



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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

Case No. 119837

FILED
SUPREME COURT
STATE OF OKLAHOMA

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BRIEF-IN-CHIEF OF DEFENDANTS/APPELLANTS
MATT WEHMULLER, CANADIAN COUNTY ASSESSOR, AND
CAROLYN MULHERIN, KINGFISHER COUNTY ASSESSOR

On Appeal from the District Court of Canadian County
 Canadian County Case No. CJ-2016-241
 (Consolidated with Kingfisher County Case No. CV-2016-61)
 The Honorable Jack D. McCurdy II
 Canadian County District Judge

Ad Valorem Tax Appeal

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INTRODUCTION

The Oklahoma Constitution provides that all property subject to ad valorem tax shall be assessed for taxation at its “fair cash value” determined as of January 1 each year. Okla. Const. Art. 10, § 8; *see* 68 Okla. Stat. § 2818; 68 Okla. Stat. § 2817(A). “‘Fair cash value’ or ‘market value’ means 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 Okla. Stat. § 2802(19). This case involved the determination of the fair cash value of certain tangible personal property comprising a wind farm owned by Kingfisher Wind, LLC (“**KW**”) in Canadian and Kingfisher Counties, Oklahoma as of January 1, 2016 (the “**Subject Property**”) for purposes of calculating the amount of ad valorem tax owed by KW.

One of the key economic benefits of owning a wind farm facility is the owner’s ability to claim renewable energy production tax credits (“**Production Tax Credits**” or “**PTCs**”) on its income tax return based on the volume of electricity produced and sold from the facility the prior year. This economic reality is a key factor considered by buyers and sellers in the real world when deciding how much to pay or to accept for the purchase and sale of wind farm assets. Consistent with this reality, at trial Assessors presented an analysis of the fair cash value of the Subject Property taking into account the economic impact of an owner’s ability to claim PTCs. Conversely, KW completely excluded the effect of PTCs from its analysis and, as a result, advocated a drastically lower fair cash value.

In direct opposition to controlling law, the District Court incorrectly reasoned that in this instance, a hypothetical buyer of the Subject Property on January 1, 2016, would not be entitled to claim PTCs on its income tax return based on electricity generated and sold after

becoming the new owner. Based on this erroneous analysis, the District Court accepted the reduced fair cash value advocated by KW. Because the linchpin of the District Court's analysis is incorrect and contrary to controlling law, the District Court's decision should be reversed and judgement entered based on the fair cash value presented by Assessors.

ISSUES PRESENTED

- Issue I:** Whether the District Court erred by determining the fair cash value of the Subject Property for tax year 2016 to be \$175 million.
- Issue II:** Whether the District Court erred in determining that the economic benefit of PTCs could not in this instance be used or taken into account in determining the fair cash value of the Subject Property.
- Issue III:** Whether the District Court erred by not applying, or not properly applying, the hypothetical willing buyer-willing seller standard for the purpose of determining the fair cash value of the Subject Property.
- Issue IV:** Whether the District Court erred in finding that an unrelated third party, MidAmerican Wind Tax Equity Holdings, LLC, could claim PTCs on its income tax return after the hypothetical purchase and sale of the Subject Property to a hypothetical willing buyer.
- Issue V:** Whether the District Court erred in determining that a hypothetical willing buyer of the Subject Property would be bound by a contractual agreement between KW's parent entities and an unrelated third party, MidAmerican Wind Tax Equity Holdings, LLC, such that the hypothetical willing buyer would be precluded from claiming PTCs after the hypothetical sale of the Subject Property.
- Issue VI:** Whether the District Court erred by rendering a decision contrary to undisputed evidence that real-world buyers and sellers in the marketplace consider the economic benefits of PTCs as a factor in determining the appropriate purchase price for the tangible personal property comprising a wind farm.

SUMMARY OF THE RECORD

Construction of the Subject Property. In 2015, KW began construction of the Subject Property, consisting of 149 Wind Turbine Generators (“WTGs”), electrical equipment, maintenance facility, substation and transmission line comprising the Kingfisher Wind Farm (the “Wind Farm”). (ROA, Doc. 61, Tr. Vol. at 50; ROA, Docs. 66-67, Defs.’ Ex. 148, p. 1.) 100 of the WTG’s are located in Kingfisher County and 49 of the WTGs are located in Canadian County. (ROA, Docs. 66-67, Defs.’ Ex. 148, p. 1.) Although construction of the Wind Farm was not yet complete and commercial operations had not yet begun as of January 1, 2016, KW’s business records reflect that KW had spent over \$450 million on the Subject Property during 2015. (ROA, Doc. 62, Tr. Vol. II at 44-49, 53-54; *see also* ROA, Docs. 66-67, Defs.’ Ex. 148, p. 2; ROA, Docs. 66-67, Defs.’ Ex. 148, Appx. 2.7; ROA, Docs. 66-67, Defs.’ Ex. 148, Appx. 2.8-B, p. 21; ROA, Doc. 65, Defs.’ Exs. 17, 122 & 139.)

Administrative Proceedings. KW submitted Form 900XM Applications for a Five-year Ad Valorem Tax Exemption for Oklahoma Manufacturing or Research & Development Facilities (“900XM Applications”), seeking to exempt the Subject Property from ad valorem taxation pursuant to 68 Okla. Stat. § 2902 for a period of five (5) years beginning on January 1, 2016. (ROA, Defs.’ Exs. 127-128.) KW stated that, as of January 1, 2016, KW’s original cost for the Subject Property totaled \$459,286,149. (ROA, Defs.’ Exs. 127-128.) KW’s 900XM Applications covering the Subject Property were rejected as incomplete. (ROA, Doc. 61, Tr. Vol. I at 72.)

Its request for exemption having been denied, KW submitted Form 901 Business Personal Property Renditions (“901 Renditions”) to the Assessors, listing the Subject Property pursuant 68 Okla. Stat. § 2835 for purposes of ad valorem taxation. (ROA, Defs.’ Exs. 127-

128.) KW stated that, as of January 1, 2016, KW's original cost for the Subject Property totaled \$459,286,149. (ROA, Defs.' Exs. 127-128.)

Based on the information KW submitted, Assessors determined the fair cash value of the Subject Property and KW appealed those values to the Boards of Equalization ("BOE") in both Counties. (ROA, Doc. 3, Pl.'s First Am. Pet.; ROA, Doc. 9, Pl.'s First Am. Pet.) The Kingfisher County BOE determined the fair cash value of KW's tangible personal property located in Kingfisher County as of January 1, 2016, to be \$275,839,357.00, and the Canadian County BOE determined the fair cash value of KW's tangible personal property located in Canadian County as of January 1, 2016, to be \$182,164,150.00, for a total fair cash value of \$458,003,507 for the Subject Property. (ROA, Doc. 3, Pl.'s First Am. Pet.; ROA, Doc. 9, Pl.'s First Am. Pet.) KW appealed both decisions, and the two cases were consolidated into the Canadian County District Court under Case No. CV-2016-241 for purposes of discovery and trial. (ROA, Doc. 13, Order of Consolidation; ROA, Doc. 12, Order of Transfer.)

District Court Proceedings. Two of the future economic benefits of owning the Subject Property are the ability to claim; (1) accelerated and bonus depreciation deductions, and (2) PTCs calculated based on the volume of electricity produced and sold from the Subject Property. (ROA, Doc. 61, Tr. Vol. I at 34; ROA, Doc. 62, Tr. Vol. II at 77-79; ROA, Docs. 66-67, Defs.' Ex. 148, p. 5.) The undisputed evidence showed that buyers and sellers in real-world transactions involving the purchase and sale of tangible personal property comprising wind energy facilities consider PTCs in projecting future cash flows of such tangible personal property to arrive at a purchase price. (ROA, Doc. 62, Tr. Vol. II at 77-79, 112-115, 156, 158.)

During the litigation, the parties exchanged expert reports prepared by their respective expert witnesses. (ROA, Docs. 66-67, Defs.' Ex. 148; ROA, Doc. 69, Pl.'s Exs. 46-47.)

Assessor's expert witness, David R. Payne ("Payne"), considered the "cost approach," the "income and expense approach" and the "sales comparison approach," which are the three (3) statutory approaches or methods used to determine the fair cash value of property subject to ad valorem taxation. (ROA, Docs. 66-67, Defs.' Ex. 148); *see* 68 O.S. § 2802(15), (21), (26).

Utilizing information obtained from several public sources, as well as KW's business records reflecting the amount actually incurred during construction as of January 1, 2016, Payne determined the cost to replace the Subject Property with a property of equivalent utility. (ROA, Doc. 62, Tr. Vol. II at 109-12; ROA, Docs. 66-67, Defs.' Ex. 148, p. 32-33.) Considering the income and expense approach, Payne explained that tangible personal property comprising a wind farm, such as the Subject Property, generates three components of cash flow: (i) the sale of electricity generated from the property; (ii) the sale of "committed energy" or "capacity," i.e. the commitment of the facility to be available to produce electricity when needed; and (iii) tax attributes, including depreciation and tax credits. (ROA, Doc. 62, Tr. Vol. II at 77-79; ROA, Docs. 66-67, Defs.' Ex. 148, p. 5.) Therefore, Payne analyzed all future economic benefits to be generated by the Subject Property, including the impact of PTCs. (ROA, Doc. 62, Tr. Vol. II at 35-41; ROA, Docs. 66-67, Defs.' Ex. 148, p. 113-14.)

Finally, under the sales comparison approach, Payne considered 27 transactions involving 89 wind projects that sold during the period of 2012-2015. Payne made adjustments to these transactions to account for differences in age, size, location, and considerations for the power market the project sells power into and quality of the wind resource for the project. Payne then narrowed the number of transactions to those most comparable to the Subject Property. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 33-35; ROA, Docs. 66-67, Defs.' Ex. 148, Appx. 4.1-4.8; ROA, Doc. 62, Tr. Vol. II at 112-13, 118-20.)

Based on his analysis, Payne concluded the fair cash value of the Subject Property was \$416,402,000 as of January 1, 2016. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 2-3.)

KW's first expert witness, Kevin Reilly, also submitted an expert report reflecting his opinion as to the fair cash value of the Subject Property. (ROA, Doc. 69, Pl.'s Ex. 46.) In his report, Kevin Reilly explains that although one of the main drivers for investors or developers of wind farms is the potential for tax credits, he excluded the economic impact of PTCs from his analysis based on his understanding that PTCs are a form of intangible asset that is exempt from ad valorem tax under Oklahoma law. (ROA, Doc. 61, Tr. Vol. I at 178-79, 194; *see also* ROA, Doc. 69, Pl.'s Ex. 46, p. 3-4, 21-22.) As a direct result of excluding the impact of PTCs on this basis, Kevin Reilly concluded that the fair cash value of the Subject Property on January 1, 2016, was only \$164 million. (ROA, Doc. 61, Tr. Vol. I at 165; *see also* ROA, Doc. 69, Pl.'s Ex. 46, p. 2, 9.) KW's second expert witness, Robert Reilly, submitted an expert report criticizing Payne's valuation of the Subject Property, because Payne considered the economic impact of PTCs that could be claimed by the owner of the Subject Property. (ROA, Doc. 63, Tr. Vol. III at 62; *see also* ROA, Doc. 69, Pl.'s Ex. 47, p. 7.) As the foundation of his opinion in this regard, Robert Reilly explains in his report: "we were instructed by legal counsel that PTCs . . . are intangible personal property exempt from taxation under Oklahoma law." (ROA, Doc. 63, Tr. Vol. III at 88-89; *see also* ROA, Doc. 69, Pl.'s Ex. 47, p. 7.)

Summary Judgment Rulings. After the exchange of expert witness reports, KW filed a motion for partial summary judgment, asking the District Court to rule that PTCs claimed on an income tax return are items of intangible personal property exempt from ad valorem taxation under Oklahoma law and should be excluded from the valuation analysis. (ROA, Doc. 15, Pl.'s

Mot. for Partial Summ. J.) Assessors filed a combined response and counter-motion for partial summary judgment, asking the District Court to rule just the opposite, i.e., that PTCs are not intangible personal property, but are merely an economic reality of owning the Subject Property. (ROA, Doc. 24, Defs.' Resp. & Counter-Mot. for Partial Summ. J.) After full briefing and oral arguments, the District Court denied KW's motion for partial summary judgment and sustained Assessor's motion for partial summary judgment, ruling that PTCs "are not 'intangible personal property' that is exempt from ad valorem taxation." (ROA, Doc. 30, Memo. Opin., p. 1-2.)

KW then filed a second motion for partial summary judgement, requesting a ruling that PTCs claimed on an income tax return are not tangible personal property and should be excluded from the valuation analysis on that basis. (See ROA, Doc. 37, Pl.'s 2nd Mot. for Partial Summ. J.) Assessors filed a response and second cross-motion for partial summary judgment, requesting the District Court to rule that: (1) PTCs are not property of any kind; (2) PTCs are an economic factor, influence or benefit of owning a wind farm; and (3) analysis of the extent to which PTCs affect the fair cash value of the Subject Property should not be excluded. (ROA, Doc. 38, Defs.' 2nd Resp. & Counter-Mot. for Partial Summ. J.) After full briefing and oral arguments, the District Court affirmed its previous ruling that PTCs are not intangible personal property and found further that PTCs are not property of any kind. (ROA, Doc. 41, Memo. Opin., p. 1-2.) The District Court overruled the parties' respective motions in all other respects, explaining that at trial the parties would be allowed to argue their respective positions for inclusion or exclusion of PTCs in the valuation analysis based on recognized appraisal or accounting practices. (ROA, Doc. 41, Memo. Opin., p. 2.) The District Court's rulings on these motions for partial summary judgment were not appealed by either party and are not at issue

in this appeal. (*See* ROA, Doc. 56, Defs.' Pet. in Error, ROA, Doc. 54, Pl.'s Resp. to Pet. in Error.)

Trial. Based on the District Court's summary judgment rulings, a seminal issue at trial was the extent to which an owner's ability to claim PTCs impacted the fair cash value of the Subject Property. Consistent with his expert report, Payne demonstrated that buyers and sellers in the real-world marketplace for the purchase and sale of tangible personal property comprising wind farms consider the impact of PTCs when arriving at a transaction price. (ROA, Doc. 62, Tr. Vol. II at 77-79, 112-115, 156, 158.)

As just one example, the Kay Wind Facility located in Kay County, Oklahoma, was sold on December 15, 2015, a mere 15 days prior to the applicable valuation date of the Subject Property. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34-35; ROA, Doc. 62, Tr. Vol. II at 121.) The Kay Wind Facility is similar in age. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34-35; ROA, Doc. 62, Tr. Vol. II at 121.) It achieved commercial operations on December 12, 2015, while the Subject Property achieved commercial operations on March 29, 2016. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34-35; ROA, Doc. 62, Tr. Vol. II at 121.) The facilities are similar in size. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34-35; ROA, Doc. 62, Tr. Vol. II at 121.) The Kay Wind Facility is a 299-megawatt facility, and the Wind Farm is a 298-megawatt facility. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34-35; ROA, Doc. 62, Tr. Vol. II at 121.) Both facilities use Vestas WTGs and both had the same developer. (ROA, Doc. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34-35; ROA, Docs. 66-67, Defs.' Ex. 148, Appxs. 4.1-4.8; ROA, Doc. 62, Tr. Vol. II at 121.) In Securities and Exchange Commission filings, the buyer allocated \$481 million of the purchase price to the tangible personal property comprising the Kay Wind Facility, representing \$1,608,696 per megawatt. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34; ROA, Docs.

66-67, Defs.' Ex. 148, Appxs. 4.1-4.8; ROA, Doc. 62, Tr. Vol. II at 121-23; ROA, Doc. 63, Tr. Vol. III at 6-7.) The buyer also included the impact of PTCs when analyzing the cash flow benefit streams attributable to the tangible personal property of that Kay Wind Facility. Had the buyer excluded the impact of PTCs, the portion of the purchase price that the buyer allocated to the tangible personal property of the Kay Wind Facility would have been significantly lower. (ROA, Docs. 66-67, Defs.' Ex. 148, p. 34; ROA, Docs. 66-67, Defs.' Ex. 148, Appxs. 4.1-4.8; ROA, Doc. 62, Tr. Vol. II at 121-23.)

Like real-world buyers and sellers, Mr. Payne considered the economic impact of PTCs in his discounted cash flow analysis of the Subject Property. (ROA, Doc. 62, Tr. Vol. II at 77-79, 113-14; ROA, Docs. 66-67, Defs.' Ex. 148, p. 35-41.) Considering the economic impact of PTCs, Mr. Payne reiterated the conclusion in his expert report that the fair cash value of the Subject Property was \$416,402,000 on January 1, 2016. (ROA, Doc. 62, Tr. Vol. II at 83-85.)

In their expert reports, both of KW's expert witnesses opined that the PTCs should be excluded from the valuation analysis because of their understanding or instruction from KW's counsel that PTCs are intangible personal property exempt from taxation. (ROA, Doc. 63, Tr. Vol. III at 88-89; *see also* ROA, Doc. 69, Pl.'s Ex. 47, p. 7.) Because the District Court rejected that argument and ruled that PTCs are not intangible personal property, or property of any kind, KW presented a new argument at trial in support of its position that the economic impact of PTCs should still be excluded from the determination of fair cash value. According to KW's expert witness, Robert Reilly, the impact of PTCs should be excluded in this instance because, in his opinion, a contractual arrangement between KW's parent entities and an unrelated third party would preclude a hypothetical buyer of the Subject Property from claiming PTCs on

electricity generated and sold after the hypothetical sale on January 1, 2016. (ROA, Doc. 63, Tr. Vol. III at 97-99.)

Robert Reilly testified: “Sir, these credits have been sold. The next buyer of the Kingfisher Wind tangible personal property doesn’t get these tax credits. These tax credits have been sold. They’re gone. They’re out of the picture.” (ROA, Doc. 63, Tr. Vol. III at 97.)

Robert Reilly testified further as follows:

Q: So, if a hypothetical owner, an entity that owns this wind facility sells that facility to a hypothetical buyer, isn’t it true that that hypothetical buyer then is eligible to claim any production tax credits earned in the future after that sale on electricity produced by that facility?

A: The facility being Kingfisher Wind, the answer is no. Those tax credits have been transferred already. They’re not – you can’t resell tax credits after you sell them. I mean, it’s like you trying to sell your house to me and then to someone else. Once you sell your house, you’ve sold your house. Sir, these tax credits have been sold. The next buyer of Kingfisher Wind or Kingfisher Wind tangible personal property can’t use these tax credits. MidAmerican owns these tax credits.

Q: So let make sure, what you’re saying is that if this wind facility sold on January 1st, 2016, for the next ten years, all the electricity that’s produced by that facility MidAmerican can claim the production tax credits on all that electricity?

A: Bingo. You got it.

(ROA, Doc. 63, Tr. Vol. III at 98-99.)

This new opinion, apparently formulated as a result of the District Court’s ruling that PTCs are not intangible personal property exempt from taxation, is nowhere in Robert Reilly’s expert report. (*See generally* ROA, Doc. 69, Pl.’s Ex. 47.) Instead, Robert Reilly’s new opinion—that all PTCs to be earned in the future had been sold as of January 1, 2016—was based on an agreement between KW’s parent entities and an unrelated third party as part of

KW's organizational tax structure, none of which were mentioned in Robert Reilly's expert report. (*Compare* ROA, Doc. 63, Tr. Vol. III at 97-99, *with* ROA, Doc. 69, Pl.'s Ex. 47.)

As of January 1, 2016, KW was wholly owned by FR Kingfisher Holdings II LLC ("**FR Holdings II**"), and FR Holdings II was wholly owned by FR Kingfisher Holdings LLC ("**FR Holdings**"). (ROA, Doc. 61, Tr. Vol. I at 45-47; *see also* ROA, Doc. 70, Pl.'s Ex. 41, p. 1.)

On January 21, 2015, FR Holdings, FR Holdings II and MidAmerican Wind Tax Equity Holdings, LLC ("**MidAmerican**"), entered into an agreement titled "Equity Capital Contribution Agreement" ("**ECCA**"). (ROA, Doc. 61, Tr. Vol. I at 45-47, 50, 56-60; ROA, Doc. 63, Tr. Vol. III at 97; *see also* ROA, Doc. 70, Pl.'s Ex. 41, p. 29, 70-71.) Under the ECCA, MidAmerican agreed that it would purchase a membership interest in FR Holdings II once the Wind Farm was completely constructed and placed into service for commercial operations. (ROA, Doc. 61, Tr. Vol. I at 45-47, 50, 56-60; ROA, Doc. 63, Tr. Vol. III at 97; *see also* ROA, Doc. 70, Pl.'s Ex. 41, p. 29, 70-71.) Because construction of the Wind Farm was not complete on January 1, 2016, MidAmerican did not yet own any interest in FR Holdings II or the Subject Property. (ROA, Doc. 61, Tr. Vol. I at 50-51, 57-60.) MidAmerican did not acquire an ownership interest in FR Holdings II until three (3) months later, on March 29, 2016. (ROA, Doc. 61, Tr. Vol. I at 57-60; *see also* ROA, Doc. 68, Pl.'s Ex. 44, p. 1, 31-32.)

Throughout trial, Assessors objected to the admission of evidence concerning the ECCA on several grounds, including: (1) guidance from applicable appraisal literature that the particular tax structure of the actual or current owner should not be considered; (2) proper application of the hypothetical willing buyer-willing seller standard utilized to determine the fair cash value of the Subject Property prohibits consideration of KW's specific tax structure and a contractual agreement involving KW's parent entities; and (3) the fact that MidAmerican

had not acquired any ownership interest in FR Holdings II as of January 1, 2016. (ROA, Doc. 46, Defs.’ Bench Memo. of Law; ROA, Doc. 61, Tr. Vol. I at 46, 58-59). Notwithstanding Assessors’ objections, the District Court relied on Robert Reilly’s testimony and the ECCA to support its finding that “the right to claim PTC’s in this case was contracted out by Plaintiff to a third party, MidAmerican . . . prior to construction of this facility.” (ROA, Doc. 49, Memo. Opin., p. 3.)

According to the District Court:

[A]ny willing buyer would be bound by the contract between Plaintiff and MidAmerican dealing with the PTCs and would not receive the PTCs in a purchase of the property. That being the case, since those PTCs would not be available to a willing buyer, then they should not be included in the valuation of the property.”

(ROA, Doc. 49, Memo. Opin., p. 4.)

Based on this analysis, the District Court accepted the valuation of KW’s expert witness, Kevin Reilly, because Kevin Reilly excluded the economic impact of PTCs in his determination of fair cash value of the Subject Property.

STANDARD OF REVIEW

An ad valorem tax appeal to a district court from a decision of the county board of equalization, pursuant to 68 Okla. Stat. § 2880.1, is a special statutory proceeding that is governed by equitable principles. *Appeal of Nat’l Bank of Tulsa*, 1957 OK 17, ¶ 10, 312 P.2d 495, 499; *Dolese Bros. Co. v. Nichols*, 1945 OK 152, ¶ 4, 165 P.2d 982, 983. A district court’s judgment determining the fair cash value of property rendered in a proceeding governed by equitable principles may be modified or reversed when it is contrary to the clear weight of the evidence or is contrary to law. *Cty. Bd. of Equalization of Kay Cty. v. Frontier Grain Co.*, 1969 OK 82, ¶ 17, 454 P.2d 317, 319; *Dolese Bros.*, 1945 OK 152, ¶ 4, 165 P.2d at 983. Furthermore,

the district court's legal rulings on questions of law are reviewed under the *de novo* standard. *Kluver v. Weatherford Hosp. Auth.*, 1993 OK 85, ¶ 14, 859 P.2d 1081, 1084. Under this standard, appellate courts have plenary, independent and non-deferential authority to determine whether the trial court erred in its legal rulings. *Id.*

SUMMARY OF THE ARGUMENT

The District Court was required to determine the fair cash value of the Subject Property as of January 1, 2016, which is the price a hypothetical willing buyer would pay to purchase, and a hypothetical willing seller would accept to sell the Subject Property on that date. Applying this willing buyer-willing seller standard, the individual characteristics of the actual owner or its particular tax structure must not be considered.

One of the key economic benefits of owning tangible personal property comprising a wind farm is the owner's ability to claim PTCs on its income tax return, which are calculated based on the amount of electricity produced and sold during the prior year. If such tangible personal property is sold, the new owner then has the right to claim PTCs on its income tax return based on the electricity produced and sold after the sale. For this reason, buyers and sellers in real-world transactions involving tangible personal property comprising wind farms carefully consider the economic impact of PTCs when deciding the agreed-upon purchase price of the property. Determining the amount a hypothetical willing buyer would pay and a hypothetical willing seller would accept for the Subject Property involves the same considerations.

The District Court completely disregarded the hypothetical willing buyer-willing seller standard in reaching its decision. Instead, the District Court focused on the ECCA, which was a specific agreement unique to KW's parent entities and MidAmerican, an unrelated third

party. The District Court found that the ECCA would somehow preclude a hypothetical willing buyer from claiming PTCs after purchasing the Subject Property. Based on this analysis of the ECCA, the District Court concluded that the economic impact of PTCs, which would certainly be considered by hypothetical willing buyers and sellers, should be excluded from the determination of the fair cash value of the Subject Property.

The District Court erred, as a matter of law, by violating the hypothetical willing buyer-willing seller standard and basing its decision on an agreement specific to KW's parent entities and MidAmerican. The scenario envisioned by the District Court resulting from its erroneous analysis is a perfect illustration of why the hypothetical willing buyer-willing seller standard is required under Oklahoma law and applicable appraisal methodology. First, as a matter of law, a hypothetical willing buyer would not be bound by the ECCA after purchasing the Subject Property in an asset sale. Second, MidAmerican would be prohibited by law from claiming PTCs after the sale of the Subject Property. Third, a hypothetical willing buyer would be prohibited by law from allocating or transferring PTCs to MidAmerican after the sale.

Under the hypothetical willing buyer-willing seller standard that must be followed, hypothetical willing buyers and sellers will both consider the economic impact of PTCs that an owner of the Subject Property will be able to claim after a hypothetical sale on January 1, 2016. Taking that economic benefit into consideration, a hypothetical willing buyer would pay, and a hypothetical willing seller would accept \$416 million for the sale of the Subject Property.

ARGUMENT AND AUTHORITIES

I. PTCS ARE ECONOMIC BENEFITS OF OWNING AND OPERATING THE TANGIBLE PERSONAL PROPERTY COMPRISING A WIND FARM.

To stimulate development of renewable energy sources, Congress, the United States Department of the Treasury and most state governments have enacted laws and regulations over the last half century providing a stable of tax benefits and credits to owners of renewable energy facilities, including wind farms. As part of the Energy Policy Act of 1992 (P.L. 102-486), Congress enacted 26 U.S.C. § 45 to provide renewable energy production tax credits, or PTCs, to taxpayers that produce and sell electricity from qualified renewable energy facilities. *See generally* Molly F. Sherlock, *The Renewable Electricity Production Tax Credit: In Brief*, Congressional Research Service (Apr. 29, 2020)¹.

PTCs are per-kilowatt-hour (kWh) tax credits providing a dollar-for-dollar reduction of the taxpayer's tax liability. 26 U.S.C. § 45(a)². Under Section 45, a taxpayer must satisfy a number of statutory requirements to be eligible to claim PTCs. First, the taxpayer must own a "qualified facility." 26 U.S.C. § 45(a), (d)³. For a wind farm, the term "qualified facility" means "a facility using wind to produce electricity" that is owned by the taxpayer and originally placed into service during the applicable statutory period. 26 U.S.C. § 45(d)(1)⁴. Second, the taxpayer must produce "qualified energy resources" from the qualified facility. 26 U.S.C. § 45(a)(2)(A)⁵. "Qualified energy resources" include, among others, electricity produced from a wind farm. 26 U.S.C. § 45(c)(1)(A)⁶. Third, the taxpayer must sell the qualified energy

¹ (Defs.' Appx., Doc. 18.)

² (Defs.' Appx., Doc. 9, p. 168.)

³ (Defs.' Appx., Doc. 9, p. 168, 177.)

⁴ (Defs.' Appx., Doc. 9, p. 177.)

⁵ (Defs.' Appx., Doc. 9, p. 168.)

⁶ (Defs.' Appx., Doc. 9, p. 171.)

resources (i.e., the electricity) to an unrelated person during the taxable year. 26 U.S.C. § 45(a)(2)(B)⁷. PTCs may be earned over a 10-year period that begins on the date the facility was originally placed in service. 26 U.S.C. § 45(a)(2)(A)(ii)⁸. There is no advance approval requirement for claiming PTCs. If the requirements of Section 45 are satisfied, a taxpayer that is entitled to PTCs reports them on the proper IRS form and submits the form as an attachment to the taxpayer's federal income tax return. The IRS does not provide the taxpayer with a certificate or any other credentialed item indicating that the taxpayer has earned the PTCs.

Pursuant to the requirements of Section 45, only the owner of a qualified wind facility may claim PTCs. 26 U.S.C. § 45(d)(1)⁹; IRS Instructions Form 8835, at 3¹⁰; *see also* Paul Schwabe et al., *Wind Energy Finance in the United States: Current Practice and Opportunities*, National Renewable Energy Laboratory, United States Dept. of Energy, at 13 (2007)¹¹. If more than one person has an ownership interest in the wind farm, production from the wind farm is allocated among the owners in proportion to their respective ownership interests. 26 U.S.C. § 45(e)(3)-(4)¹².

There is no statutory restriction on the types of owners of wind farms that may be eligible to claim PTCs. Taxpayers eligible to claim PTCs may be corporations, partnerships, limited liability companies, estates, trusts and their beneficiaries, cooperatives and even individuals. *See* 26 U.S.C. §§ 45(e)(3)-(5), (11) & (11)(D)¹³. Section 45 also does not require owners of wind farms to enter into a particular type of corporate ownership structure or

⁷ (Defs.' Appx., Doc. 9, p. 168.)

⁸ (Defs.' Appx., Doc. 9, p. 168.)

⁹ (Defs.' Appx., Doc. 9, p. 177.)

¹⁰ (Defs.' Appx., Doc. 12, p. 203.)

¹¹ (Defs.' Appx., Doc. 17, p. 252.)

¹² (Defs.' Appx., Doc. 9, p. 182.)

¹³ (Defs.' Appx., Doc. 9, p. 182-83, 187-89.)

financing arrangement. *See* 26 U.S.C. § 45¹⁴; Schwabe, *supra*, at 21-22¹⁵; (ROA, Doc. 61, Tr. Vol. I at 190.) Where the owner of a qualified wind facility is a partnership or limited liability company taxed as a partnership, PTCs and other tax benefits may be allocated to the partners or members in accordance with 26 U.S.C. § 704(b) and 26 C.F.R. § 1.704-1(b)(4)(ii). *See* IRS Rev. Proc. 2007-65, 2007-2 B.N 967 (2007)¹⁶; *Route 231, LLC v. Comm’r of Internal Revenue*, 107 T.C.M. 1155, 2014 WL 700397, at *10 (U.S. Tax Ct. 2014) (Partnerships are pass-through entities. The partnership is a conduit, through which income and loss flow to the individual partners.)¹⁷; Kathrine M. Breaks & Richard Blumenreich, *New Guidance on Partner Allocations of Wind Energy Production Tax Credits*, 108 J. Tax’n 95 (2008)¹⁸.

II. PTCS ARE ECONOMIC BENEFITS THAT IMPACT THE FAIR CASH VALUE OF THE TANGIBLE PERSONAL PROPERTY COMPRISING A WIND FARM.

The propriety of considering the impact of PTCs in determining the fair cash value of the Subject Property is recognized by numerous courts, leading appraisal authorities and the considerations of real-world buyers and sellers.

First, courts across the country have recognized that tax policies, benefits and credits impact the value of property and must be considered in any valuation analysis. *See, e.g., Fairfield Gardens, Inc. v. United States*, 306 F.2d 167, 170 (9th Cir. 1962) (“All kinds of government action may directly affect the value of property”); *Spring Hill, L.P. v. Tenn.*

¹⁴ (Defs.’ Appx., Doc. 9.)

¹⁵ (Defs.’ Appx., Doc. 17, p. 260-61.)

¹⁶ (Defs.’ Appx., Doc. 13.) The IRS Revenue Procedure 2007-65 (the “**Revenue Procedure**”) provides a set of safe harbor requirements guiding the creation of valid partnerships to ensure that tax equity partners maintain a meaningful stake in the partnership that is deemed the owner of the qualified wind facility. If all of the requirements are satisfied, the IRS will respect the partnership as the owner of the wind farm for federal income tax purposes and the allocation among the partners of the economic benefits (e.g., income, depreciation, PTCs) derived from ownership and operation of the wind farm in accordance with 26 U.S.C. § 704(b).

¹⁷ (Defs.’ Appx., Doc. 4, p. 97.)

¹⁸ (Defs.’ Appx., Doc. 15.)

State Bd. of Equalization, No. M2001-02683-COA-R3-CV, 2003 WL 23099679, at *10, 12-14 (Tenn. Ct. App. 2003) (endorsing the “longstanding policy of including the value of government incentives that make projects economically feasible . . . as a factor in determining fair market value of real property.”)¹⁹.

In *Van Duzer v. Comm'r of Internal Revenue*, 61 T.C.M. 2791, 1991 WL 93170 (U.S. Tax Ct. 1991)²⁰, the petitioner-taxpayer, an individual, purchased two wind farms. *Id.* at 2, 4, 6.²¹ The taxpayer chose to make an outright purchase of the assets instead of purchasing an interest in a limited partnership that would own the wind farms. *Id.* at 2.²² Prior to the purchases, the taxpayer conducted due diligence regarding the profitability of the wind farms. *Id.* at 3.²³ The taxpayer “considered the tax benefits he expected to receive from purchasing a wind farm[,]” as a factor in arriving at the agreed-upon purchase prices of the wind farms. *Id.* at 2.²⁴

The taxpayer filed federal income tax returns after purchasing each of the wind farms. *Id.* at 2.²⁵ In calculating his income tax liability, the taxpayer claimed depreciation and tax credits based on the purchase prices of the wind farms. *Id.* at 7-8.²⁶ The Respondent-IRS issued notices of deficiency²⁷ with respect to the taxpayer’s federal income taxes. The IRS contended that the purchase prices of the wind farms exceeded their respective fair market values, because the taxpayer had considered the tax benefits and credits he expected to receive when

¹⁹ (Defs.’ Appx., Doc. 5, p. 115, 117-18.)

²⁰ (Defs.’ Appx., Doc. 8.)

²¹ (Defs.’ Appx., Doc. 8, p. 152, 154, 156.)

²² (Defs.’ Appx., Doc. 8, p. 152.)

²³ (Defs.’ Appx., Doc. 8, p. 153.)

²⁴ (Defs.’ Appx., Doc. 8, p. 152.)

²⁵ (Defs.’ Appx., Doc. 8, p. 152.)

²⁶ (Defs.’ Appx., Doc. 8, p. 157-58.)

²⁷ A notice of deficiency is a legal determination by the IRS of a taxpayer’s tax deficiency. It is an official written claim that a taxpayer owes additional income tax and often interest on that amount, plus additional penalties.

determining the purchase prices. *Id.* at 1, 8.²⁸ To resolve this dispute, the *Van Duzer* court was charged with addressing the issue of whether the purchases prices taking into account expected tax benefits and credits represented fair market value²⁹ of the wind farms. *Id.* at 8.³⁰

At trial, each party presented the testimony of an expert witness. *Id.* at 10.³¹ The taxpayer's expert determined the fair market value of the wind farms under the three approaches to value—the cost approach, the market approach and income approach. *Id.* at 11.³² Under the income approach, the taxpayer's expert performed a discounted cash flow analysis that “considered the Federal and State tax benefits [taxpayer] expected to receive from the wind farms as a cash inflow.” *Id.* at 11.³³ The IRS' expert did not include consideration of the tax benefits and credits derived from the wind farm purchases. *See id.* at 12-13.³⁴

The *Van Duzer* court agreed with the taxpayer's expert's analysis which considered the impact of tax benefits and credits in determining the fair market value of the wind farms. *See id.* at 10-11, 13.³⁵ Therefore, the court ruled that the fair market values of the wind farms were equal to their purchase prices. *Id.*³⁶

Van Duzer is consistent with a large line of cases addressing the consideration of low-income housing tax credits in determining the fair market value of low-income housing. In these cases, “the majority of state courts that have considered the issue have concluded that the

²⁸ (Defs.' Appx., Doc. 8, p. 151, 158.)

²⁹ The *Van Duzer* court applied the willing buyer-willing seller standard for determining fair market value that is identical to the applicable willing buyer-willing seller standard for determining fair cash value under Oklahoma law: “As a general rule the price at which a willing buyer will purchase property from a willing seller, when neither party is acting under compulsion and both parties are fully informed of all the relevant facts and circumstances, establishes fair market values.” (Defs.' Appx., Doc. 8, p. 160)

³⁰ (Defs.' Appx., Doc. 8, p. 158.)

³¹ (Defs.' Appx., Doc. 8, p. 160.)

³² (Defs.' Appx., Doc. 8, p. 161.)

³³ (Defs.' Appx., Doc. 8, p. 161.)

³⁴ (Defs.' Appx., Doc. 8, p. 162-63.)

³⁵ (Defs.' Appx., Doc. 8, p. 160-61, 163.)

³⁶ (Defs.' Appx., Doc. 8, p. 160-61, 163.)

tax credits should be included when determining the value of a tax-credit-funded housing project.” *Huron Ridge LP v. Ypsilanti Tp.*, 737 N.W. 2d 187, 195 (Mich. App. Ct. 2007); *see also In re Ottawa Housing Assoc., L.P.*, 10 P.3d 777 (Kan. 2000) (both the benefits and burdens of low-income housing should be considered); *Parkside Townhomes Assoc. v. Bd. of Assessment Appeals of York County*, 711 A.2d 607, 610-11 (Pa. Cmmw. Ct. 1998) (tax credits are properly included in a fair market value analysis); *Spring Hill*, 2003 WL 23099679, at *15 (the valuation of the low-income project must include consideration of tax credits); *Brandon Bay, Ltd. P’Ship v. Payette Cty.*, 132 P.3d 438, 441 (Idaho 2006) (tax credits are properly considered in assessing the value of low-income housing).

The majority of courts recognize the reality that tax credits provide an economic benefit, not property in and of itself, that affects the fair cash value of property. *Huron Ridge*, 737 N.W. 2d at 194-95 (foremost value for low-income housing properties is found in the tax benefits they generate). As one court noted, tax credits are “part of the economic reality” of the credit generating, tangible property. *Parkside Townhomes*, 711 A.2d at 610-11.

To judicially exclude tax credits from the analysis of fair cash value all together, would be to ignore these realities of the marketplace and factors that willing buyers and willing sellers would certainly consider in determining the fair cash value. *See In re Lewis & Clark Apartments, LP*, 479 B.R. 47, 54 (B.A.P. 8th Cir. 2012) (“valuation without consideration of the tax credits does not accurately reflect what a willing buyer would pay to purchase the property”); *Rainbow Apartments v. Illinois Prop. Tax Appeal Bd.*, 762 N.E.2d 534, 536-57 (Ill. App. Ct. 2001) (Where willing buyer would certainly consider the availability of tax credits in determining fair cash value, ignoring the effect of tax credits distorts the earning capacity and resulting value of the property.); *Huron Ridge*, 737 N.W. 2d at 194-95 (willing

buyer would undoubtedly consider the impact of the tax credits in valuing credit-generating property as “the credits are critical to the economic feasibility of the developments.”).

Second, the exclusion of PTCs from the determination of fair cash value of a wind farm is contrary to fundamental appraisal theory and methodology. Expert witnesses for both parties in this case have considered the income approach to value, citing the American Society of Appraisers’ leading treatise *Valuing Machinery and Equipment, The Fundamentals of Appraising Machinery and Technical Assets*, (4th ed. 2020) (“**MTS Treatise**”).³⁷ KW’s expert, Kevin Reilly, even testified that he refers to the MTS Treatise as the appraisers’ “bible.” (See ROA, Doc. 61, Tr. Vol. I at 106.)

Regarding the central underpinnings of the income approach, the American Society of Appraisers explains:

The decision to purchase any business asset, whether it is a piece of land, a building, an operating business, an automobile, or an item of machinery or equipment, is typically an investment decision Before making an investment decision, **the investor must understand all of the future benefits from the investment.** The range of benefits is almost limitless; **some of the more common ones include** interest, dividends, capital appreciation, business synergies, and **tax incentives.** An investment decision is based on the present value of the future benefits to be earned by the investment, and the value of a particular asset is represented by the present value of its expected future benefits. **This is the foundation for the income approach to value.**

(MTS Treatise, at 115 (emphasis added)).³⁸

Lastly, Assessors’ expert witness, Payne, presented uncontroverted evidence at trial that real-world buyers and sellers in transactions involving wind farms consider the impact of PTCs in projecting future cash flows from the tangible personal property comprising the wind farms. (ROA, Doc. 62, Tr. Vol. II at 77-79.) Such evidence included Payne’s analysis of the purchase and sale of the Kay Wind Facility, where the buyer accounted for the future receipt

³⁷ (Defs.’ Appx., Doc. 14.)

³⁸ (Defs.’ Appx., Doc. 14, p. 212.)

of tax benefits and credits in allocating \$481 million of the purchase price to the tangible personal property comprising the Kay Wind Facility. Payne testified that this is one of many examples of how buyers and sellers in the marketplace consider the impact of PTCs and other benefits when deciding the appropriate price to pay for a wind farm.

Based on ample guidance from other courts, appraisal treatises and the uncontroverted evidence presented by Assessors' expert demonstrating the considerations of real-world buyers and sellers, PTCs should be considered in determining the fair cash value of tangible personal property comprising a wind farm.

III. THE DISTRICT COURT ERRED BY EXCLUDING THE IMPACT OF PTCs IN THE DETERMINATION OF THE FAIR CASH VALUE OF THE SUBJECT PROPERTY.

A. The District Court Violated the Hypothetical Willing Buyer-Willing Seller Standard.

Under Oklahoma law, every valuation of tangible personal property for ad valorem tax purposes must be based on its fair cash value³⁹ as of January 1 of the applicable tax year. 68 Okla. Stat. § 2817(A); *Cimmarron Transp., LLC v. Heavner*, 2008 OK 44, ¶¶ 2-3, 186 P.3d 947, 949. At its core, the determination of fair cash value is an objective test based on a hypothetical arm's-length purchase and sale of the property being valued between a hypothetical willing buyer and a hypothetical willing seller. 68 Okla. Stat. § 2802(19); *United States v. Cartwright*, 411 U.S. 546, 551 (1973); *In re Bloom*, 634 B.R. 559, 586 (B.A.P. 10th Cir. 2021). The buyer and the seller are hypothetical persons, rather than specific individuals or entities. *Estate of Bright v. United States*, 658 F.2d 999, 1005–1006 (5th Cir. 1981); *Exelon Corp. v. Comm'r of Internal Revenue*, 147 T.C. 230, 312-13 (U.S. Tax Ct. 2016)⁴⁰; Shannon

³⁹ "Fair cash value" is synonymous with "fair market value." *Cimmarron Transp.*, 2008 OK 44, ¶ 3, 186 P.3d at 949; see 68 Okla. Stat. § 2802(19).

⁴⁰ (Defs.' Appx., Doc. 3, p. 77.)

P. Pratt & Alina V. Niculita, *Valuing a Business: The Analysis and Appraisal of Closely Held Companies*, 42 (5th ed. 2020)⁴¹. Courts must not take into consideration the specific characteristics or tax structure of the actual owner/seller and actual buyer of the property. *Bright*, 658 F.2d at 1005–06; *Exelon Corp.*, 147 T.C. at 312-13⁴²; MTS Treatise, at 139 (“Remember, when valuing specific operating property, the current owner of the property is not taken into consideration, nor its tax structure.”)⁴³.

In this case, the District Court ruled that PTCs could not be considered in determining the fair cash value of the Subject Property because of a contractual arrangement between KW’s direct parent entities and MidAmerican. The District Court reasoned that “[t]he right to claim the PTC’s in this case was contracted out” and “any willing buyer would be bound by the contract between Plaintiff and MidAmerican” (ROA, Doc. 49, Memo. Opin., p. 3-4.) The District Court’s rationale appears to have been directly influenced by the flawed testimony of KW’s expert, Robert Reilly. Despite being unable to articulate any of the statutory requirements or restrictions for claiming PTCs under Section 45, Robert Reilly testified that the PTCs had already been “transferred” and “sold” to MidAmerican under the ECCA, which would preclude a hypothetical buyer of the Subject Property from claiming PTCs earned after the sale.

The District Court committed reversible error by basing its decision on an analysis that violated the hypothetical willing buyer-willing seller standard. The District Court’s exclusion of PTCs from the analysis to determine the fair cash value of the Subject Property was not based on the requisite hypothetical transaction between a hypothetical buyer and a hypothetical

⁴¹ (Defs.’ Appx., Doc. 16, p. 230.)

⁴² (Defs.’ Appx., Doc. 3, p. 77.)

⁴³ (Defs.’ Appx., Doc. 14, p. 213.)

seller. Rather, the District Court considered and relied upon the specific contractual agreements between the entities in KW's specific tax ownership structure. On this basis alone, this Court should overturn the District Court's decision to exclude the impact of PTCs on the fair cash value of the Subject Property.

The fundamental rationale for requiring courts to determine the fair cash value under the hypothetical willing buyer-willing seller standard without consideration of the specific tax structure of the actual buyer or seller is to ensure that similar properties are valued consistently and uniformly. The ramifications of the District Court's analysis in this case illustrate why this standard is required.

For example, assume Wind Farm A is owned by a partnership with an agreement to allocate PTCs to a particular partner. Wind Farm B, which is identical to Wind Farm A, is owned by a corporation that claims PTCs on its own tax return from the electricity produced and sold from Wind Farm B. Applying the District Court's analysis, the impact of PTCs would be excluded from the determining of the fair cash value of Wind Farm A, because the partnership agreement would somehow preclude a hypothetical willing buyer from claiming PTCs after the purchase. Applying the same analysis to Wind Farm B, however, the impact of PTCs would be taken into consideration in determining the fair cash value of Wind Farm B. According to the District Court, the fair cash value of Wind Farm A and Wind Farm B (two identical wind farms) would be drastically different based on nothing more than the tax structure and contractual agreements of the actual sellers. The consequences of the District Court's analysis in this case are exactly what the hypothetical willing buyer-willing seller standard is designed to prevent.

Moreover, KW's tax equity partnership structure contemplated in the ECCA did not even exist on the pertinent ad valorem tax assessment date of January 1, 2016. Qualifying wind farm facilities in the development and construction phase cannot be eligible to earn PTCs. On January 1, 2016, KW had not completed construction of the Wind Farm. KW had not placed the Wind Farm into service for commercial operations. It is further undisputed that MidAmerican did not own an interest in any entity in KW's ownership structure on January 1, 2016. These seminal events did not occur until March 29, 2016, 88 days after the January 1 assessment date. Thus, on January 1, 2016, MidAmerican was not even eligible to claim any of the economic benefits, including PTCs, from owning and operating the Subject Property.

The fair cash value of the Subject Property must be determined under the hypothetical willing buyer-willing seller standard without consideration of KW's particular tax structure or an agreement between KW's parent entities and MidAmerican. The District Court's violation of the hypothetical willing buyer-willing seller standard requires reversal.

B. 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.

As part of its analysis regarding the exclusion of the impact of PTCs, the District Court ruled that "any willing buyer would be bound by the contract between Plaintiff and MidAmerican dealing with the PTCs and would not receive the PTCs in a purchase of the property." The District Court's analysis is based on the incorrect premise that "Plaintiff," i.e., KW, was a party to the ECCA. KW was not a party to the ECCA. In fact, there was no evidence presented at trial that KW was a party to any contract or agreement with MidAmerican. In addition to a lack of evidentiary support, there is no legal authority supporting the District

Court's analysis that a hypothetical willing buyer of the Subject Property would be bound by an agreement to which KW was not a party.

Moreover, even if the hypothetical willing buyer-willing seller standard is improperly disregarded and the ECCA is considered, the District Court's ruling is contrary to longstanding precedent of the Oklahoma Supreme Court regarding successor liability in an asset sale. Under the willing buyer-willing seller standard, the hypothetical purchase and sale to be considered only includes the specific property at issue. MTS Treatise, at 139 ("The appraisal includes just the subject property as a standalone operation.")⁴⁴. In this case, the hypothetical transaction should represent an asset sale of the Subject Property.

Under the Oklahoma Supreme Court's longstanding precedent, the purchaser of tangible assets or property is not bound by the debts and obligations of the seller. "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." *Crutchfield v. Marine Power Engine Co.*, 2009 OK 27, ¶ 1, 209 P.3d 295, 297; *accord Pulis v. United States Electrical Tool Co.*, 1977 OK 36, ¶ 5, 561 P.2d 68, 69; *Ezzard v. State National Bank*, 1916 OK 471, ¶ 13, 157 P. 127, 131-32 ("[T]he liability of the purchasing corporation is very similar to the liability of an individual who purchases the assets of a debtor, and it does not, by reason of the purchase merely, become liable for the debts of the selling corporation . . .").

The Court did establish four (4) exceptions to this general rule. "[t]he exceptions to the general rule of successor non-liability exist to prevent the shareholders, officers, and directors of a corporation from eluding its debts and liabilities while maintaining control over its assets." *Crutchfield*, 2009 OK 27, ¶ 14, 209 P.3d at 300–01. An entity purchasing the assets of another

⁴⁴ (Defs.' Appx., Doc. 14, p. 213.)

entity will not be bound by the debts, liabilities and obligations of the seller-entity, unless it appears that: (i) the parties have an agreement for the buyer to assume the seller's debts, liabilities and obligations; (ii) the buyer receives seller's assets by way of corporate consolidation or merger; (iii) the transaction was fraudulent; or (iv) the buyer-entity is a mere continuation of the seller-entity. *Crutchfield*, 2009 OK 27, ¶ 1, 209 P.3d at 297; *Pulis*, 1977 OK 36, ¶ 5, 561 P.2d at 69.

However, none of the exceptions to the general rule against successor liability are applicable in this case. The first exception is not applicable, because it cannot be presumed that a hypothetical willing buyer would enter into an agreement to assume the debts, liabilities and obligations of KW's parent entities under the ECCA. Assuming the existence of such an agreement would be contrary to the economic interest of the hypothetical willing buyer and violate the willing buyer-willing seller standard. *See Estate of Curry v. United States*, 706 F.2d 1424, 1428-29 (7th Cir. 1983); *Estate of Adell v. Comm'r of Internal Revenue*, 108 T.C.M. 107, 2014 WL 3819046, at *12 (U.S. Tax Ct. 2014)⁴⁵.

The second exception is not applicable, because the hypothetical willing buyer-willing seller standard presumes the existence of an arm's length sale. *Cimmaron Transp.*, 2008 OK 44, ¶¶ 3, 11, 186 P.3d at 949, 950-51. A merger or consolidation does not qualify as an arm's-length sale. The third exception is not applicable, because assuming the existence of fraud would violate the willing buyer-willing seller standard by presuming a hypothetical transaction that is something less than fair and voluntary. *See* 68 Okla. Stat. § 2817(A); *Cimmaron Transp.*, 2008 OK 44, ¶ 2, 186 P.3d at 949.

⁴⁵ (Defs.' Appx., Doc. 2, p. 28.)

Lastly, the fourth exception is not applicable. “For the ‘mere continuation’ exception, the test is not whether there is a continuation of business operations, but whether there is a continuation of the corporate entity. *Crutchfield*, 2009 OK 27, ¶ 17, 209 P.3d at 301. The buyer in an asset sale will not be regarded as the mere continuation of the seller, where: (1) the seller continues to exist and operate after the sale; (2) there is no lack of consideration for the sale; and (3) there is no continuity between the two entities regarding the identity of their respective stock, directors, officers, employees or stockholders. *Crutchfield*, 2009 OK 27, ¶ 17, n. 16, 209 P.3d at 301-02, n. 16; *Pulis*, 1977 OK 36, ¶¶ 8-9, 561 P.2d at 71-72. None of these facts may be presumed with respect to a hypothetical transaction involving the Subject Property. This would, again, violate the willing buyer-willing seller standard. *See Gross v. Comm’r of Internal Revenue*, 272 F.3d 333, 356 (6th Cir. 2001) (“[A] court is not required to presume hypothetical, unlikely, or unreasonable facts in determining fair market value.”).

Thus, under the general rule, a hypothetical willing buyer of the Subject Property would not be bound by the contractual obligations of the hypothetical willing seller, let alone the contract between KW’s parent entities and MidAmerican. Because the District Court erred in ruling that a hypothetical willing buyer would be bound by the ECCA, the District Court’s decision must be reversed.

C. The District Court Erred By Ruling That MidAmerican Could Legally Claim PTCs After the Hypothetical Sale of the Subject Property.

After the hypothetical sale of the Subject Property on January 1, 2016, MidAmerican would not own any interest in the Subject Property. MidAmerican would also not own any interest in a partnership that owns the Subject Property after the sale. Without the requisite ownership interest, MidAmerican could not satisfy the requirements under Section 45 or the Revenue Procedure permitting allocations of PTCs to partners. Any attempt by MidAmerican

to claim PTCs after a sale on January 1, 2016, would violate federal income tax laws and expose MidAmerican to civil and criminal penalties. *See, e.g., United States v. Todd*, 791 Fed. Appx. 10 (11th Cir. 2019) (defendant sentenced to 222 months in prison and ordered to pay restitution for fraudulently claiming tax credits that he was not entitled to receive)⁴⁶; *Blossom Day Care Centers, Inc. v. Comm’r of Internal Revenue*, 122 T.C.M. 11, 2021 WL 2942025 (U.S. Tax. Ct. 2021) (claiming deductions to which a taxpayer is not entitled can constitute tax fraud)⁴⁷.

D. The Allocation of PTCs to MidAmerican After the Hypothetical Sale of the Subject Property Would Constitute an Impermissible Transfer of Tax Credits.

Even if KW’s specific tax structure is considered, which is improper, a hypothetical willing buyer would not allocate PTCs to MidAmerican.

All tax credits are non-transferable credits, unless the statutory provisions creating the credit expressly authorize their transferability. *Randall v. Loftsgaarden*, 478 U.S. 647, 665-66 (1986) (“tax deductions and tax credits are not, in the absence of a statutory provision to the contrary, freely transferable from one person to another if wholly severed from the property or activity to which they relate . . .”). Section 45 has no express provision authorizing the transfer of PTCs. Thus, PTCs are non-transferable credits.

Non-transferable tax credits, like PTCs, may only be claimed by the owner of the credit-generating property. The owner may not allocate or transfer PTCs to an unrelated third party without the required ownership interest. As one court stated, “the United States Supreme Court [in *Randall v. Loftsgaarden*] characterized as ‘obvious’ the logic underlying the connection between ownership and the right to claim a tax credit. *State Bldg. & Constr. Trades*

⁴⁶ (Defs.’ Appx., Doc. 7.)

⁴⁷ (Defs.’ Appx., Doc. 1.)

Council of Cali. v. Duncan, 76 Cal. Rptr. 3d 507, 526 (Cal. Ct. App. 2008)⁴⁸; *see also Lewis & Clark Apartments*, 479 B.R. at 53 (“tax credits—like a low property tax rate or good schools—are a benefit which accrues only to those who have an ownership interest in the [low-income housing] itself.”). PTCs, therefore, cannot be allocated or transferred to a third party, unless and until that third party holds a concomitant ownership interest in the wind farm.

After the hypothetical sale of the Subject Property on January 1, 2016, a hypothetical willing buyer could not legally allocate PTCs to MidAmerican. This would constitute an impermissible transfer of non-transferable tax credits.

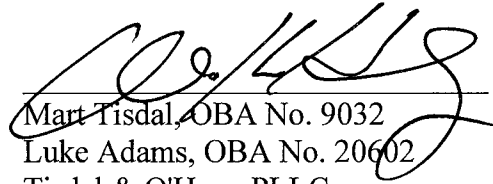
CONCLUSION

Under Oklahoma law, the fair cash value must be determined under the hypothetical buyer-seller standard without regard to specific characteristics of the actual owner, including its specific tax structure. The District Court failed to apply this standard and, as a result, reached a decision contrary to law.

Assessors’ expert witness, David Payne, was the only expert witness in this case to determine the fair cash value of the Subject Property under a proper application of the hypothetical willing buyer-willing seller standard, taking into account the economic impact of an owner’s ability to claim PTCs after the sale. Accordingly, the District Court’s decision should be reversed and judgment entered determining the fair cash value of the Subject Property to have been \$416 million as of January 1, 2016.

⁴⁸ (Defs.’ Appx., Doc. 6, p. 136.)

Respectfully submitted,



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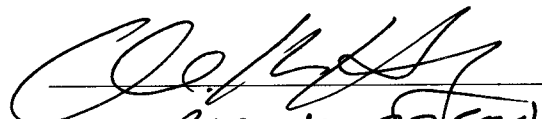
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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of April 2022, a true and correct copy of the BRIEF-IN-CHIEF OF DEFENDANTS/APPELLANTS was mailed, via U.S. mail postage prepaid, to the following:

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