IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

ORIGINAL

KINGFISHER WIND, LLC,

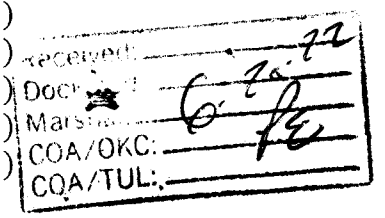
Plaintiff/Appellee,

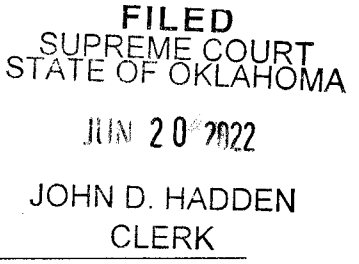
v.

MATT WEHMULLER,
CANADIAN COUNTY ASSESSOR,

Defendants/Appellants.

Case No. 119837





REPLY BRIEF 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[1]

In its Answer Brief, KW makes two (2) overarching arguments to support its contention that PTCs should be excluded from the analysis when determining the fair cash value of the Subject Property. First, KW asserts that hypothetical willing buyer would not be able to claim PTCs after purchasing the Subject Property, and that MidAmerican would be entitled to claim PTCs after the sale. Second, KW asserts that PTCs are intangible personal property exempt from ad valorem taxation. Both arguments are contrary to the applicable law and evidence presented to the District Court. Thus, for the reasons set forth in Assessors' Brief-in-Chief and this Reply, this Court should reject KW's arguments, reverse the decision of the District Court and enter a judgment determining the fair cash value of the Subject Property to be $416 million as of January 1, 2016.

ARGUMENT AND AUTHORITIES

I. A HYPOTHETICAL WILLING BUYER, NOT MIDAMERICAN, WOULD BE ENTITLED TO CLAIM PTCS AFTER PURCHASING THE SUBJECT PROPERTY.

A. KW's Argument That a Hypothetical Willing Buyer Would Not Be Able to Claim PTCs After Hypothetically Purchasing the Subject Property Is Contrary to Law.

KW has not and cannot present any legal authority to support the contention that a hypothetical willing buyer could not claim PTCs following the purchase of the Subject Property, because KW's argument is contrary to law.

Ownership and operation of the tangible personal property comprising a wind facility are the statutory prerequisites to becoming eligible to claim PTCs on an income tax return. Under 26 U.S.C. § 45[2], a taxpayer seeking to claim PTCs must (1) own a qualified wind

[1] Capitalized terms used in this Reply Brief shall have the same meaning as used in Assessors' Brief-in-Chief.
[2] (Defs.' Appx. to Brief-in-Chief, Doc. 9.)

facility, and (2) produce and sell electricity from the wind facility to an unrelated third party. 26 U.S.C. §§ 45(a), (d)[3]; IRS Instructions for Form 8835, at 3 ("[T]he owner of the facility is allowed the credit.")[4].

As discussed in Assessors' Brief-in-Chief, there are no statutory restrictions on the types of owners of wind farms that may be eligible to claim PTCs. *See* 26 U.S.C. §§ 45(e)(3)-(5), (11) & (11)(D). A wind facility can be owned by a single owner, like a corporation or individual, that would be eligible to claim PTCs from the production and sale of electricity. The IRS also allows ownership of a qualified wind facility to be set up through a partnership or limited liability company ("**LLC**") that is taxed as partnership. In a partnership or LLC, the IRS will allow PTCs generated by the wind facility to be allocated among the partners or members. This ownership structure is often referred to as a tax equity partnership.

In a tax equity partnership, the developer/operator of a wind facility and investors enter into a partnership through a holding company ("**Holdco**"), which in turn owns the project company ("**ProjectCo**") that holds legal title to the wind facility. **For federal income tax purposes, the Holdco is treated as the owner of the wind facility and the ProjectCo is a disregarded entity.** The taxable income and other tax items, deductions and credits derived from the wind farm pass over the ProjectCo, as a disregarded entity, and then through the Holdco, as a pass-thru entity, to the partners. The allocation among partners of income, PTCs and other tax benefits and deductions must comply with the provisions of 26 U.S.C. § 702(a)(7), 26 U.S.C. § 704(b) and Treasury Reg. 1.704(b)(4)(ii).

Faced with a series of cases involving sham partnerships and disguised attempts to impermissibly sell tax credits, the IRS published its Rev. Proc. 2007-65, 2007-2 B.N 967

[3] (Defs.' Appx. to Brief-in-Chief, Doc. 9, p. 168, 177.)
[4] (Defs.' Appx. to Brief-in-Chief, Doc. 12, p. 203.)

(2007) (the "**Revenue Procedure**")[5]. The Revenue Procedure establishes a series of ownership requirements that must be satisfied to ensure that a valid partnership exists and to ensure that tax equity partners/investors have a meaningful stake in the partnership that owns the wind facility for income tax purposes.

The Revenue Procedure requires, among other things, that: (i) all partners maintain a minimum interest in all partnership income, gains, losses, deductions and credits during the existence of the partnership; (ii) the tax equity partner must make a "minimum conditional investment" on or before the date the wind farm is placed into service or the date the investor acquires an interest in the partnership, whichever is later; (iii) at least 75 percent of the tax equity partner's total fixed capital contributions must be fixed and determinable obligations, not contingent in amount or certainty of payment; (iv) the tax equity partner cannot be indemnified from loss of its investment; and (v) the tax equity partner cannot be guaranteed or assured that it will receive an allocation of PTCs from the wind facility. *See generally* Rev. Proc. 2007-65[6]; *see also* Kathrine M. Breaks & Richard Blumenreich, *New Guidance on Partner Allocations of Wind Energy Production Tax Credits*, 108 J. Tax'n 95, 97-103 (2008)[7].

When the Revenue Procedure requirements are met, the IRS will not challenge an **allocation** of PTCs among the partners or members. *See* Breaks, *supra*, at 97-98[8]. The IRS will respect the partnership as the **owner** of the wind facility 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 facility in accordance with 26 U.S.C. § 702(a)(7), 26 U.S.C. § 704(b) and Treasury Reg. 1.704(b)(4)(ii). The tax equity partner will

[5] (Defs.' Appx. to Brief-in-Chief, Doc. 13.)
[6] (Defs.' Appx. to Brief-in-Chief, Doc. 13.)
[7] (Defs.' Appx. to Brief-in-Chief, Doc. 15, p. 216-222.)
[8] (Defs.' Appx. to Brief-in-Chief, Doc. 15, p. 216-217.)

be treated as a partner in a valid partnership, not a mere purchaser of tax credits or lender. Breaks, *supra*, at 98-99[9].

Whether a single owner or partnership, the key requirement for taxpayer's eligibility to claim PTCs is **ownership**. The owner or partners in a partnership that owns a wind facility are the only persons or entities that may claim PTCs generated by the production and sale of electricity. There is no other way for an individual or entity to legally claim PTCs, because PTCs are not transferable or saleable to non-owners. The United States Supreme Court established a simple test for determining whether a federal tax credit is transferable. *Randall v. Loftsgaarden*, 478 U.S. 647, 666–67 (1986). Tax credits are not transferable or saleable, unless the statute creating the tax credits expressly authorizes their transfer or sale. *Id.* Where section 45 contains no express provision authorizing the transfer or sale of PTCs to non-owners, PTCs are non-transferable or saleable pursuant to Supreme Court precedent.

In this case, the fair cash value of the Subject Property must be analyzed in the context of a hypothetical sale on January 1, 2016. After the hypothetical sale, the hypothetical willing buyer would be the owner of the Subject Property. MidAmerican would not own an interest in the Subject Property or in a partnership that owns the Subject Property. The hypothetical willing buyer, not MidAmerican, would be the only individual or entity eligible to claim PTCs going forward from the production and sale of electricity produced by the Subject Property. This Court should not and cannot adopt KW's argument that MidAmerican could claim PTCs after the sale of the Subject Property, because KW's argument is tantamount to tax fraud. Without the requisite ownership interest, any attempt by MidAmerican to claim PTCs after a sale on January 1, 2016, would violate federal income tax laws.

[9] (Defs.' Appx. to Brief-in-Chief, Doc. 15, p. 216-17.)

Thus, the statutory provisions of 26 U.S.C. § 45 coupled with published guidance from the IRS' Revenue Procedure are the legal guideposts which dictate a finding that a hypothetical willing buyer, as the new owner, would have the exclusive right to claim PTCs after purchasing the Subject Property.

B. KW's Argument That A Buyer Would be Bound by a Contract Among KW's Parent Entities and MidAmerican Is Contrary to Law.

KW asserts that the District Court was correct in ruling that any hypothetical willing buyer would not be able to claim PTCs, because the buyer would be bound by a contract among KW's parent entities, FR Holdings and FR Holdings II, and MidAmerican.

In the Brief-in-Chief, Assessors presented the Oklahoma Supreme Court's longstanding precedent regarding successor liability in an asset sale, in *Crutchfield v. Marine Power Engine Co.*, 2009 OK 27, 209 P.3d 295, *Pulis v. United States Electrical Tool Co.*, 1977 OK 36, 561 P.2d 68, and *Ezzard v. State National Bank*, 1916 OK 471, 157 P. 127. Each of these cases recognize the general rule that the buyer of tangible assets is not bound by the contractual debts and obligations of the seller.

KW summarily dismisses this line of authority as not applicable, but KW does not attempt to provide this Court with any explanation or any legal authority regarding how a hypothetical willing buyer could be bound by the 2015 ECCA. Neither the hypothetical willing buyer nor KW, as seller, are parties to the ECCA. Assessors have scoured, without avail, for any legal authority that would bind a new buyer to a contract among FR Holdings, FR Holdings II and MidAmerican. No such legal authority exists, because KW's argument is contrary to the most basic principles of contract law.

C. KW's Argument In Favor of Disregarding the Hypothetical Willing-Buyer Willing Seller Standard to Determine the Fair Cash Value of the Subject Property Is Contrary to Law.

The District Court's ruling in this case violated the objective test under hypothetical willing buyer-willing seller standard for determining the fair cash value of the Subject Property. The District Court considered and imputed KW's contemplated ownership structure into the District Court's fair cash value analysis, even though KW's contemplated tax equity partnership structure did not even exist until March 29, 2016, 88 days after the January 1, 2016 assessment date. The District Court concluded that MidAmerican could claim PTCs following the hypothetical sale of the Subject Property, even though MidAmerican had not acquired its ownership interest in the tax equity partnership to become eligible to claim PTCs on January 1, 2016. MidAmerican did not acquire the requisite ownership interest until March 29, 2016. The District Court considered and relied upon a contract among FR Holdings, FR Holdings II and MidAmerican, even though KW was not a party to the contract. Moreover, even if KW's contemplated tax structure was in place on January 1, 2016, the characteristics of that structure must not be considered. *See* Brief-in-Chief, Proposition III.A. Thus, the District Court committed reversible error as a matter of law by basing its decision on an analysis that violated the hypothetical willing buyer-willing seller standard.

D. KW Presents No Credible Evidence To Support Its Contentions.

In the absence of supporting legal authority in its Answer Brief, KW attempts to address the legal issues raised by Assessors by repeated references to the evidence that KW presented at trial. KW claims that the ECCA and the trial testimony of Robert Reilly and Kevin Reilly definitively answer the legal issues raised in this appeal. However, apart from the obvious error

of relying on its own evidence to address legal issues, KW's cited evidence does not credibly support the contentions KW asserts in its Answer Brief.

ECCA. KW cites to the ECCA in support of its argument that MidAmerican, not the hypothetical willing buyer, could claim PTCs after the hypothetical sale of the Subject Property. However, KW's varying explanations of the effect of the ECCA are entirely inconsistent. KW asserts that under the ECCA: (1) all PTCs that could potentially be claimed in the future had been "sold" to MidAmerican; (2) all PTCs that could potentially be claimed in the future had been "contractually committed" to MidAmerican; (3) the "right to claim" PTCs in the future had been "sold" to MidAmerican, and/or (4) the "right to claim" PTCs in the future was contractually "transferred" to MidAmerican.

The glaring inconsistencies between these divergent assertions, alone, demonstrates their lack of merit. On one hand, KW contends the evidence established future PTCs were "sold" to MidAmerican, but on the other hand, contends the evidence established future PTCs were merely "contractually committed" to MidAmerica. In other instances, KW inconsistently contends that it was the "right to claim" future PTCs that was "sold" to MidAmerican. Even if the ECCA could support KW's inconsistent factual findings, such findings are contrary to applicable law as established above and in Assessors' Brief-in-Chief.

Notwithstanding their inconsistencies, ECCA does even not support KW's varying factual findings in any event. While relying on the ECCA, KW does not cite any specific language from that agreement or explain how the agreement supports it claims. An accurate reading of the ECCA reveals that it provides no support for KW's assertions. The ECCA is an agreement among KW's parent entities and MidAmerican, where MidAmerican promised to purchase an interest in KW's parent entity, FR Holdings II, only after the Wind Farm had been

completely constructed and placed into service. The ECCA says nothing about selling, transferring or committing to MidAmerican any future PTCs or the right to claim them. The ECCA says nothing about a hypothetical willing buyer, as the new owner of the Subject Property, being obligated to allocate, sell or transfer PTCs to MidAmerican in the future, or being obligated to allow MidAmerican to claim such PTCs.

The only document addressing the allocation of PTCs is the unsigned form of proposed Amended and Restated Limited Liability Company Agreement of FR Holdings II ("**LLC Agreement**"), attached as Exhibit A to the ECCA. (ROA, Doc. 70, Pl.'s Ex. 41, Ex. A.) However, the LLC Agreement would only be signed if MidAmerican funded the project with $269 million and closed on its purchase of a membership interest in FR Holdings II. (ROA, Doc. 70, Pl.'s Ex. 41, p. 3-4.) Contrary to KW's characterizations, MidAmerican's obligation under the ECCA to purchase a membership interest in FR Holdings II was subject to a multitude of conditions precedent. (ROA, Doc. 70, Pl.'s Ex. 41, p. 56-74.) If any of those conditions were not fulfilled, MidAmerican would not be obligated to purchase the membership interest. One such condition was that construction be complete and in commercial operation, which did not happen until March 29, 2016. (ROA, Doc. 70, Pl.'s Ex. 41, p. 66.) Another fundamental condition was that KW actually own the Subject Property. (ROA, Doc. 70, Pl.'s Ex. 41, p. 12, 36, 64.) This condition is logical because if KW did not own the Subject Property, there would be no income, depreciation deductions or PTCs to allocate to MidAmerican. If the Subject Property was sold on January 1, 2016, MidAmerican would have no obligation to fund and close on its purchase of the membership interest. Even if a hypothetical buyer could ever be bound by an LLC Agreement between MidAmerican and

KW's indirect parent entity[10], KW brushes over the reality that if the Subject Property was sold on January 1, 2016, which must be assumed, the transaction contemplated by the ECCA would never have been consummated and the LLC Agreement would never have been signed.[11]

Robert Reilly. KW also cites to the testimony of Robert Reilly as support for the conclusion that all future PTCs had already been "sold" to MidAmerican. Robert Reilly's opinion is contradicted by the fact that no single document or piece of evidence in this case purports to embody a "sale" of PTCs. Nevertheless, Robert Reilly's opinion offered at trial is just the latest in a long line of differing opinions that he has offered throughout this case on behalf of KW.

In his expert report, Robert Reilly opined that PTCs should be excluded from the analysis due to instruction from KW's legal counsel that PTCs are intangible personal property. (ROA, Doc. 63, Tr. Vol. III at 88-89; *see also* ROA, Doc. 69, Pl.'s Ex. 46, p. 7.) In his subsequent deposition, Robert Reilly testified that an owner of wind farm assets does not own tax credits, but merely has an expectation of receiving an economic benefit. (ROA, Doc. 29, Defs.' Reply Br., p. 4 & Ex. 4.) Robert Reilly also testified that a hypothetical buyer of wind farm assets would step into the shoes of the seller and have the right to begin claiming PTCs from that point forward. (ROA, Doc. 29, Defs.' Reply Br., p. 4 & Ex. 4.)

After the District Court correctly ruled PTCs are not intangible personal property or property of any kind, Robert Reilly changed his position again and advocated that any value emanating from the ability to claim PTCs would inure to the "taxpayer's business entity" and not the tangible personal property that generates such PTCs. (ROA, Doc. 39, Aff. of Robert

[10] KW, the asset seller, is not a party to the LLC Agreement. (*See* ROA, Doc. 70, Pl.'s Ex. 41, Ex. A.)
[11] Over Assessors' relevance objections, the District Court admitted into evidence the LLC Agreement signed on March 29, 2016, nearly three (3) months after the ad valorem tax assessment date.

Reilly, Ex. A to Pl.'s Reply Br., p. 2.) At trial, Mr. Reilly offered yet another opinion that PTCs are transferred with stock. (ROA, Doc. 63, Tr. Vol. III at 42.) Perhaps realizing that the United States Supreme Court has rejected the notion that the purchase of an ownership interest in an entity is the same as the purchase of PTCs, Mr. Reilly switched gears again later in the trial and testified that any PTCs that would ever be generated by the Subject Property after the sale to a hypothetical buyer on January 1, 2016, had already been "sold" to MidAmerican. (ROA, Doc. 63, Tr. Vol. III at 98-99.) In addition to the bias and lack of credibility evidenced by Mr. Reilly's ever-changing positions, his ultimate opinion that a hypothetical buyer would not be entitled to claim PTCs in the future because they had already been sold to MidAmerican is contrary to law as demonstrated herein and in Assessors' Brief-in-Chief. *See, e.g.*, *Randall,* 478 U.S. at 666–67.

Robert Reilly's opinion is also unsupported by any evidence in this case. In fact, Robert Reilly's opinion is actually contrary to the testimony of KW's own corporate representative. Robert Hanna, CEO of KW (*see* ROA, Doc. 61, Tr. Vol. I at 17), acknowledged that it is the owner of the facility that is entitled to claim PTCs:

> Q. What is the production tax credit?
> A. Production tax credit is the uniform, essentially, a credit that can be applied to a taxpayer's tax obligation or credit against its obligation that is, essentially, metered out by megawatt hours on an uniform basis. So it's not project specific as to what the rate is. All projects that receive PTCs receive them at the same rate per megawatt hour, and then **those are claimed by the owners**.

(ROA, Doc. 61, Tr. Vol. I at 34 (emphasis added).) Mr. Hanna agreed that if KW no longer owned the Subject Property, neither it nor its tax equity partner, MidAmerican, would be entitled to claim PTCs:

> Q. Kingfisher Wind has to continue to own all of this to get the PTCs into action; is that correct?

A. The PTCs are associated with the generation of the wind turbines that Kingfisher Wind owns, yes.
Q. That's correct. And Kingfisher Wind always has to own those if your tax equity project is to work; is that correct? Kingfisher Wind has to keep owning that part of it, all of the facility; correct?
A. Yes, sir, that's correct.
Q. **Because, under the federal rules, if it doesn't own it, you guys, all you guys out here at this tax equity program, can't get any kind of transfers or PTCs or anything else; is that right?**
A. **I think that's fair, yes.**

(ROA, Doc. 61, Tr. Vol. I at 69 (emphasis added).)

Kevin Reilly. KW relies upon the testimony of its other expert witness, Kevin Reilly, to support the contention that the Subject Property was worth only $175 million on January 1, 2016. But, Kevin Reilly's opinions are inconsistent with KW's own business records. As part of his analysis, Kevin Reilly calculated the value of KW's overall "business enterprise" to be $496 million based on a summation of the value attributable to the various asset groups that comprise KW's business. (ROA, Doc. 61, Tr. Vol. I at 172-174; *see* ROA, Doc. 69, Pl.'s Ex. 46 Appx. D, p. 80-86.) According to Kevin Reilly, only $153 million of that value was attributable to tangible assets. (ROA, Doc. 61, Tr. Vol. I at 172-174; *see* ROA, Doc. 69, Pl.'s Ex. 46 Appx. D, p. 80-86.)

The audited financial statement of KW reflects that, as of December 31, 2015, KW reported $473,730,667 (including an asset retirement obligation of $12,258,407), for "property and equipment: construction in progress". (ROA, Doc. 62, Tr. Vol. II at 49; *see* ROA, Doc. 65, Defs.' Ex. 139, p. 4.) If the property, plant and equipment is unable to realize cash flows over time to recover its carrying value (i.e. "impairment"), then accounting principles require that the property be written down to a lower value. (ROA, Doc. 62, Tr. Vol. II at 50-51, 159.) KW's management found no impairment for KW's property, plant and equipment as of December

31, 2015 and no lower value was reflected. (ROA, Doc. 62, Tr. Vol. II at 50-51, 156; *see* ROA, Doc. 65, Defs.' Ex. 139, p. 9.)

KPMG appraised KW's tangible personal property to be worth $452 million. (ROA, Doc. 62, Tr. Vol. II at 41-42; *see* ROA, Doc. 64, Defs.' Ex. 99.)

Deloitte Transactions and Business Analytics LLP performed a cost segregation analysis to classify KW's property for purposes of accelerated depreciation deductions under the federal income tax Modified Accelerated Cost Recovery System ("**MACRS**") pursuant to Section 168 of the Internal Revenue Code. (ROA, Doc. 62, Tr. Vol. II at 67, 69, 103; *see* ROA, Doc. 64, Defs.' Ex. 19.) MACRS enables wind project owners to depreciate the vast majority of their investment over a 5-6 year period, with a 50% "bonus depreciation" schedule that has been available periodically since 2008. The study classified well over $400 million as tangible personal property subject to MACRS accelerated depreciation. (ROA, Doc. 62, Tr. Vol. II at 103; *see* ROA, Doc. 64, Defs.' Ex. 19.)[12]

Because KW is a disregarded entity, FR Holdings II files the income tax return reflecting the activities of the wind farm. Consistent with the Deloitte study, FR Holdings II's income tax return classified $425,499,374 as depreciable, tangible personal property, resulting in a depreciation deduction of over $67 million. (ROA, Doc. 62, Tr. Vol. II at 62-63, *see* ROA, Doc. 65, Defs.' Ex. 143, p. 003422.)[13] Now, after claiming depreciation deductions on

[12] Ironically, Kevin Reilly considered the impact of MACRS accelerated depreciation in his income approach, but excluded the impact of PTCs. (ROA, Doc. 61, Tr. Vol. I at 186.) Excluding the impact of one tax benefit (i.e., PTCs) while including the impact of another (i.e., MACRS depreciation deductions) is not only inconsistent, it also improperly excludes a future economic benefit of owning the Subject Property and renders his analysis inaccurate and unreliable. (ROA, Doc. 62, Tr. Vol. II at 77-79.)

[13] That same income tax return also records an accrued ad valorem tax projection of $3.8 million, which equates to taxable tangible personal property worth approximately $420 million. (ROA, Doc. 62, Tr. Vol. II at 77-79; *see* ROA, Doc. 65, Defs.' Ex. 143.)

$425,499,374 attributable to tangible personal property for income tax purposes, KW claims the same property is worth only $175 million for ad valorem tax purposes.

Of the total $496 million value of KW's overall business, Mr. Reilly opined that $274 million of that value was attributable to "contract and incentive intangible assets" including PTCs. (ROA, Doc. 61, Tr. Vol. I at 172-74; *see* ROA, Doc. 69, Pl.'s Ex. 46, Appx. D.) Contrary to this analysis, KW's business records reflect a contract value of only $18 million, with a liability of approximately $31 million. (ROA, Doc. 62, Tr. Vol. II at 32-34, 49; *see* ROA, Doc. 65, Defs.' Ex. 139, p. 4.) KW's audited financial statement reported only $18,691,253 for intangible asset value. (ROA, Doc. 62, Tr. Vol. II at 49; *see* ROA, Doc. 65, Defs.' Ex. 139, p. 4.) KPMG appraised KW's intangible assets to be worth $18.9 million. (ROA, Doc. 62, Tr. Vol. II at 41-42; *see* ROA, Doc. 64, Defs.' Ex. 99.)

The Form 901 Business Personal Property Rendition forms KW submitted to the Assessors required that "if any intangible property is imbedded in the reported assets the intangible property must be identified and valued to the county assessor with supporting documentation." (ROA, Doc. 65, Defs.' Ex. 127; ROA, Doc. 65, Defs.' Ex. 128.) No such documentation was submitted and PTCs were certainly never identified as intangible personal property.

Consequently, KW has presented no credible evidence supporting the assertion that the Subject Property was worth only $175 million, because MidAmerican, as opposed to a hypothetical buyer of the Subject Property, would be entitled to claim PTCs calculated based on electricity generated and sold from the Subject Property after January 1, 2016.

II. PTCS ARE NOT INTANGIBLE PERSONAL PROPERTY OR PROPERTY OF ANY KIND.

KW re-raises its twice rejected argument that PTCs are intangible personal property exempt from ad valorem taxation. In making this argument a third time, KW again relies almost exclusively on the Court of Civil Appeals' opinion in *Stillwater Housing Associates v. Rose*, 2011 OK CIV APP 51, 254 P.3d 726[14], which held that low-income housing tax credits ("**LIHTCs**") are intangible personal property.

However, an analysis of the *Stillwater Housing* decision proves that its holding and legal reasoning are inconsistent with: (1) established precedent of the Oklahoma Supreme Court interpreting the meaning of the word "credit" as used in former Okla. Const. Art. 10, § 6A; (2) established precedent of the United States Supreme Court establishing that tax credits are not separate, identifiable property; and (3) the real-world reality that PTCs lack the essential characteristics of property. For the reasons set forth below, this Court should find *Stillwater Housing* to be unpersuasive and contrary to law.

A. *Stillwater Housing* Departs from Oklahoma Supreme Court Precedent Interpreting the Meaning of "Other Credits" Under the Former Okla. Const. Art. 10, § 6A.

The *Stillwater Housing* court ruled that tax credits are exempt intangible personal property under the former Art. 10, § 6A of the Oklahoma Constitution. *Stillwater Housing*, 2011 OK CIV APP 51, ¶ 12, 254 P.3d at 729. After parsing the language of the constitutional amendment, the court decided that the reference to "other credits" meant "tax credits." On this basis, *Stillwater Housing* deemed all tax credits to be exempt intangibles under Oklahoma law. *Id.* This ruling is a serious departure from established precedent of the Oklahoma Supreme

[14] The Oklahoma Supreme Court did not order or approve the *Stillwater Housing* opinion for publication. At best, the decision is persuasive, but it certainly has no precedential or "*stare decisis*" effect, as urged by KW. *See Skinner v. John Deere Ins. Co.*, 2000 OK 18, ¶ 19, 998 P.2d 1219, 1223-1224; Okla. Sup. Ct. R. 1.200.

Court which had already interpreted the same "other credits" language as used in the former Art. 10, § 6A. The process of understanding how the *Stillwater Housing* is inconsistent with longstanding Oklahoma Supreme Court precedent requires an examination of the history of Oklahoma's treatment of intangible personal property.

From 1939 to 1968, the Oklahoma Legislature statutorily authorized a tax on the categories of intangible personal property enumerated under the now repealed Intangible Personal Property Act of 1939, previously codified under 68 Okla. Stat. §§ 1501 *et seq.* (repealed 1971), as renumbered to 68 Okla. Stat. §§ 2501 *et seq.* (repealed 1971).[15] Section 1501 of the Act enumerated eight (8) categories of taxable intangible personal property. The pertinent language of Section 1501 provides:

> As used in this Act, the term "intangible personal property" means and includes the following: . . .
>
> ***
>
> **(c) Accounts and bills receivable, including brokerage accounts, and <u>other credits,</u> whether secured or unsecured**. . . .

68 Okla. Stat. § 1501 (repealed 1971) (emphasis added).[16]

The Oklahoma Supreme Court, in *Dunlap v. Spencer*, examined the language of Section 1501(c): "(c) Accounts and bills receivable, including brokerage accounts, and other credits, whether secured or unsecured." 1942 OK 349, ¶¶ 11-14, 131 P.2d 994, 996. The Court interpreted "other credits" within this section as modifying the term "accounts receivable" and to mean credits on an account of a debtor or payor. *Dunlap*, 1942 OK 349, ¶¶ 14, 131 P.2d at 996. Specifically, the Court held that: "**Paragraph (c), supra, refers <u>only</u> to accounts and bills receivable. Brokerage accounts and other credits are there classified as accounts or bills receivable.**" *Id.* (emphasis added).

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[15] (Defs.' Appx. to Reply Br., Doc. 19.)
[16] (Defs.' Appx. to Reply Br., Doc. 19.)

In other cases, the Oklahoma Supreme Court has identified the types of "credits" that are the subject of Section 1501 as deferrals of payment obligations in the context of accounts and bills receivable. *See, e.g., State v. Atlantic Oil Producing Co.*, 49 P.2d 534 (Okla. 1935) (advancements of operating expenses that joint owners could pay back at a later date were the type of credits on accounts subject to taxation under Section 1501); *Edmunds v. White*, 219 P.2d 1007 (Okla. 1950) (deferred payments under lease installment agreement fell "within the class of credits or bills receivable made taxable by [Section 1501(c)]," and thus, the plaintiff was obligated to show compliance with the intangible personal property tax laws.).

In 1968, Art. 10, § 6A was adopted into the Oklahoma Constitution, such that it exempted the exact same items of property that had previously been taxable under Section 1501, and provided that they were no longer subject to ad valorem tax in Oklahoma:

> Intangible personal property as below defined shall not be subject to ad valorem tax or to any other tax in lieu of ad valorem tax within this State: . . .
>
> ***
>
> **(c) Accounts and bills receivable, including brokerage accounts, and <u>other credits</u>, whether secured or unsecured**. . . .

Okla. Const. Art. 10, § 6A (1968) (emphasis added)[17]. Accordingly, the language of former Art. 10, § 6A was derived from Section 1501 to effectively repeal the tax on intangible personal property. *See In re Assessment of Personal Property Taxes Against Missouri Gas Energy, Div. of Southern Union Co., for Tax Years 1998, 1999, and 2000* ("***Missouri Gas***"), 2008 OK 94, ¶ 24, 234 P.3d 938, 948 ("The constitutional exemption created in Article 10, § 6A, adopted in 1968, abolished the intangible tax which had been imposed by 68 O.S. Supp. 1965 § 2501.").

In 2008, the Oklahoma Supreme Court again interpreted the meaning of "other credits" then under the former Art. 10, § 6A paragraph (c), as follows: "**The term 'credit' in ordinary**

[17] (Defs.' Appx. to Reply Br., Doc. 20.)

usage means the right granted by a creditor to a debtor to defer payment of a monetary obligation." *Missouri Gas*, 2008 OK 94, ¶ 20, 234 P.3d at 946-47. This interpretation of "other credits" from the *Missouri Gas* case is consistent with the Oklahoma Supreme Court's earlier interpretations of the same language in *Dunlap*, *Atlantic Oil* and *Edmunds*, i.e., a grant of the right to defer payment of debt obligations in the context of accounts and bills receivable.

Stillwater Housing, however, departs from this established precedent in deciding whether LIHTCs should be excluded from the fair cash value analysis of a low-income housing development based on the taxpayer's argument that LIHTCs are exempt intangible personal property. Like *Missouri Gas*, *Stillwater Housing* was also decided under the prior version of Okla. Const., Art. 10, § 6A (1968). The court addressed the taxpayer's argument that the term "credit" as used in Art. 10, § 6A (1968) includes "tax credits" utilizing the footnote from the *Missouri Gas* opinion:

> The word "credit" is used in a variety of contexts and is associated with such terms as consumer credit, tax credit, line of credit, extension of credit, full faith and credit, federal credit, confirmed credit, transfer credit, offer of credit, etc. **For example, the Oklahoma Consumer Credit Code defines credit in substantially the form which we employ here**. *See* 14A O.S.2001 1–301(7), which states: **"'Credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment."**

Missouri Gas, 2008 OK 94, ¶ 20 n. 18, 234 P.3d at 947 n. 18 (emphasis added). The *Stillwater Housing* court held that "tax credits are intangible personal property exempt from taxation[,]" because the *Missouri Gas* footnote "acknowledged the term [credit] was used in a variety of contexts with other meanings, including tax credits." *Stillwater Housing*, 2011 OK CIV APP, ¶ 12, 254 P.3d at 729. This holding and reasoning ignore the substantive definition of "other credits" adopted in the body of the *Missouri Gas* opinion and reconfirmed in the footnote that the term "other credits" as used in Art. 10, § 6A, is a creditor's right to defer payment of a debt

obligation in a debtor-creditor relationship. *Missouri Gas*, 2008 OK 94, ¶¶ 19-20, 234 P.3d at 946-47, 947 n. 18.

Because *Stillwater Housing* is inconsistent with the Oklahoma Supreme Court precedent set in *Dunlap*, *Atlantic Oil*, *Edmunds* and *Missouri Gas*, the intermediate court of appeals' decision in *Stillwater Housing* lacks any valid foundation and should not be followed here.

B. *Stillwater Housing* Is Inconsistent with United States Supreme Court Precedent Establishing That Tax Credits Are Not Separate, Identifiable Property.

Stillwater Housing is also inconsistent with the United State Supreme Court precedent. The Supreme Court, in *Randall v. Loftsgaarden*, 478 U.S. 647 (1986), addressed the legal nature and characteristics of tax credits and provided two pertinent rulings with respect to tax credits. *Stillwater Housing* purports to rely on the *Randall* court's first ruling, which recognized that "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. *Randall*, 478 U.S. at 656-57. However, *Stillwater Housing* overlooks the second ruling in the *Randall* opinion, where the Supreme Court expounds on its characterization of tax credits and rules that tax credits do **not** constitute a separate, identifiable property interest.

> Respondents essentially ask us to treat tax benefits as a separate asset that is acquired when a limited partner purchases a share in a tax shelter partnership. But the legal form of the transaction does not reflect this treatment. Petitioners purchased securities, thereby acquiring freely alienable rights to any income that accrued to them by virtue of their ownership. They did not, however, also acquire a separate, freely transferable bundle of tax losses that would have value apart from petitioners' status as partners. For obvious reasons, 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 . . . . Accordingly, we decline to treat these tax losses as so much property created by the promoters of the partnership.

Randall, 478 U.S. at 665–66. Courts following *Randall* have also held that tax credits are not separate property or a property interest separate and apart from the credit generating property. *See, e.g.*, *State Building & Construction Trades Council of Cali. v. Duncan* ("***Duncan***"), 76 Cal. Rptr. 3d 507, 526 (Cal. Ct. App. 2008) ("the United States Supreme Court [in *Randall*] characterized as 'obvious' the logic underlying the connection between ownership and the right to claim a tax credit.").

For instance, in *City of Chicago v. Michigan Beach Housing Co-Op.* ("***Michigan Beach***"), 609 N.E. 2d 877 (Ill. App. Ct. 1993), the city issued a loan to the developers as financing for the restructuring of a low-income housing development as a cooperative. *Id.* at 880-81. In exchange, the cooperative granted the city a security interest in the building and related assets. *Id.* at 881. In the suit to recover the loaned money from the cooperative, the city argued that the LIHTCs received by the cooperative were subject to the parties' security agreement. *Id.* at 884-85. The security agreement covered all personal property of any kind or character, and thus, the city argued that the LIHTCs were intangible personal property subject to the city's Article 9 security interest. *Id.* at 885. Following *Randall*, the court rejected the city's argument and held:

> **Applying the Supreme Court's analysis in *Randall* to the case at bar, we are led ineluctably to the conclusion that the tax credits at issue cannot serve as collateral because they are not general intangible personal property. Tax credits, as *Randall* instructs us,** have no independent value in and of themselves; instead, they **are an incidental benefit** that investors receive when they purchase a security evidencing their interest in a limited partnership. The investors cannot transfer or sell the tax credits separate from the security itself. The limited partnership did not "sell" the tax credits to the investors; the tax credits remain exactly where they resided before the sale of the securities, in the limited partnership. Accordingly, it is clear that the [ ] defendants in this case did not purchase and do not own tax credits; instead, they bought and now possess securities which gave them an interest in the [limited partnership]. **The tax credits they received along with their interest in the partnership were incidental benefits of that investment—not separate intangible personal**

> **property which could collateralize the city's loan**—and whatever benefit they conferred on the investor renders no comfort to the city.

Michigan Beach, 609 N.E. 2d at 886 (emphasis added); *see also In re Lewis & Clark Apartments, LP*, 479 B.R. 47, 53 (B.A.P. 8th Cir. 2012); *Rainbow Apartments v. Illinois Prop. Tax Appeal Bd.*, 762 N.E.2d 534, 537 (Ill. App. Ct. 2001).

Randall dispels the notion that tax credits constitute a separate, identifiable property interest. The *Stillwater Housing* court's holding that tax credits are intangible personal property runs afoul of the analysis and widely adopted interpretation of *Randall*. Because *Stillwater Housing* is inconsistent with precedent set in *Randall*, the intermediate court of appeals' decision in *Stillwater Housing* lacks any valid foundation and should not be followed here.

C. PTCs Lack the Essential Characteristics to Qualify as Property.

KW urges the sweeping application of the holding in *Stillwater Housing* declaring all tax credits to be intangible personal property. This ruling ignores the reality regarding the legal nature, rights and characteristics of tax credits, including PTCs.

The judicial exercise of defining what is and is not "property" is often understood by examining the legal rights and characteristics necessary for a legal property interest. To qualify as intangible personal property, the subject must have certain attendant rights and characteristics. These legal rights or characteristics include: (i) it subject to specific identification and recognizable description; (ii) the intangible asset being subject to legal existence and protection; (iii) it should be subject to the right of private ownership, and the private ownership should be legally transferrable; (iv) there should be some tangible evidence of the intangible asset; (v) it should have been created or come into existence at some

identifiable time; and (vi) it should be subject to being destroyed or terminated at some identifiable time. Robert F. Reilly & Robert P Schweihs, *Valuing Intangible Assets*, 5 (1999).[18]

PTCs do not meet these criteria. In addition to there being no tangible evidence that represents PTCs[19] or the fact that PTCs cannot be destroyed or terminated, PTCs lack at least two other essential rights and characteristics necessary to qualify as intangible personal property: (1) a legally protectable property interest; and (2) a right to legally transfer the PTCs.

i. *A Taxpayer's Unilateral, Contingent Expectation of Claiming PTCs on Future Income Tax Returns Is Not a Legally Protectable Property Interest.*

An essential characteristic of property, whether tangible or intangible, is the attendant right of an owner to seek legal protection of the property in a court of law. *See e.g.*, *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 178 (1942); *Globe Life & Acc. Ins. Co. v. Okla. Tax Comm'n*, 1996 OK 39, ¶ 9, 913 P.2d 1322, 1326; *see also* Reilly, *supra*, at 5. ("For an intangible asset to qualify as property, it should possess the legal rights of property . . . [which include] the right of the property owner to claim ownership rights and protect those rights in a court of law.")[20].

Federal tax benefits, credits and deductions are government benefits. Whether there is a legally protectable property interest in a government benefit is determined under a due process clause analysis. The due process clause safeguards a person's interest in a government benefit that has already been granted and received, but not in every prospective advantage potentially afforded by the government. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576 (1972). A legally protectable property interest in a government benefit typically turns

[18] (Defs.' Appx. to Reply Br., Doc. 21.)
[19] The IRS does not provide the taxpayer with a certificate or any other tangible evidence or item indicating that the taxpayer has been granted PTCs.
[20] (Defs.' Appx. to Reply Br., Doc. 21.)

on the question of whether the person possesses a mere expectation of receipt versus an actual claim of entitlement. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a **legitimate claim of entitlement to it**." *Roth*, 408 U.S. at 577 (emphasis added). "A person's belief of entitlement to a government benefit, no matter how sincerely or reasonably held, does not create a protected right if that belief is not mutually held by the government." *Gerhart v. Lake County, Montana*, 637 F.3d 1013, 1020 (9th Cir. 2011) (emphasis added). In the context of tax credits, courts have ruled that taxpayers do not have a legitimate claim of entitlement to unawarded tax credits. *See, .e.g., Barrington Cove Ltd. Partnership v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1 (1st Cir. 2001); *DeHarder Inv. Corp. v. Ind. Hous. Fin. Auth.*, 909 F. Supp. 606 (S.D. Ind. 1995).

KW claims that the ECCA created MidAmerican's legally protectable property interest in the right to claim future PTCs, because MidAmerican could bring a lawsuit against FR Holdings II. To support this argument, KW inexplicably claims without citation to any legal authority that "[b]ecause the tax credits are creatures of contract, the right to claim them is legally protectable in a court of law." (KW Answer Br., at 23.)[21] KW's analysis completely misses the mark for two (2) reasons.

First, even the most cursory examination of the statutory provisions of 26 U.S.C. § 45 reveals absolutely no statutory requirement that a taxpayer, as the owner of a qualified wind facility, enter into a contract for the purposes of becoming eligible to claim PTCs on its tax return. The claim that PTCs are "creatures" of contract is absolutely indefensible.

[21] KW's unsupported claim that "tax credits are creatures of contract" contradicts its prior claim in the Answer Brief that tax matters as "creatures of statute." (*See* KW Answer Br., at 11).

Second, the fact that MidAmerican may file a lawsuit for breach of the ECCA against KW's parent entities is irrelevant to the analysis of whether MidAmerican has a legally protectable property interest in PTCs, as federal government benefits. A legally protectable property interest in a government benefit is protectable in a court of law **against the government body or agency** that is responsible for administering or issuing the government benefit. *See, e.g., Gerhart*, 637 F.3d 1013; *Barrington Cove*, 246 F.3d 1; *DeHarder*, 909 F. Supp. 606. This comes in the form of a constitutional due process claim against the government for denying the benefit.

Even under the correct legal analysis, MidAmerican does not have a legitimate claim of entitlement to PTCs that may be enforced against the IRS or federal government. As of January 1, 2016, MidAmerican had not acquired its ownership interest in FR Holdings II, the Subject Property had not been completely constructed, and no electricity had been produced and sold to a third party. On January 1, 2016, MidAmerican could not demonstrate satisfaction of statutory requirements for eligibility to claim PTCs under Section 45 and the Revenue Procedure. Furthermore, neither the IRS nor any other federal government agency was a party to the ECCA with MidAmerican. MidAmerican had absolutely no legitimate claim to PTCs that could be upheld in any court of law in this country.

A taxpayer cannot earn the right to claim PTCs until all of the statutory requirements under Section 45 are satisfied. A taxpayer cannot "earn" PTCs until: (1) the taxpayer owns a qualified wind facility; (2) the taxpayer produces electricity from the wind facility; (3) the taxpayer sells the electricity produced by the wind facility to an unrelated third party. Moreover, eligibility to claim PTCs is necessarily dependent upon the wind actually blowing sufficient to produce electricity. Until the wind blows and electricity is produced and sold, the

taxpayer, as owner of the wind facility, merely has a unilateral belief or expectation of receiving PTCs at some unspecified time in the future. Such a belief or expectation falls well-short of the requisite legal entitlement necessary for a protected property interest in a government benefit. Such an expectation of receipt of PTCs is, therefore, not property that can be protected against government denial or other action and enforced in a court of law. Thus, PTCs lack an essential characteristic of property as a matter of law.

ii. *PTCs are not property, because PTCs are not transferable.*

Another essential characteristic of property is transferability, i.e., the right to freely and legally transfer the personal property. Under *Randall* and progeny, PTCs cannot be transferred or sold to an unrelated third party, because Section 45 does not expressly authorize the transfer or sale of PTCs. *Randall,* 478 U.S. at 666–67 (Unless the statute creating the tax credit allows for the transfer or sale, the tax credits are non-transferable and non-saleable); *see also Michigan Beach*, 609 N.E. 2d at 886; *Rainbow Apartments*, 762 N.E. 2d at 537 ("Section 42 tax credits are not intangible personal property because they . . . are not freely transferable upon receipt."); *Duncan*, 76 Cal. Rptr. 3d at 527 (person claiming a non-transferable tax credit cannot "immediately sell it on any street corner.").

While PTCs may be allocated to partners in a tax equity partnership, these allocations are not sales or transfers of the tax credits. The partners may receive an allocation of tax credits through their respective interests in the partnership, but the partners do not acquire ownership of the tax credits. *See, e.g.*, *Randall*, 478 U.S. at 665–66; *In re Creekside Sr. Apartments, LP*, 477 B.R. 40, 59-60 (B.A.P. 6th Cir. 2012); *Lewis & Clark, LP*, 479 B.R. at 53; *Michigan Beach*, 609 N.E. 2d at 886; *Duncan*, 76 Cal. Rptr. 3d at 313-14.

As the *Randall* court recognized, the right to an allocation of tax credits is not property that is transferred when a partner purchases an interest in a partnership that is eligible to claim tax credits. *Michigan Beach*, 609 N.E. 2d at 886; *Duncan*, 76 Cal. Rptr. 3d at 313-14. "The tax credits the equity partners received along with their interest in the partnership were incidental benefits of the investment—not separate intangible personal property." *Michigan Beach*, 609 N.E. 2d at 886; *accord Creekside Sr. Apartments*, 477 B.R. at 59-60 (LIHTCs never leave the partnership as owner of the low-income housing development); *Lewis & Clark*, 479 B.R. at 53 (same); *Duncan*, 76 Cal. Rptr. 3d at 313-14 ("it is actually interests in the property that are sold; the tax credits are merely an incidental feature of partnership ownership.").

When tax credits are non-transferable apart from the credit-generating property, courts have consistently ruled that tax credits cannot be separate, identifiable property. *See, e.g.*, *Randall,* 478 U.S. at 666–67; *Creekside Sr. Apartments*, 477 B.R. at 59-60; *Lewis & Clark*, 479 B.R. at 53; *Michigan Beach*, 609 N.E. 2d at 886; *Rainbow Apartments*, 762 N.E. 2d at 537; *Duncan*, 76 Cal. Rptr. 3d at 313-14. PTCs are not transferable as a matter of law, and thus, this Court should find that PTCs lack another essential characteristic of property, let alone intangible personal property.

III. RATHER THAN PROPERTY, PTCS ARE MERELY ECONOMIC BENEFITS THAT AFFECT THE FAIR CASH VALUE OF THE SUBJECT PROPERTY.

KW argues that since Supreme Court in *Randall* ruled that tax credits are not "gross income" under the Internal Revenue Code, PTCs cannot be considered in determining the fair cash value of the Subject Property. In *Randall*, the Supreme Court ruled that tax credits are not property, but the Court also considered whether the receipt of tax credits was itself the receipt of "income" pursuant to 26 U.S.C. § 61, which provides the definition of "gross income" under the Internal Revenue Code. The Court found that: "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[22]." *Randall*, 478 U.S. at 657.

Gross income "means all income from whatever source derived[.]" 26 U.S.C. § 61(a). The Internal Revenue Code, however, does not define the term "income." The United States Supreme Court, in *Commissioner v. Glenshaw Glass Co.*, described gross income as "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." 348 U.S. 426, 431 (1955). The Supreme Court has also confirmed that the statutory definition of "gross income" does not recognize or include all potential economic benefits. *See Comm'r v. Indianapolis Power & Light Co.*, 493 U.S. 203 (1990). Thus, the ruling in *Randall* that tax credits are not gross income rests in sound logic. If tax credits were an income generating event under the Internal Revenue Code, it would defeat the purpose of a tax credit by requiring that the credit be reported as a taxable income-generating event.

Nevertheless, the fact that PTCs may not meet the definition of "gross income" under the Internal Revenue Code does not require their exclusion from the determination of the fair cash value of the Subject Property. Courts following *Randall* have reached the exact opposite conclusion in finding that tax credits should be considered in determining the value of the tax credit generating property. *Huron Ridge LP v. Ypsilanti Tp.*, 737 N.W. 2d 187, 195 (Mich. App. Ct. 2007) (under *Randall*, "tax credits should be included when determining the value of

[22] The *Randall* court cites to 26 U.S.C. § 61, which defines "Gross Income" under the Internal Revenue Code.

a tax-credit-funded housing project."); *Spring Hill, L.P. v. Tenn. State Bd. of Equalization*, No. M2001-02683-COA-R3-CV, 2003 WL 23099679 *15 (Tenn. App. Ct. 2003) (same).

These courts recognize the reality that the tax credits provide an economic benefit, not property in and of itself, that affects the fair cash value of tangible property. *Huron Ridge*, 737 N.W. 2d at 194-95. To judicially exclude tax credits from the fair cash value analysis altogether, would be to ignore the realities of the marketplace and factors that willing buyers and willing sellers would certainly consider in determining the fair cash value. *See, e.g., Lewis & Clark*, 479 B.R. at 54 ("valuation without consideration of the tax credits does not accurately reflect what a willing buyer would pay to purchase the property").

Furthermore, excluding PTCs from the determination of fair cash value would violate fundamental appraisal methodology. American Society of Appraisers' appraisal treatise, *Valuing Machinery and Equipment, The Fundamentals of Appraising Machinery and Technical Assets* ("**MTS Treatise**"), instructs appraisers performing an income approach to value to understand and consider "all future benefits" arising from the purchase of an asset, including "tax incentives." MTS Treatise, 4th. Ed., at 115 (2020).[23] Although PTCs may not constitute taxable gross income, the MTS Treatise recognizes that the Congressional implementation of tax credits can increase the benefits of asset ownership.

IV. THIS COURT SHOULD FOLLOW THE GUIDANCE PROVIDED BY *VAN DUZER* AND THE CONSIDERATIONS OF REAL-WORLD BUYERS AND SELLERS.

This Court should follow the guidance provided by the United States Tax Court's opinion, in *Van Duzer v. Comm'r* of *Internal Revenue*, 61 T.C.M. 2791, 1991 WL 93170 (U.S. Tax Ct. 1991)[24]. *Van Duzer* is the only case cited by either party in this appeal that involves a

[23] (Defs.' Appx. to Brief-in-Chief, Doc. 14, p. 212.)
[24] (Defs.' Appx. to Brief-in-Chief, Doc. 8.)

judicial determination of the fair market value of wind farms. In its opinion, the *Van Duzer* court agreed that the impact of tax benefits and credits generated by the wind farms should be considered in determining the fair market value of the tangible personal property comprising the wind farms. *See id.* at 10-11, 13.[25] This Court should follow *Van Duzer* court and allow consideration of PTCs in determining the fair cash value of the Subject Property.

The analysis of the *Van Duzer* court is consistent with the actions of buyers and sellers in real world transactions. David 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. Mr. Payne then narrowed the number of transactions considered to those most comparable to the Subject Property. (ROA, Doc. 62, Tr. Vol. II at 112-13, 118-20; *see* ROA, Doc. 66, Defs.' Ex. 148, p. 33-35.)

In the transactions where both tangible and intangible personal property was sold, purchase price allocations were included in filings with the Securities and Exchange Commission ("**SEC**"). In these publicly filed purchase price allocations, the buyer and/or seller allocated the purchase price among the various classes of assets that were bought/sold, including tangible personal property and intangible personal property. (ROA, Doc. 62, Tr. Vol. II at 77-79, 112-15, 148, 163; ROA, Doc. 63, Tr. Vol. III at 5-6.)

As an example, the Kay Wind Facility, located in Kay County, Oklahoma sold on December 15, 2015, just fifteen (15) days prior to the valuation date of the Subject Property. The Kay Wind Facility is similar in age. It achieved COD on December 12, 2015, whereas the

[25] (Defs.' Appx. to Brief-in-Chief, Doc. 8, p. 160-61, 163.)

Subject Property achieved COD on March 29, 2016. The facilities are similar in size. The Kay Wind is a 299-megawatt facility, where the Kingfisher wind farm is a 298-megawatt facility. Both facilities use Vestas wind turbine generators and both had the same developer. (ROA, Doc. 62, Tr. Vol. II at 121; *see* ROA, Docs. 66-67, Defs.' Ex. 148, p. 34 & Appxs. 4.1-4.8.) In SEC filings, the buyer allocated $481 million of the purchase price to the tangible personal property comprising the Kay Wind Facility, or $1,608,696 per megawatt. (ROA, Doc. 62, Tr. Vol. II at 121-23; ROA, Doc. 63, Tr. Vol. II at 6-7; ROA, Doc. 66-67, Defs.' Ex. 148, p. 34.)

In the Kay Wind transaction, the buyer included the impact of PTCs when analyzing the cash flow benefit streams attributable to the tangible personal property of that facility. Had the buyer excluded the impact of PTCs, as advocated by KW in this case, the value allocated to the tangible personal property of the Kay Wind Facility would have been significantly lower. (ROA, Doc. 62, Tr. Vol. II at 121-23; ROA, Docs. 66-67, Defs.' Ex. 148, p. 34 & Appxs. 4.1-4.8.) Market participants in the other transactions analyzed by Mr. Payne also considered PTCs when evaluating the cash flows attributable to the tangible personal property comprising the wind farms being bought and sold. (ROA, Doc. 62, Tr. Vol. II at 77-79, 112-15.)

By ignoring the economic impact of claiming PTC's, KW effectively reduces the value of the Subject Property by 56%. KW characterizes this manufactured reduction in value as "economic obsolescence." Under appraisal theory, economic obsolescence ("**EO**") is a form of depreciation where the loss in value or usefulness of a property is caused by factors external to the property. These may include such things as the economics of the industry; availability of financing; loss of material and/or labor sources; new legislation or ordinances; increased cost of raw material, labor, or utilities without a compensatory increase in product price; reduced demand; increased competition; inflation or high interest rates; or similar factors. MTS

Treatise, at 68, 532.[26] EO is a loss in value caused by external factors applicable to an industry as opposed to a single asset. Therefore, had the Subject Property suffered from EO of the magnitude claimed by KW, the tangible personal property comprising other similar facilities that sold during or close to 2015 would have also suffered from substantial EO. However, the purchase prices paid for tangible personal property comprising wind energy facilities in the comparable transactions considered by Mr. Payne did not evidence the presence of such EO. (ROA, Doc. 62, Tr. Vol. II at 82-83, 84-85, 112-113, 123-124; ROA, Docs. 66-67, Defs.' Ex. 148, p. 33-35 & Appxs. 4.1-4.8.)

The position of KW and its experts is contrary to the considerations of real-world buyers and sellers. This Court should be guided by the evidence that real-world buyers and sellers consider the impact of PTCs in determining the purchase and sale price for tangible personal property comprising wind farms.

CONCLUSION

For the reasons set forth herein and in Assessors' Brief-in-Chief, this Court should reverse the District Court's decision and enter a judgment establishing the fair cash value of the Subject Property to be $416 million as of January 1, 2016.

Respectfully submitted,

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[26] (Defs.' Appx. to Reply Br., Doc. 22.)

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CERTIFICATE OF SERVICE

This is to certify that on the 20th day of June 2022, a true and correct copy of the above and foregoing was mailed, via U.S. mail postage prepaid, to the following:

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