UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Osage Wind, LLC) Docket No. EC13-142-000

MOTION FOR LEAVE TO ANSWER AND ANSWER OF OSAGE WIND, LLC

On August 29, 2013, Osage Wind, LLC ("Osage Wind" or "Applicant") filed an application in the above-captioned proceeding (the "Application") for authorization pursuant to Section 203(a)(1)(A) of the Federal Power Act ("FPA") for a transaction (the "Transaction") pursuant to which Wind Capital Group, LLC ("Wind Capital") has agreed to sell, and TradeWind Energy, Inc. ("TradeWind") has agreed to acquire, 100% of the ownership interests in Applicant. As a result of the Transaction, Osage Wind will become a wholly-owned subsidiary of TradeWind. On September 19, 2013, the Osage Nation ("Osage Nation"), filed a Motion to Intervene and Protest (the "September 19 Protest"). On September 24, 2013, the Osage Nation filed an untimely Supplemental Protest (the "Supplemental Protest" and, together with the September 19 Protest, the "Protests"). No other party protested the Application or filed substantive comments.[1] Pursuant to Rules 212 and 213 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[2] Applicant hereby moves for leave to submit this answer ("Answer") to respond to the Protests.

For the reasons described below, Applicant respectfully urges the Commission to reject the Protests and issue an approval order as quickly as possible. The Osage Nation concedes that the matters it raises regarding the proposed 150 MW wind-powered facility in Osage County, Oklahoma ("Project") are undergoing review by the appropriate federal agency.

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1 Associated Electric Cooperative, Inc., filed a timely, doc-less motion to intervene.

2 18 C.F.R. §§ 385.212, 385.213 (2013).

That process should continue independently, as it normally does for any renewable resource project development. The Commission should recognize the Protests for what they are—transparent delay tactics by an entity that does not like the Project for reasons unrelated to the Commission's review of the Application. There is no basis under Section 203 of the FPA, however, for the Commission to delay its approval based on issues not pertinent to its FPA review.

Prompt processing of the Transaction would assist the parties' efforts to close the upstream transfer of ownership interests as soon as possible, and facilitate the ongoing development of a generation resource in Oklahoma that will bring needed jobs and a new renewable energy source to the region.

I. MOTION FOR LEAVE TO ANSWER

Applicant respectfully requests that the Commission accept this Answer in response to the Protests. As described below, the Osage Nation raises no issue under Section 203 of the FPA and, therefore, no issue properly considered within the scope of this proceeding. The Protests should therefore be summarily rejected.

The Protests, however, while wholly irrelevant to this docket, are riddled with gross factual inaccuracies and blatant misrepresentations, and Applicant respectfully seeks leave to submit this Answer to clarify the public record. The Commission regularly accepts otherwise impermissible answers where, as here, an answer promotes the Commission's understanding of the issues raised in the proceeding.[3] Good cause exists to accept this Answer as it will help to

[3] *See, e.g., Dominion Cove Point, LNG, LP*, 126 FERC ¶ 61,036 at P 30 (2009) (accepting otherwise impermissible answers that assisted the Commission's decision-making process); *Southwest Power Pool, Inc.*, 126 FERC ¶ 61,012 at P 35 (2009) (same); *BP Pipelines (Alaska) Inc.*, 125 FERC ¶ 61,367 at P 9 n.10 (2008) (same); *Steckman Ridge, L.P.*, 125 FERC ¶ 61,217 at P 4 (2008) (same).

clarify the scope of issues in this proceeding and correct the factual record, and will allow the Commission to make a reasoned decision with respect to the Application.[4]

II. ANSWER

A. The Supplemental Protest Is Untimely And Should Be Rejected

This Application involves a straightforward, upstream transfer of the membership interests of Applicant. Applicant, in turn, is developing a single generation facility, *i.e.*, the Project. As described in the Application, the output of the facility is fully committed under a long-term sales contract and there are, quite clearly*, no issues raised* by the Application regarding impacts on competition, rates, regulation or cross-subsidization. There is no Appendix A analysis required for the Transaction,[5] nor does the Transaction involve multiple generation facilities or any transmission facilities other than interconnection facilities.

The Osage Nation nonetheless argued, in the September 19 Protest, that it needed more time to "thoroughly review" the proposed transaction,[6] and then filed its untimely

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[4] Applicant does not object to the Osage Nation's Motion to Intervene. The Commission should consider, however, whether the Osage Nation has established proper standing to press its claims in this proceeding. Osage Nation has raised no issue that is within the zone of interests of the Commission's analysis under Section 203 regarding the effect of the Transaction on competition, rates or effective regulation. As described herein, the Osage Nation has limited its claims to alleged concerns regarding environmental and cultural resource impacts. In similar contexts, where environmental and cultural resource concerns have been raised in the context of a proceeding under Part II of the FPA (*i.e.*, in a proceeding under Section 205 of the FPA), the courts have found that entities raising such concerns lacked prudential standing because the issues were unrelated to the order being sought before the Commission. *See*, *e.g.*, *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 956-57 (D.C. Cir. 2000) (holding that concerns regarding cultural and environmental interests were outside the relevant zone of interests where the Commission had properly excluded environmental claims in its review of a market-based rate application under Section 205 of the FPA). While Applicant does not object to granting the Osage Nation party status to this proceeding, Applicant preserves its rights in this proceeding to object to the Osage Nation's claims on standing grounds.

[5] *See* Application at 8.

[6] September 19 Protest (at page 1 of the unpaginated filing).

Supplemental Protest well after public notice was issued.[7] The Osage Nation implicitly suggests the twenty-one day comment period was inadequate but provides no justification for being unable to prepare and file a single set of comments within the timeframe that all other intervenors are held to under the Commission's standard period for comments. The Osage Nation's Supplemental Protest is deficient under the Commission's Rules of Practice and Procedure by failing to include an appropriate motion for leave to file the protest out-of-time.[8] Moreover, the Supplemental Protest enumerates the same three issues raised in the September 19 Protest.[9] Thus, because all three issues were already raised in Osage Nation's timely September 19 Protest, the Supplemental Protest adds nothing to the record and appears to be nothing more than a desire of the Osage Nation to "pile on" with a longer (but still grossly incorrect) and untimely pleading, which should be rejected.

B. The Commission Should Summarily Reject The Protests As Outside The Scope Of This Proceeding And Reject The Osage Nation's Attempt To Mischaracterize The Transaction

1. *The Issues Raised By The Osage Nation Fall Outside The Scope Of The Commission's Section 203 Analysis*

The Osage Nation concedes that none of its concerns "fall squarely within the traditional scope of the issues considered by the Commission's [sic] in analyzing an application under section 203."[10] There can be no dispute over what the Commission has said is the scope of its evaluation under Section 203. In the Commission's Merger Policy Statement—which is not referenced by the Osage Nation in either of its Protests—the Commission explained that its

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7 *See* Combined Notice of Filings #1, Docket No. EC13-142-000 (issued on Aug. 30, 2013).

8 *See generally* Supplemental Protest at 1 (omitting any motion to request permission to file out-of-time and simply asserting that it "now supplements" its "preliminary protest").

9 *Compare* September 19 Protest (listing three issues, at page 3 of the unpaginated filing) *with* Supplemental Protest at 3 (listing the same three issues).

10 September 19 Protest (at page 4 of the unpaginated filing).

review of a Section 203 application focuses on (i) the effect on competition, (ii) the effect on rates and (iii) the effect on regulation.[11] The Commission has also consistently held that it will not entertain comments on issues outside the scope of a Section 203 analysis.[12] If upon review of these three factors, the Commission concludes that the transaction is "consistent with the public interest," the Commission is required to authorize the proposed transaction.[13]

Commission precedent expressly holds that environmental issues, such as the alleged avian and cultural resource issues cited by the Osage Nation, are generally not to be considered in a Section 203 analysis. In the rulemaking proceeding that resulted in the Commission's Merger Policy Statement, the Commission was asked to include an analysis of the environmental effects of a transaction but declined to do so, stating that "most mergers do not

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[11] *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 at 30,111-112 (1996) ("*Merger Policy Statement*"), *order on recons.*, Order No. 592-A, 79 FERC ¶ 61,321 (1997).

[12] *See*, *e.g.*, *Dominion Energy Brayton Point, LLC*, 144 FERC ¶ 61,139 at P 49 (2013) (declining to consider concerns regarding future operations of a facility as beyond the scope of a Section 203 proceeding); *BHE Holdings Inc.*, 133 FERC ¶ 61231 at P 40 (2010) (declining to consider intervenor concerns regarding potential future rate increases as such matters would be subject to a Section 205 tariff filing, subject to public notice and comment and Commission review); *Great Plains Energy Inc.*, 121 FERC ¶ 61,069 at P 50 (2007) (declining to condition Section 203 approval "on matters that should be addressed in another proceeding or forum"); *Energy East Corp.*, 121 FERC ¶ 61,236 at P 38 (2007) (finding that the Commission does not normally consider potential environmental effects of proposed transactions under Section 203 of the FPA, noting that such issues are the purview of other regulatory authorities); *NE Gen. Co.*, 117 FERC ¶ 61,068 at P 18 (2006) (finding that lack of information in the Section 203 application related to certain planning is not relevant to the Commission's consideration of the application); *FirstEnergy Corp.*, 112 FERC ¶ 61,243 at P 24 (2005) (rejecting intervenors' concerns as outside of the scope of the proceeding where they failed to provide evidence that the proposed transaction was not consistent with the public interest or that it will adversely affect competition, rates or regulation).

[13] 16 U.S.C. § 824b(a)(4). Section 203 does not require a demonstration that a proposed transaction will result in a positive benefit to the public. Rather, the Commission need only conclude that the proposed transaction is *consistent with* the public interest. *See Tex.-N.M. Power Co.*, 105 FERC ¶ 61,028 at P 23 (2003); *Entergy Servs., Inc.*, 62 FERC ¶ 61,073 at 61,370 (1993); *Fitchburg Gas & Elec. Light Co.*, 58 FERC ¶ 61,201 at 61,624 (1992); *Ky. Utils. Co.*, 56 FERC ¶ 61,184 at 61,654 (1991); *Savannah Elec. & Power Co.*, 42 FERC ¶ 61,240 at 61,780 (1988); *Pac. Power & Light Co. v. FPC*, 111 F.2d 1014, 1016-17 (9th Cir. 1940).

present environmental concerns."[14] The Commission has consistently held the view that environmental factors are not to be considered in Section 203 applications unless highly unusual circumstances exist.[15] Courts of appeal have affirmed the Commission's policy of refusing to consider environmental issues in Section 203 and Section 205 applications absent extraordinary circumstances.[16] This policy has been acknowledged and approved in the context of a transfer of upstream ownership interests. For example, in *Town of Norwood v. FERC*, the United States Court of Appeals for the First Circuit upheld the Commission's decision to disregard environmental issues regarding a change in upstream ownership of hydroelectric facilities.[17] The First Circuit acknowledged protesters' claims that operating a major new dam is likely to have environmental consequences, but found that "the transfer of existing facilities from one large utility to another is simply a change in ownership, and [the new owner] became subject to the same license conditions and regulations that had bound [the previous owner]."[18]

Here, as in the typical case, the upstream transfer of membership interests in Applicant raises no environmental issues because Applicant, regardless of who its owner is at any point of time, will be required to undergo applicable siting and environmental review prior to

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14 *Merger Policy Statement* at 30,128.

15 *Cal. Indep. Sys. Operator Corp.*, 93 FERC ¶ 61,001 at 6 (2000) ("we emphasize that it has long been the case in section 203 and 205 proceedings that environmental factors are not material considerations unless highly unusual circumstances are present").

16 *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 954, 957 (D.C. Cir. 2000) (upholding the Commission's exclusion of environmental claims in a Section 205 proceeding finding that the Commission is not required to consider environmental consequences of rates, such as the Crees' allegations that Commission approval will "devastate the lives, environment, culture and economy of the Crees," when determining "just and reasonable" rates); *see also, Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 958-59 (1st Cir. 1993) (upholding Commission approval of a merger between utility companies without any environmental analysis as there was no evidence in the record of identifiable environmental harms).

17 *Town of Norwood v. FERC*, 202 F.3d 392, 406 (1st Cir. 2000).

18 *Id.*

construction of its facility, just like any other developer of electricity generation projects in the United States. Importantly, this environmental review process is *wholly independent of the Commission's* review in this Section 203 proceeding, which makes logical sense. It is supervised by the expert agency that administers the applicable environmental laws (in this case, the Department of Interior, through the U.S. Fish and Wildlife Service ("USFWS")).

The Osage Nation has not provided any reason why, in this case, the Commission should depart from its regulations, its own precedent and applicable circuit court precedent and expend resources considering issues that are being raised with and will be resolved by the USFWS. The Osage Nation makes certain arguments regarding concerns with an Eagle Take Permit and a potential effect on cultural resources, but, even if it were appropriate for the Commission to consider these claims (which it is not), the Osage Nation does not provide any evidence of identifiable environmental harm arising out of the proposed transfer of ownership interests. Moreover, the Osage Nation does not explain how these concerns are appropriately before the Commission in a Section 203 proceeding that involves only the transfer of upstream ownership interests. The Transaction in no way implicates any of the concerns raised by the Osage Nation. Osage Wind will still be the entity subject to environmental permitting obligations since it has been and will continue to be the entity developing, owning and operating the Project (just as it would be if the Transaction did not close).

Finally, the Osage Nation's concerns are before another federal agency. As noted above and as the Osage Nation concedes, USFWS is in the process of reviewing the Eagle Take Permit Application and Eagle Conservation Plan ("Eagle Take Permit") filed by Osage Wind with the USFWS on October 4, 2012, and preparing an Environmental Assessment ("EA"). Both the Osage Nation and Osage Wind have received a preliminary draft of the EA and are

providing comments to this draft. Significantly, and contrary to the claims of the Osage Nation that its concerns have been "ignored,"[19] Osage Wind understands that the Osage Nation has been in frequent communication with the USFWS regarding the Eagle Take Permit since December 2012. Further, the Osage Nation met with the USFWS and Applicant on September 12, 2013, to express its concerns regarding the Eagle Take Permit and the Project. All of this has occurred *prior* to the EA being published in the Federal Register for formal public comment.[20] The Osage Nation's concerns will be appropriately addressed in the proceedings related to the Eagle Take Permit. Accordingly, there is no reason that the process by which the USFWS addresses the Osage Nation's concerns should delay or affect Commission approval of the Transaction.

2. *The Commission Should Reject The Osage Nation's Inaccurate Attempt To Recast The Nature Of The Subject Transaction*

A theme of the Protests is that, as a result of the Transaction, the owner of the physical development site, or proposed generation facility, will change.[21] The Protests argue that the Commission should somehow condition approval of the Transaction by requiring a new, indirect upstream owner of membership interests in Osage Wind to make certain "commitments"[22] that have nothing to do with Section 203 jurisdiction. These claims are misplaced.

The Osage Nation implies that the Application was not forthright regarding the nature of the Transaction, claiming: "although Applicants have styled the transaction as an acquisition of 100% of the ownership interests in Osage Wind LLC by TradeWind Energy, the

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19 *See*, *e.g.*, Supplemental Protest at 4.

20 The EA is expected to be published in the Federal Register later this year, and the USFWS has indicated that there will be a full notice and comment process.

21 September 19 Protest (at page 4 of the unpaginated filing).

22 *See* Supplemental Protest at 10 (asserting that the Commission should condition its approval on a "commitment by TradeWind . . . to resolve" the Osage Nation's concerns).

physical ownership of the generation site will be impacted . . . and the parties to the on-going negotiations [over issues being reviewed by USFWS] will change. . . ."[23] This is flatly wrong. The generation site will continue to be owned by the six private landowners who have leased the land to Osage Wind (*see* footnote 36). As described in the Application (page 7), TradeWind will acquire 100% of the limited liability company membership interests in Osage Wind. The transfer is not an asset transfer. Osage Wind will continue to be the entity that develops the Project on the land leased by Osage Wind, and will continue to be the party to any further interactions with the Osage Nation and USFWS regarding, for example, the Eagle Take Permit and the EA being conducted by USFWS. Thus, the Osage Nation is simply incorrect when it asserts that "TradeWinds (sic) . . . would be the entity with the permit obligations"[24]—on the contrary, that entity is, and will remain, Osage Wind. Applicant has accurately described the proposed Transaction and Osage Nation's implications to the contrary should be rejected.

3. *The Commission Should Also Reject The Osage Nation's Arguments Suggesting Applicant Failed To Disclose Required Permits*

Section 33.2(i) of the Commission's regulations requires an applicant to identify all "licenses, orders, or other approvals from regulatory bodies *in connection with the proposed transaction*."[25] As explained in the Application, there are no licenses, orders, or other approvals required from other regulatory bodies *in connection with the Transaction*, *i.e.*, in connection with an upstream transfer from Wind Capital to TradeWind of 100% of the membership interests in Osage Wind.

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[23] September 19 Protest (at page 4 of the unpaginated filing); *see also* Supplemental Protest at 6 ("Applicants attempted to represent this transaction as simple….").

[24] Supplemental Protest at 5.

[25] 18 C.F.R. § 33.2(i) (2013) (emphasis added).

The Osage Nation argues it is necessary to disclose licenses, orders or other regulatory approvals "if there is a transfer of physical property ownership"[26] and then argues that despite the fact that the Transaction involves a transfer of *upstream* ownership interests, "the physical ownership of the generation site will be affected."[27] As a result, the Osage Nation appears to take the position that Applicant was required to "disclose" the Eagle Take Permit application, including the development, of an EA, before the USFWS. This is not the case. A Section 203 applicant must identify all licenses, orders, or other approvals necessary *related to the proposed transaction*. As is widely understood based on well-established practice for an upstream transfer such as the subject Transaction, the type of licenses, orders and other regulatory approvals that the Commission's regulations refer to in Section 33.2(i) of the regulations typically include any required state public service commission notices or approvals, approval from the Federal Trade Commission and/or the Department of Justice under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, if applicable, and approvals from the Federal Communications Commission for the transfer of radio licenses, if applicable. No such approvals are necessary for the Transaction.

Applicable environmental permits for the development of the Project, where required of Osage Wind, will be obtained in the normal course,[28] but they are *not* required in connection with the upstream transfer of ownership interests in Applicant. The Osage Nation makes the inflammatory assertion that Applicant "fail[ed] to disclose the information required by

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[26] Supplemental Protest at 6.

[27] Supplemental Protest at 6.

[28] The Eagle Take Permit—referred to by the Osage Nation as the "Eagle Kill" permit—is a *voluntary* permit and is not required for construction or operation of the Project.

Section 33.2(h) of the Commission's regulations."[29] The Osage Nation offers no evidence for this claim—other than the Osage Nation's own misreading of the regulations.[30] The Commission should summarily reject these claims.

4. *There Is No Justification For The Osage Nation's Call For Delay, And Applicant Respectfully Reiterates Its Request For Prompt Review And Approval Of The Transaction*

As demonstrated above, no issue has been raised that is germane to this Section 203 proceeding, as none of the issues raised by Osage Nation relate—even remotely—to the impact of the Transaction on competition, rates, or effective regulation. There is no Appendix A analysis required for this Transaction and, with respect to the effect on horizontal market power, the *de minimis* standard is met.[31] In Section VI of the Application, Osage Wind explained that the parties sought to satisfy all closing conditions, including Commission approval of the Transaction on an expedited schedule. Applicant further explained that the expedited schedule requested was not unusual and consistent with other examples where the Transaction was not a merger and an Appendix A analysis is not required.[32]

While Applicant recognizes that the expedited schedule requested is not generally available where a protest has been filed, Applicant nonetheless respectfully reiterates its request for swift processing of this Application, in light of the specious and unfounded nature of the arguments made in the Protests. There is simply no justification for granting the Osage Nation's

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29 Supplemental Protest at 6.

30 18 C.F.R. § 33.2(h) requires an applicant to "provide a general or key map showing in different colors the properties of each party to the transaction" if the proposed transaction "involves physical property." As stated in the original application, the Transaction does not involve a merger or other combination of jurisdictional facilities and therefore a map would not provide useful information to the Commission. It is unclear why the Osage Nation is citing this provision, especially given the assertion that Applicant did not disclose all necessary permits.

31 *See* Application at 8-11 (explaining that the Transaction has no adverse impact on competition, on rates, regulation and that no cross-subsidization issues are raised).

32 *See* Application at 16-7 (citations omitted).

request for delay, when the environmental and cultural resource issues they have raised will be addressed in the ongoing EA process, and where they have raised *no concerns* with the Transaction's impact on competition, rates or regulation.

C. The Osage Nation's Blatant Misrepresentations Of Facts Wholly Irrelevant To This Proceeding Should Be Disregarded

As stated earlier, the Osage Nation has failed to raise any issue related to the Commission's Section 203 analysis of the effect of the Transaction on competition, rates, or effective regulation. Accordingly, the Commission cannot and should not review the substance of any issues raised in the Protests because they fall outside the scope of this proceeding. Applicant, however, is deeply concerned that the Protests have placed several serious misrepresentations and misleading statements into the public record. Below, Applicant responds to some of the most blatant of these, in order to correct the record and to highlight to the Commission the startling inaccuracies that underlie the Osage Nation's various arguments.

1. *There Is No Osage Nation Reservation*

Underlying both Protests is the premise that the Project is being developed on the Osage Nation's "Reservation" and that the "federally protected" interests of a tribal reservation in Indian country are implicated.[33] This is incorrect. The Osage Nation's reservation, originally established in 1872, was subsequently disestablished over 100 years ago with the enactment of the Osage Allotment Act.[34] In litigation over the authority of Oklahoma to tax tribal members, the Osage Nation specifically claimed that its reservation continued to exist. The United States

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[33] *See*, *e.g.*, September 19 Protest (at page 2 of the unpaginated filing) ("The Osage Nation is a federally recognized tribe, based mainly in Osage County, Oklahoma, conterminous *with their reservation*."); *see also* Supplemental Protest at 2 (asserting that the Osage Allotment Act of 1906 "created the present day Osage Reservation which includes approximately 160,000 acres of restricted lands…"); *id.* at 6 (". . . particularly given the [Project's] location on tribal lands, within the Osage reservation . . . the potential transfer . . . is a serious infringement of the Osage Nation's Federally-protected interests . . . .").

[34] *See* Act of June 28, 1906, ch. 3572, 34 Stat. 539 ("Osage Allotment Act").

District Court for the Northern District of Oklahoma held that the Osage reservation ceased to exist more than a century ago; the United States Court of Appeals for the Tenth Circuit affirmed the District Court's decision, stating that the Osage reservation had been disestablished, and the Supreme Court denied certiorari.[35] Thus, the Osage Nation's claim that the Project will be developed on reservation lands is demonstrably false.[36]

2. *The Project Will Not Interfere With The Osage Nation's Subsurface Mineral Rights*

The Protests baldly assert, without any elaboration or supporting evidence, that Applicant's facility will "interfere" with the ability of the Osage Nation to exploit underlying mineral rights, such as oil and gas extraction.[37] This precise claim, too, has already been litigated and rejected.

In 2011, the Osage Nation, acting through the Osage Minerals Council, filed suit against Wind Capital, Applicant and another named defendant in the United States District Court for the Northern District of Oklahoma seeking, among other things, an order enjoining defendants "from taking any actions designed to construct or operate" the Project and declaring that "the construction and operation of the . . . Project on the land above Osage Nation's mineral estate will interfere with Osage Nation's access to the mineral estate and that the . . . Project violates federal law." On December 20, 2011, the District Court denied the Osage Nation's

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35 *See Osage Nation v. State ex rel. Okla. Tax Comm'n*, 597 F. Supp. 2d 1250 (N.D. Okla. 2009); *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 3056 (2011).

36 The Osage Nation also erroneously claims that the Project "is located on property belonging to members of the Osage Nation." Supplemental Protest at 2. To the contrary, the Project is being developed on privately owned fee land, not held in trust by the United States or subject to federal restraints on alienation. That land is owned by six individuals, only one of which is a member of the Osage Nation, and all of which support the development of the Project.

37 *See*, *e.g.*, Supplemental Protest at 3.

request for declaratory relief and a permanent injunction barring the defendants from constructing the Project. The Findings of Fact and Conclusions of Law include the following:

> Plaintiff did not prove that the Wind Farm will unreasonably interfere with plaintiff's right to make reasonable use of the surface estate, nor did it prove that the Wind Farm will unreasonably hinder the right to use so much of the surface as may be reasonable for oil and gas operations and marketing. Plaintiff also failed to prove that it would be irreparably harmed unless an order enjoining construction and operation of the Wind Farm is granted; that the threatened injury to the Tribe outweighs the harm the injunction may cause the defendants; and that the injunction, if issued, would not adversely affect the public interest.[38]

The Osage Nation appealed to the United States Court of Appeals for the Tenth Circuit and, prior to the deadline for filing briefs, withdrew their appeal.[39]

3. *Osage Wind Has Not "Ignored" Concerns Of The Osage Nation And Has Proactively Sought To Address Avian Issues*

The Supplemental Protest claims that Applicant has ignored the concerns of the Osage Nation and the Project's environmental impacts. This is not the case, as Osage Wind has been in communication with various officers and instrumentalities of the Osage Nation regarding the Project since 2009.

With respect to the most specific environmental concern raised by the Osage Nation, the impact of the Project on bald eagles, as noted earlier, Applicant has sought an Eagle Take Permit from USFWS[40] and the review for this permit is ongoing. Also as noted earlier, it is important to appreciate that this permit is *voluntary* and is not required for the construction or operation of the Project. While the Osage Nation states in its pleading that it "opposes" the

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38 *Osage Nation ex rel. Osage Minerals Council v. Wind Capital Group, LLC*, 2011 WL 6371384 P. 26 (N.D.Okla. Dec. 20, 2011), *appeal dismissed* (10th Cir. 12-5007) (Feb. 23, 2012).

39 *Id.*

40 The Osage Nation provocatively invents the moniker "Eagle Kill Permit" for this voluntary permit, which does nothing to salvage a strained attempt to shoehorn an avian issue into a proceeding evaluating impacts on competition, rates and effective regulation under Section 203 of the FPA.

Eagle Take Permit, Commission rules and precedent clearly confirm that the Commission need not and should not address that issue in this Section 203 proceeding. The Osage Nation's mischaracterization of both the permit and the process is disturbing.

4. *Cultural Resource Concerns Are Not At Issue In This Proceeding*

In its Supplemental Protest, the Osage Nation alleges that there are cultural resource concerns and that archaeological sites are implicated by the Project's development. The Osage Nation indicates that it has asked the U.S. Army Corps of Engineers ("Army Corps") to review these sites.[41] As discussed in Section II.B, *supra*, the Merger Policy Statement makes clear such issues are outside the scope of this proceeding.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, Applicant respectfully requests that the Commission grant its motion for leave to answer and accept this Answer and expeditiously issue an order granting the authorizations requested in the Application, including authorization of the Transaction.

Respectfully submitted,

/s/ Jared W. Johnson
Jared W. Johnson
Tyler Brown
Latham & Watkins LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004

Counsel for Osage Wind, LLC

Dated: October 2, 2013

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[41] Supplemental Protest at 8. It should be noted that the Supplemental Protest was the first time the Osage Nation informed Osage Wind that it had raised cultural resource concerns with the Army Corps.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary of the Commission in the above-captioned proceeding.

Dated at Washington, DC, this 2nd day of October, 2013.

/s/ Tyler Brown

Tyler Brown
Latham & Watkins LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

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