne’s methodology was thoroughly rebutted by Kingfisher Wind’s expert rebuttal witness, Robert Reilly. ROA, Doc. 63, Tr.Vol.III p. 10-103. The District Court weighed the evidence presented by both parties and ultimately adopted Kingfisher Wind’s expert Kevin Reilly’s opinion of value based on the cost approach for the Court’s concluded fair cash value of \$175 million for the Subject Property. ROA, Doc. 49, p. at 5. The District Court’s ruling adopting Kevin Reilly’s opinion of fair cash value under the cost approach is supported by the clear weight of the evidence.

Significantly, Appellants do not mention *Stillwater Housing* in their brief, which is the only case in Oklahoma that addresses the treatment of tax credits for ad valorem tax purposes.

See discussion *infra* Proposition II.B. Instead, the case law Appellants cite to support their arguments are all from foreign jurisdictions and span appraisal, accounting, and income tax contexts without explaining the property tax schemes of those jurisdictions or the intricacies of valuation in each of these different contexts. Tax is a creature of statute. See, e.g., *Globe Life & Acc. Ins. Co. v. Okla. Tax Comm'n*, 1996 OK 39, 913 P.2d 1322, 1326 (“The genesis of all taxation lies in the legislature. The subject has no existence apart from statute.”). While most states levy ad valorem tax, no two states are identical in their ad valorem scheme. Interpreting the cases Appellants cite would at minimum require knowing the following information about each case’s jurisdiction: (1) types of taxable property; (2) ad valorem classification scheme; (3) statutory treatment of tax credits for ad valorem taxation; (4) case law addressing treatment of tax credits for ad valorem taxation.

For example, Appellants discuss *Van Duzer v. Commissioner of Internal Revenue* at length but never explain their purpose for doing so. Appellants’ Brief-in-Chief 18-19 (citing 61 T.C.M. 2791, 1991 WL 93170 (U.S. Tax Ct. 1991)). *Van Duzer* is a 1991 federal income tax case related to 1984 and 1985 transactions for wind farms in the U.S. Tax Court that analyzed provisions of the Internal Revenue Code, where the general rule is cost equals basis unless any “peculiar circumstances” exist. 61 T.C.M. 2791, 1991 WL 93170. Appellants ignore the fact that the levy of federal income tax considers “all income from whatever source derived,” I.R.C. § 61, as compared to the levy of ad valorem property tax in Oklahoma, which is based on *value* of the property. App’x Tab No. 3. *Van Duzer* is inapplicable.

Appellants also cite case law from other jurisdictions related to low income housing tax credits (“LIHTCs”) and make sweeping generalizations about their applicability but do not delve into the complicated interplay between case law and statutes in each of these jurisdictions

for comparison to Oklahoma's ad valorem tax scheme. See discussion *infra* Propositions II & III. As Kingfisher Wind explained in its briefing related to the summary judgment motions, the majority of states that have provided guidance for the valuation of LIHTC properties have acted via legislation with or without guidance from state courts and have excluded the credits from use in real property valuation. ROA, Doc. 39, p. 10. Second, of the state courts who have issued decisions without guidance from their state legislatures, the majority have decided to exclude credits in valuing LIHTC properties. ROA, Doc. 39, p. 10. Third, of the state courts who have issued decisions ruling LIHTCs can be considered in valuing such properties, several have had their decisions superseded by their state legislatures enacting legislation to exclude the credits from use in property valuations (including a Pennsylvania state court opinion cited by Appellants at pages 17-18 of their Brief-in-Chief). ROA, Doc. 39, p. 10-11.

B. A hypothetical willing buyer would not have the right to claim the tax credits after the hypothetical sale because the tax credits were contractually committed to a tax equity investor prior to the assessment date.

As an initial matter, Appellants argue the tax structure of a wind project should not be included in the hypothetical willing buyer-willing seller analysis to ensure uniform and consistent ad valorem valuations. In support, they cite the following passage from the ASA MTS treatise, *Valuing Machinery and Equipment*: "Remember, when valuing a specific operating property, the current owner of the property is not taken into consideration, nor is its tax structure. The appraisal includes just the subject property as a standalone operation." *Valuing Machinery and Equipment, supra*, at 139, App'x Tab No. 5. Even assuming the treatise is binding authority, Appellants' argument is a fallacy.

The purpose of Kingfisher Wind demonstrating how the tax credits are committed to a tax equity investor is not to value the Subject Property, which is the subject of the guidance,

but to illustrate how the tax credits are separate from the assessable Subject Property. Moreover, Kingfisher Wind's expert appraiser, Kevin Reilly, cited the same treatise as authority for his methodology and followed its guidance. Unlike Appellants' expert, David Payne, Mr. Reilly valued the Subject Property as a standalone operation and excluded anything that was not tangible personal property. ROA, Doc. 61, Tr.Vol.I p. 118:13–119:13, 179:2-19, 194:1-14; *see also* Proposition III.C *infra*. Finally, regardless of the ownership structure, the District Court ruled that tax credits are not tangible property. ROA, Doc. 49, p. 4. Therefore, the only way to achieve uniform and consistent ad valorem valuation is to exclude the tax credits from valuation of tangible personal property.

Next, Appellants assert that the hypothetical willing buyer of the Subject Property could claim the tax credits after the hypothetical sale, but the evidence at trial showed and the District Court properly concluded that the tax credits were contractually committed to a tax equity investor, MidAmerican, prior to the assessment date. ROA, Doc. 61, Tr.Vol.I p. 56:23–57:6, 57:13-17; Am. ROA, Doc. 1, Pl.'s Exs. 41, 44. The hypothetical willing buyer would have to buy the right to claim the tax credits from MidAmerican. ROA, Doc. 63, Tr.Vol.III p. 98-99.

Appellants use a hypothetical on page 24 of their Brief-in-Chief for the proposition that to achieve uniform and consistent ad valorem valuations, no consideration should be given to the specific tax structure of the actual buyer or seller. Without explanation, Appellants assume that the District Court's ruling would apply only to a partnership ownership structure (Wind Farm A) but not to a single entity ownership structure (Wind Farm B). The District Court ruled that tax credits are neither tangible nor intangible and should not be used in the valuation for tax purposes. ROA, Doc. 49, p. 4. The District Court's ruling would apply to both Wind

Farm A and Wind Farm B in Appellants' hypothetical. Regardless of the ownership structure, tax credits are not tangible property.

Appellants raise additional legal arguments challenging the District Court's conclusion, but these arguments also lack merit. First, Appellants contend that the District Court's ruling that a hypothetical willing buyer would be bound by the ECCA is contrary to longstanding precedent of the Oklahoma Supreme Court related to successor liability. Appellants' Brief-in-Chief 25-27 (citing *Crutchfield v. Marine Power Engine Co.*, 1977 OK 27, ¶ 1, 209 P.3d 295, 297). The holding in *Crutchfield* states, "As a general rule, when one company sells or otherwise transfers all its assets to another company, the successor is not liable for the debts and liabilities of the seller." 2009 OK 27, ¶ 1, 209 P.3d at 297. Using the *Crutchfield* holding, Appellants misapply "debts and liabilities" to somehow incorporate the ECCA. The ECCA is not a debt or a liability; it is a contractual agreement binding the parties to exchange cash for the right to claim tax credits. Assuming *arguendo* the *Crutchfield* rule would apply to the ECCA and MidAmerican's rights to claim the tax credits were somehow erased, the tax credits would not become taxable under Oklahoma law. The right to claim the tax credits would still have value separate and apart from the value of the tangible personal property.

Second, Appellants' broad claims that Section 45 of the Internal Revenue Code would somehow prohibit the allocation of the tax credits to MidAmerican after a hypothetical sale of the Subject Property are unsupported by law or fact. *See* I.R.C. § 45, App'x Tab No. 2. Appellants make these claims without doing a deep dive into the Internal Revenue Code and regulations and decisions interpreting it or properly applying them to the ownership structure of Kingfisher Wind. For example, Appellants cite IRS Revenue Procedure 2007-65, which established the mechanism for wind farm partnerships like Kingfisher Wind's to allocate the

tax credits in a tax equity partnership structure, but then ignored its application when arguing incorrectly that Section 45 of the Internal Revenue Code prohibits transfer of the tax credits. Appellants' Brief-in-Chief 16-17, 29; IRS Rev. Proc. 2007-65, App'x Tab No. 4. No knowledgeable willing buyer or willing seller of the tangible personal property could ignore the fact that the right to claim the tax credits for the Kingfisher Wind project was transferred prior to January 1, 2016. The unrebutted evidence at trial showed that the tax credits are freely transferrable. ROA, Doc. 61, Tr.Vol.I p. 62:7-13; Am. ROA, Doc. 1, Pl.'s Ex. 44, p. P044.0102. Appellants' statement that after the hypothetical sale any attempt by MidAmerican to claim the tax credits would violate federal income tax laws is rebutted by IRS Revenue Procedure 2007-65 and the evidence presented at trial.

C. Appellants produced no evidence of “real world” comparable asset sales transactions for only wind energy property.

Appellants contend that their expert, Mr. Payne, “presented uncontroverted evidence at trial that real-world buyers and sellers in transactions involving wind farms consider the impact of [tax credits] in projecting future cash flows from the tangible personal property comprising the wind farms.” Appellants Brief-in-Chief 21. A recurring theme in the Appellants' brief is the use of the phrase “real-world buyers and sellers.” This begs the question: real-world buyers and sellers of what? Appellants either explicitly state or imply that the “real-world buyers and sellers” are transacting for wind energy tangible personal property, but they presented zero evidence at trial supporting this claim. All of the market evidence presented by Mr. Payne at trial was for business acquisitions, not for asset sales of only tangible wind turbines. ROA, Doc. 62, Tr.Vol.II p. 136:13-25, 137:1-6. Oklahoma does not assess ad valorem tax on business value. Only tangible personal property is subject to ad valorem tax. Okla. Const. art. 10, § 8(A)(1); 68 O.S. §§ 2804, 2807, 2817(A); *see discussion infra*

Proposition III.A. So, in fact, there was no evidence presented at trial of any “real-world transactions involving the purchase and sale of tangible personal property.” Moreover, the comparable sales and the corresponding data presented at trial were rigorously disputed by Kingfisher Wind with cross-examination and through the lengthy and detailed testimony of rebuttal expert Robert Reilly.

Appellants’ legal arguments lack merit and fail to establish that tax credits are taxable property in Oklahoma or that the judgment is against the clear weight of the evidence.

II. TAX CREDITS MUST BE EXCLUDED FROM THE VALUE OF TANGIBLE PERSONAL PROPERTY BECAUSE THEY ARE INTANGIBLE PERSONAL PROPERTY EXEMPT FROM TAXATION.

A. Though the District Court erred in its reasoning, its judgment should be affirmed under the rationale that tax credits are intangible personal property exempt from taxation.

Although the District Court correctly ruled that the value of tax credits must be excluded in the valuation of tangible personal property, it erred in its determination that tax credits are not intangible personal property that is exempt from taxation under Article 10, Section 6A of the Oklahoma Constitution. The District Court’s judgment should be affirmed on this ground, which is well supported by the record and Oklahoma law. As discussed above, Kingfisher Wind moved for partial summary judgment arguing that tax credits are intangible personal property, but the Court rejected this argument and the application of *Stillwater Housing* in its rulings on summary judgment. ROA, Doc. 30, p. 1-2; ROA, Doc. 41, p. 1-2; see Summary of the Record *supra* at 4-5. After trial, the District Court issued its judgment affirming its erroneous rulings but concluding that the tax credits should be excluded from the Subject Property’s valuation because tax credits are neither tangible nor intangible property

and the right to claim the tax credits was contractually committed to a tax equity investor before the assessment date. ROA, Doc. 49, p. 2-5.

Despite Appellants' statement that the District Court's rulings on partial summary judgment "were not appealed by either party and are not at issue in this appeal," Kingfisher Wind need not have appealed these rulings to now renew its argument that tax credits are intangible personal property exempt from taxation as an additional legal rationale for upholding the District Court's judgment. Appellants' Brief-in-Chief 7-8. An appellate court will affirm if the trial court reached the correct ultimate result, regardless of whether the trial court erred either in legal reasoning or factual findings in reaching that result. *E.g., Farley v. City of Claremore*, 2020 OK 30, ¶ 19, 465 P.3d 1213, 1225 (a legally correct judgment must be affirmed although it was anchored to a theory different from that on which it comes to be tested on appellate review, when the different theory is adequately supported by the record); *Holliman v. Twister Drilling Co.*, 2016 OK 82, ¶ 12, 377 P.3d 133, 136 ("If the trial court reaches the correct result but for the wrong reason, its judgment is not subject to reversal. Rather, the Court is not bound by the trial court's reasoning and may affirm the judgment below on a different legal rationale."); *MGE*, 2008 OK 94, ¶ 68 n.85, 234 P.3d 938, 960 n.85 ("An appellate court will affirm a correct judgment on any applicable theory."). A ruling that the right to claim tax credits is intangible personal property is supported by the record and would be in accordance with the broad scope of the constitutional exemption and would provide certainty to Oklahoma's ad valorem tax law.

B. The District Court erred in rejecting the application of *Stillwater Housing*.

The District Court based its ruling that tax credits are not intangible personal property in large part on the fact that tax credits are not specifically listed as exempt intangibles in the

Constitution. ROA, Doc. 49, p. 4. However, Article 10, Section 6A of the Oklahoma Constitution does not enumerate any specific types of exempt intangibles. To the contrary, it exempts all intangible personal property from ad valorem tax: “Beginning January 1, 2013, 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. Moreover, in *Stillwater Housing*, the Court of Civil Appeals, relying on the Supreme Court’s analysis in *MGE*, held in part that “tax credits are intangible personal property exempt from taxation.” *Stillwater Housing*, 2011 OK CIV APP 51, ¶ 12, 254 P.3d at 729 (citing *MGE*, 2008 OK 94, ¶ 20, 234 P.3d at 946-47 n.18). The Supreme Court denied the assessor’s petition for certiorari in *Stillwater Housing* by order dated March 28, 2011, and allowed the Court of Civil Appeals’ Order of Publication to stand.

Only a year after the Court of Civil Appeals published *Stillwater Housing* and the Supreme Court denied certiorari, the Legislature passed a referendum to amend Article 10, Section 6A to exempt all intangible personal property from taxation. S.J.R. 52, 53rd Leg., 2d Reg. Sess. (Okla. 2012), App’x Tab No. 6. When the Legislature proposed its referendum, tax credits were known to be intangible personal property. The Legislature could have acted to overrule *Stillwater Housing* by excluding tax credits from the exemption, but instead it chose the broadest language possible for the exemption. In November 2012, Oklahoma voters approved the referendum expanding the scope of Article 10, Section 6A, which became the current text of Article 10, Section 6A effective January 1, 2013. *Stillwater Housing*’s holding that tax credits are intangible personal property was reaffirmed at each of these steps.

The District Court below erred in rejecting the holding of *Stillwater Housing*. As shown by the record herein, had the District Court adhered to *stare decisis* and the *Stillwater*

Housing decision, it would have reached the same result, that tax credits must be excluded from the valuation of the tangible personal property, but under the more correct rationale that tax credits are intangible personal property exempt from taxation under Article 10, Section 6A of the Oklahoma Constitution.

C. The District Court judgment should also be upheld based on the additional holding of *Stillwater Housing* that tax credits are not income.

Stillwater Housing also unequivocally held that tax credits are not income and do not replace income. 2011 OK CIV APP 51, ¶ 10, 254 P.3d at 728. Though the District Court did not opine as to the correctness of this additional holding in *Stillwater Housing*, it is another important reason for affirming the District Court's judgment rejecting the testimony of Appellants' only trial witness, Mr. Payne, who improperly treated the tax credits and RECs as income in his income projection. ROA, Doc. 63, Tr.Vol.III p. 32:23–33:3.

In holding that the tax credits should not be treated as income to the owner of the housing development, the court in *Stillwater Housing* reasoned:

A tax credit is a government subsidy. Congress established the low income housing tax credit program as part of the Tax Reform Act of 1986 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. 26 U.S.C. § 429(a)(1) and (2). 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.**

2011 OK CIV APP 51, ¶ 10, 254 P.3d at 727 (citation omitted) (emphasis added). The court added that its view is consistent with the U.S. Supreme Court's view of tax credits in *Randall v. Loftsgaarden*, 478 U.S. 647, 657 (1986). 2011 OK CIV APP 51, ¶ 10, 254 P.3d at 728.

Randall considered whether federal tax benefits received by owners of certain securities could be considered “income” under securities laws. 478 U.S. at 655-57. The U.S. Supreme Court held that a security owner’s receipt of federal tax benefits, in the form of tax deductions and tax credits, did not constitute “income” under “any reasonable definition.” *Id.* at 656. The court explained its reasoning as follows:

The tax benefits attributable to ownership of a security initially take the form of tax deductions or tax credits. **These 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. Unlike payments in cash or property received by virtue of ownership of a security—such as distributions or dividends on stock, interest on bonds, or a limited partner’s distributive share of the partnership’s capital gains or profits—the “receipt” of tax deductions or credits is not itself a taxable event, for the investor has received no money or other ‘income’ within the meaning of the Internal Revenue Code. . . .**

Id. at 656-57 (citation omitted) (emphasis added). Accordingly, the *Randall* court rejected the argument “that the tax deductions petitioners were entitled to take by virtue of their partnership interests constitute[ed] income or profits.” *Id.* at 657 (citation omitted).

Because tax credits function as a reduction in tax liability, it is improper to treat them as income to property. In Kingfisher Wind’s case, the right to claim the tax credits was sold to its tax equity investor for upfront equity capital contributions and functions as a return of the investor’s capital as the tax credits are claimed over a 10-year period against future tax obligations. ROA, Doc. 61, Tr.Vol.I p. 34:10-17, 35:14–36:2. Kingfisher Wind receives no cash flow from the federal tax credits. ROA, Doc. 61, Tr.Vol.I p. 67:14-22, 197:19-22.

Yet, despite these uncontroverted facts and *Stillwater Housing*’s holding that tax credits are not income, Appellants’ expert, Mr. Payne, treats the tax credits and RECs as income in his income approach, thereby improperly enhancing the income projections of the tangible

personal property and leading to his finding of no economic obsolescence. ROA, Doc. 63, Tr.Vol.III p. 62:12-22. Mr. Payne testified that within his income approach analysis, if he had removed the value of tax credits and RECs from his cash flows, his discounted cash flow would have been less than \$200 million, which is similar to Kevin Reilly's opinion of value of \$175 million that the District Court adopted. ROA, Doc. 61, Tr.Vol.I p. 164:9-22; ROA, Doc. 62, Tr.Vol.II p. 155:20-25.

As Robert Reilly testified, including tax credits in an income projection when valuing tangible personal property is inconsistent with standard appraisal practice. ROA, Doc. 63, Tr.Vol.III, p. 62:12-22. Instead, an appraiser should look only at the operating income from the assets themselves. ROA, Doc. 63, Tr.Vol.III, p. 63:9-15. It would only be proper for an appraiser to include tax credits when performing a business valuation because tax credits go with the value of the business. ROA, Doc. 63, Tr.Vol.III p. 63:17-19. But, the Subject Property is tangible personal property and not a business. The District Court's judgment rejecting Mr. Payne's analysis is clearly supported by the evidence and should be affirmed on grounds that tax credits are not income and are exempt from taxation as intangible personal property.

D. Tax credits have all the characteristics of intangible personal property.

Though neither Article 10, Section 6A of the Constitution nor the Ad Valorem Tax Code defines "intangible personal property," the Ballot Title for the 2012 amendment to Article 10, Section 6A does define this term, and it informs the constitutional exemption's interpretation. *See Sw. Bell Tel. Co. v. Okla. State Bd. of Equal.*, 2009 OK 72, ¶ 13, 231 P.3d 638, 642. The Ballot Title defined "intangible personal property" as "property whose value is not derived from its physical attributes, but rather from what it represents or evidences." Final

Ballot Title, State Question 766, Legislative Referendum No. 363 (“Ballot Title”), App’x Tab No. 1.

The Supreme Court has defined “intangible personal property” similarly in case law. See *Globe Life & Acc. Ins. Co. v. Okla. Tax Comm’n*, 1996 OK 39, 913 P.2d 1322, 1328; *Perkins v. Okla. Tax Comm’n*, 1967 OK 110, 428 P.2d 328, 329-30. In *Globe Life*, the Supreme Court compared “‘tangible personal property’ refer[ring] to the rights in tangible physical things of the world over which *possession* may be taken” to “[i]ntangible personal property’ encompass[ing] property rights which—though represented by tangible objects (e.g., stock certificates, bonds, and notes)—are essentially incorporeal in that they have limited intrinsic value and *ultimately* can only be claimed or enforced by a legal action.” 1996 OK 39, 913 P.2d at 1326 (emphasis in original). Distinguishing between tangible and intangible personal property at common law, *Globe Life* said, requires looking to “*the personal property’s end use or disposition* to determine whether it is tangible or intangible.” *Id.* 1996 OK 39, 913 P.2d at 1328 (emphasis in original). Moreover, “[e]arly common law classified personal property by examining the rights which were being asserted in the *thing*. While *possession* is the key to enforcement of rights in *tangible personal property*, rights in *intangible personal property* are enforceable *only by a claim or an action*.” *Id.* 1996 OK 39, 913 P.2d at 1329 (emphasis in original).

In *Perkins*, the Supreme Court also contrasted “tangible personal property” defined as “property that may be seen, weighed, measured and estimated by the physical senses and which is capable of being possessed, property which may be touched; ‘such as is perceptible to the senses,’” with “intangible personal property” defined as having “no intrinsic and marketable

value but which is representative or evidence of value, such as certificates of stocks, bonds, promissory notes and franchises.” 1967 OK 110, 428 P.2d at 329-30.

Tax credits and the mechanisms used to transfer and monetize the tax credits readily meet the characteristics of intangible personal property identified by these authorities and as shown by the evidence presented at trial. The value of tax credits is not derived from their physical attributes, but rather from what they represent—the right to claim tax payment reductions. On January 21, 2015, MidAmerican’s rights to claim the tax credits and to become the Class A member were created by contract through the ECCA. ROA, Doc. 61, Tr.Vol.I p. 56:23–57:2. On January 1, 2016, MidAmerican remained contractually obligated to purchase the Class A membership interests, and FR Holdings II remained contractually obligated to transfer the Class A membership interests to MidAmerican, upon completion of the project. ROA, Doc. 61, Tr.Vol.I p. 56:23–57:6, 57:13-17. The right to claim the tax credits is transferable through Class A membership interests in the holding company of Kingfisher Wind, LLC. ROA, Doc. 61, Tr.Vol.I p. 62:7-13; Am. ROA, Doc. 1, Pl.’s Ex. 44, p. P044.0102. Because the tax credits are creatures of contract, the right to claim them is legally protectable in a court of law. Mr. Hanna testified that if the allocation of the tax credits was not made as required by the LLC Agreement, FR Holdings II would be in default. ROA, Doc. 61, Tr.Vol.I p. 64:15-25, 65:1-4.

E. The Class A membership interests that transfer the right to claim the tax credits are also intangible personal property exempt from ad valorem tax.

As the District Court ruled, effective January 21, 2015, ownership of the right to claim tax credits was transferred to a tax equity investor, MidAmerican. ROA, Doc. 49, p. 3. “The right to claim those [tax credits] by Mid-American [sic], was in the form of a Class A membership interest and was in exchange for Mid-American providing financing for the

project.” ROA, Doc. 49, p. 3. Membership interests are intangible personal property exempt from ad valorem tax under Article 10, Section 6A of the Constitution. Membership interests in limited partnerships were categorized as intangible personal property and exempted from ad valorem tax under the prior version of Article 10, Section 6A of the Constitution that exempted an enumerated list of intangible property. Subsection (e) of the prior version of Article 10, Section 6A exempted “[s]hares of stock or other written evidence or proportional shares of beneficial interests in corporations, joint stock companies, associations, syndicates, express or business trusts, special or limited partnerships, or other business organizations.” Okla. Const. art. 10, § 6A(e) (1968) (emphasis added). Membership interests remain exempt under Article 10, Section 6A of the Oklahoma Constitution today. *See* Final Ballot Title, *supra* (recognizing that the prior version of Article 10, Section 6A exempted **some** intangible personal property but that the amendment would exempt **all** intangible personal property).

The evidence at trial showed that MidAmerican, the tax equity investor for the Kingfisher Wind project, executed the ECCA on January 21, 2015, committing to pay \$269 million in exchange for 100 percent of the Class A membership interests, which carried the right to claim 99 percent of the tax credits. ROA, Doc. 61, Tr.Vol.I p. 47:19-25. MidAmerican’s membership interests comprise 99 percent of the allocations attributable to tax credits and other income tax incentives. ROA, Doc. 61, Tr.Vol.I p. 48:9-22. The Class A membership interests that transfer the right to claim the tax credits and the ECCA, which contractually allocated the Class A membership interests, are intangible personal property exempt from ad valorem taxation.

The judgment of the District Court, though partially based on the erroneous legal conclusion that tax credits are not intangible personal property, reaches the correct result. The

District Court's judgment should be affirmed on the additional ground that tax credits and the membership interests they comprise are intangible personal property, which is a theory adequately supported by the record.

III. ONLY KINGFISHER WIND'S TANGIBLE PERSONAL PROPERTY IS SUBJECT TO AD VALOREM TAX.

Tax credits should be excluded from the valuation of tangible personal property not only because they are intangible personal property, but also because they are not tangible personal property, which is the only personal property subject to ad valorem tax in Oklahoma. Appellants are improperly attempting to levy ad valorem tax on these tax credits. The District Court properly concluded that tax credits are not tangible personal property because they do not fall "under any persuasive definition of tangible property," and Appellants have conceded this issue, as shown by the record. ROA, Doc. 38, p. 4; ROA, Doc. 49, p. 4; ROA, Doc. 61, Tr.Vol.I p. 185:3-7.

A. Before property can be taxed, it must be classified by the Legislature.

Oklahoma only assesses property tax on property that has been classified by the Legislature for ad valorem tax. *See* Okla. Const. art. 10, § 22; 68 O.S. § 2803; *Okla. Indus. Auth. v. Barnes*, 1988 OK 98, 769 P.2d 115, 117. Classification of property is vested exclusively in the Legislature, restricted only by explicit constitutional exemptions. *See, e.g., Barnes*, 1988 OK 98, 769 P.2d at 117; *Globe Life*, 1996 OK 39, 913 P.2d at 1326. The Legislature, pursuant to the authority set out in Article 10, Section 22 of the Oklahoma Constitution, has classified five types of taxable property: (1) real property; (2) personal property, except the personal property exempted by (3); (3) personal property in the form of household goods, which certain counties have exempted pursuant to Article 10, Section 6(b) of the Constitution; (4) public service corporation property; and (5) railroad and air carrier

property. 68 O.S. § 2803. The Ad Valorem Tax Code defines real and personal property classified for taxation in 68 O.S. §§ 2806 and 2807, respectively. Only *tangible* personal property is assessable for ad valorem tax. Okla. Const. art. 10, § 8(A)(1); 68 O.S. §§ 2804, 2807, 2817(A).

B. Because tax credits are not tangible personal property, they are not subject to ad valorem tax.

In its judgment, the District Court ruled that tax credits are not tangible personal property. ROA, Doc. 49, p. 4. Even now in their Brief-in-Chief, Appellants do not claim that tax credits are taxable tangible personal property. Instead, they claim tax credits are “economic benefits” that impact the fair cash value of tangible personal property. However, tax credits are economic benefits attributable to the equity ownership, i.e., stock or membership interests, as the District Court ruled on summary judgment before trial. ROA, Doc. 63, Tr.Vol.III p. 64:1-7. Tax credits are not attributable to the tangible personal property.

If tax credits are not tangible personal property, as the District Court ruled and Appellants stipulated, it is axiomatic that they are not subject to ad valorem tax, either directly through assessment or indirectly through allocation of their value to taxable tangible personal property as the Appellants seek to do in this case.

C. Kingfisher Wind’s expert appraiser properly limited his appraisal to the tangible personal property at issue.

Kingfisher Wind’s expert Kevin Reilly is the only witness who limited his appraisal to the tangible personal property at issue, and the District Court adopted his cost approach appraisal value of \$175 million. In contrast, Appellants inaccurately define the subject of this case throughout their Brief-in-Chief. Appellants refer to the Subject Property and other wind tangible personal property as “certain tangible property comprising a wind farm,” “wind farm

facility,” “wind farm assets,” “wind farm,” “wind projects,” and “facilities” throughout the brief depending on the context and how it might benefit their argument. Appellants’ Brief-in-Chief 1, 3, 5, 8, 21. Most of these references incorporate the business enterprise of the wind farm. Yet, the property at issue is the tangible components of a wind farm (i.e, concrete and steel), not the wind farm business. ROA, Doc. 63, Tr.Vol.III p. 63:17-25. Appellants’ error highlights the crux of this case—Appellants’ expert, Mr. Payne, includes tax credits attributable to the wind farm business, not to the tangible personal property, while Kingfisher Wind’s expert, Kevin Reilly, values only the tangible personal property.

In estimating fair cash value of the wind turbines and related equipment, Kevin Reilly applied principles of standard appraisal practice described in the treatise *Valuing Machinery and Equipment*. ROA, Doc. 61, Tr.Vol.I at 105:14–106:9. Kevin Reilly testified regarding his methodology based on these principles that require identifying all non-tangible components of a business and excluding them upfront from the value of tangible personal property. ROA, Doc. 61, Tr.Vol.I p. 119:9–121:25; see *Valuing Machinery and Equipment, supra*, at 129, 175, 538, 551, App’x Tab No. 5.

First, Kevin Reilly found the wind turbines and related equipment to meet the treatise’s definition of “tangible assets” as “[p]hysical and measurable assets, including assets such as land, land improvements, buildings, machinery and equipment, and working capital.” ROA, Doc. 61, Tr.Vol.I at 119:13–120:4; *Valuing Machinery and Equipment, supra*, at 551, App’x Tab No. 5. Second, based upon his experience as an appraiser, Kevin Reilly found that wind development incentives including the tax credits, the REC Agreements, and the Energy Hedge meet the treatise’s definition of “intangible asset” as “[a]n asset having no physical existence yet having value based on rights and privileges associated with it” because they provide rights

and privileges to the wind farm business. ROA, Doc. 61, Tr.Vol.I p. 120:5-25; *Valuing Machinery and Equipment, supra*, at 538, App'x Tab No. 5. Third, Kevin Reilly relied on the treatise's explanation of the final step in the income approach to fair cash value, which provides as follows:

If the valuation is for a complex facility such as an industrial plant, the cash flow forecasts include both the returns of and the returns on all the assets of the plant. This would include land, land improvements, buildings, machinery and equipment, working capital, and any intangible assets. To estimate the value of the machinery and equipment, the appraiser must subtract the values for these other assets.

Valuing Machinery and Equipment, supra, at 129 (emphasis added), App'x Tab No. 5. Kevin Reilly testified that the significance of this final step is that under the income approach for a complex facility such as a power plant or a wind farm, the cash flow forecast would include returns of all the plant's assets (i.e., land, land improvements, building, machinery and equipment, working capital, and intangible assets), so to estimate the value of only the machinery and equipment, as he was asked to do for the Subject Property, the appraiser must subtract values of the other non-taxable assets. ROA, Doc. 61, Tr.Vol.I p. 120:16–121:1-7. Fourth, Kevin Reilly testified that he relied on the treatise's statement that “[d]educting the working capital and intangible asset values from the business enterprise value results in the value of the tangible assets, i.e., all real and personal property.” ROA, Doc. 61, Tr.Vol.I p. 121:8-21; *Valuing Machinery and Equipment, supra*, at 175, App'x Tab No. 5.

Applying these principles, Kevin Reilly identified the right to claim tax credits, the REC Agreements, and the Energy Hedge as intangible components of the wind farm business and excluded them upfront in his analysis. ROA, Doc. 61, Tr.Vol.I p. 118:24–119:8. Kevin Reilly considered each of the three appraisal approaches for estimating fair cash value and reached opinions of value under both the income and cost approaches. ROA, Doc. 61, Tr.Vol.I

p. 153:14-19, 164:25–165:1. Under his cost approach, Kevin Reilly calculated the replacement cost new for the Subject Property and then subtracted depreciation he identified in the form of economic obsolescence. ROA, Doc. 61, Tr.Vol.I p. 124:9-15, 157:13-16; 68 O.S. § 2802(15). The economic obsolescence he identified is attributable to the intangible wind development incentives that are needed to justify the construction of the wind project. ROA, Doc. 61, Tr.Vol.I p. 126:3-9, 160:3-16. Kevin Reilly explained the economic reality of these incentives, stating as follows:

A: This was one of those circumstances when we're taught in trainings and through education as appraisers where we learn to be careful because **cost doesn't always equal value.** This is a perfect example of that. **No one would build this without the incentives. . . . That's why the government has stepped in and produced these incentives.**

As Mr. Hanna testified earlier to, you don't have these incentives on fossil plants. Fossil plants can run whenever they want. They're not at the mercy of the wind. They don't cost nearly as much to construct.

So this is a perfect case of **cost does not equal value.** . . . **You cannot get a return on this investment, as I show in my economic obsolescence analysis, even close to what it cost to buy the equipment.** The value is not there for the personal property.

ROA, Doc. 61, Tr.Vol.I p. 194:21–196:7 (emphasis added).

By deducting the economic obsolescence value, Kevin Reilly valued the Subject Property as a standalone operation and excluded anything that was not tangible personal property. ROA, Doc. 61, Tr.Vol.I p. 118:13–119:13, 179:2-19, 194:1-14. Kevin Reilly applies the same methodology any time he is engaged to appraise tangible personal property and would do so regardless of any legal ruling on the classification of the wind development incentives. ROA, Doc. 61, Tr.Vol.I p. 121:22-25, 178:23–179:19.

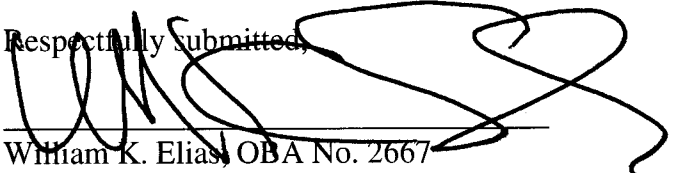
Kevin Reilly's testimony regarding his opinion of fair cash value for the Subject Property under the cost approach, determined in accordance with the ASA MTS treatise, standard appraisal practice, and his experience as an appraiser, is competent evidence

justifying a change in the Subject Property's value for ad valorem tax assessment, and the District Court reasonably adopted his cost approach appraisal value of \$175 million. ROA, Doc. 49, p. 5. The judgment of the District Court should be affirmed under the rationale that tax credits are not tangible personal property.

CONCLUSION

The District Court's judgment that the tax credits must be excluded from the valuation of the tangible personal property is supported by Oklahoma law and the facts of this case and must be affirmed for three reasons. First, though the District Court ruled otherwise, the tax credits are intangible personal property exempt from taxation under Article 10, Section 6A of the Oklahoma Constitution as held by the Court of Civil Appeals in *Stillwater Housing*. Second, the District Court ruled, and the Appellants stipulated, that tax credits are not tangible personal property. Because only tangible personal property is subject to tax, under this rationale the District Court was correct in excluding the value of tax credits from the valuation of tangible personal property. Third, the competent and uncontroverted evidence at trial established that the right to claim the tax credits had already been contractually committed to MidAmerican, the tax equity investor, prior to the assessment date and would not have been included in any hypothetical sale of the tangible personal property on January 1, 2016. Kingfisher Wind respectfully requests that this Court deny Appellants' appeal and affirm the District Court's judgment.

Respectfully submitted,



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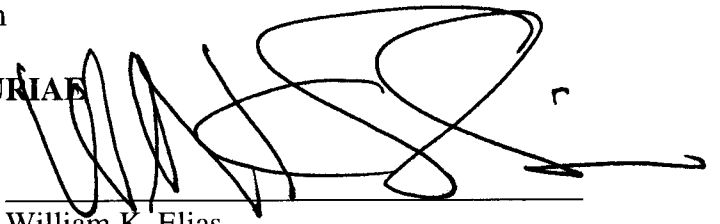
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