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PUBLIC SERVICE
COMMISSION

Commonwealth of Kentucky

Before the Public Service Commission

In the Matter of:

Tariff Filing of East Kentucky Power Cooperative,)
 Inc. and Its Member Distribution Cooperatives for)
 Approval of Proposed Changes to their Qualified)
 Cogeneration and Small Power Production)
 Facilities Tariffs and the Implementation of)
 Separate Tariffs for Power Purchases for Solar)
 Generating Qualifying Facilities)

Case No. 2017-00212

**MOTION FOR INTERVENTION
 OF BLUEBIRD SOLAR LLC**

Pursuant to 806 KAR 5:001 Section 3(8), Bluebird Solar LLC (“Bluebird” or “Movant”), respectfully requests that the Commission grant it intervention as a party in the above-captioned matter. Movant (a) has an unrepresented, special interest in the rates and terms of the proposed solar power purchase tariffs that are the subject of this proceeding and (b) is likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings. Movant Bluebird also respectfully suggests that the Commission enter a scheduling order for the case, to provide for information requests and a possible hearing. In support of its intervention request, Movant states as follows:

BACKGROUND

1. Bluebird is a limited-liability company organized under the laws of Kentucky. Its full name, mailing address, and electronic mail address are:

Bluebird Solar LLC
Vitaly A. Lee
Vitaly.Lee@baywa-re.com
17901, Von Karman Ave.; Suite 1050
Irvine, CA 92614

Bluebird is the developer of the Bluebird Solar Project, an 80-megawatt qualifying facility (“QF”), and self-certified on November 2, 2016.¹ The Bluebird Solar Project will be located in Harrison County, Kentucky, within the territory of Eastern Kentucky Power Cooperative, Inc. (“EKPC”). The Project will interconnect with EKPC on the 138 kV Renaker-Jacksonville line or the Jacksonville Substation near Broadwell, Harrison County, Kentucky.

2. On September 29, 2016, Bluebird submitted an interconnection application to PJM Interconnection, LLC (“PJM”) and was assigned PJM Queue No. AC1-074. On November 4, 2016 — two days after Bluebird self-certified as a QF — PJM coordinated a “kick off” conference call with EKPC to discuss Bluebird’s interconnection application. Later that day, EKPC filed the first of a series of FERC petitions (*see* ¶5 below) to terminate its mandatory purchase obligation with respect to QFs with over 20 MW of net capacity.

3. On December 2, a Bluebird representative contacted EKPC to communicate Bluebird’s intent to avail itself of its rights under the Public Utility Regulatory Policy Act (“PURPA”) to sell power to EKPC at avoided-cost rates. In response, EKPC pro-

¹ *See* Bluebird Solar LLC, FERC dkt. QF 17-259, Form 556 Self-Certification (Nov. 2, 2016).

vided Bluebird with the cogeneration tariff for the relevant distribution member co-op, Blue Grass Energy Cooperative Corporation (“Blue Grass Energy”). In a 12/5/16 email, Bluebird informed EKPC that it “wants to sell all of its energy and capacity to EKPC in accordance with PURPA.”² Together with prior interconnection activity, the 12/5/16 email gave rise to a legally enforceable obligation under 18 C.F.R. § 292.304 (“LEO”) as to all of the Bluebird Solar Project output. EKPC informed Bluebird that it was not interested in purchasing power from the Bluebird Solar Project and then, on December 7, 2016, EKPC amended its FERC petition to identify Bluebird as a QF potentially affected by the requested termination.

4. Further communications between Bluebird and EKPC representatives confirmed Bluebird’s commitment to sell all of its output to EKPC and EKPC’s unwillingness to purchase from Bluebird.³ Nonetheless, Bluebird has had one meeting with EKPC representatives, on May 17, 2017, to begin negotiations relating to the output from the Bluebird Solar Project.

5. FERC Termination Petitions: EKPC has filed a series of three essentially identical petitions, on December 7, 2016, March 13, 2017, and June 9, 2017, with the Federal Energy Regulatory Commission (“FERC”)⁴ seeking termination of its mandatory obligation under PURPA to enter into new contracts or obligations or to purchase power

² See 12/5/16 email from Bluebird to EKPC, attached as Exhibit A.

³ See, e.g., letters dated 12/16/16 and 12/21/16, attached as Exhibits B and C, respectively.

⁴ Assigned FERC docket numbers QM 17-2, 17-3, and 17-5-000, respectively.

from QFs with a net capacity of over 20 MW on a service territory-wide basis. Bluebird filed a protest to each such EKPC petition on January 4, 2017, April 7, and July 7, 2017, respectively.

6. Bluebird opposes EKPC's present petition for termination on the grounds that its LEO predates the termination request and therefore is grandfathered under PURPA § 210(m)(1) & (6) and FERC regulations, 18 C.F.R. §§ 292.309 and 292.314.⁵

Bluebird also opposes the petitions on the additional grounds that QFs within EKPC's service territory are subject to undue discrimination and lack meaningful access to competitive markets. Among the sources of discrimination and barriers to meaningful access cited by Bluebird are the more restrictive siting requirements imposed on renewable QFs (in KRS 278.704) than on similar utility-owned facilities (in KRS 278.216).

7. EKPC's first petition to terminate was denied by operation of law, effective March 7, 2017.⁶ EKPC's second petition was subsequently filed, and similarly denied by operation of law, as documented by a 6/13/17 FERC Notice.⁷ EKPC immediately

⁵ See, e.g., *Virginia Electric and Power Company*, Order Denying Application to Terminate, 151 FERC ¶61,038 (Apr. 16, 2015) (denying termination request where QFs had already established prior LEOs).

⁶ Notice that, in Absence of Final Determination by Commission Due to Absence of Quorum, Application Is Deemed Denied, 159 FERC ¶ 62,180 (issued Mar. 10, 2017) (giving notice that EKPC petition is deemed denied on March 7, 2017 in light of Commission's failure to act within the statutorily required 90-day deadline).

⁷ Notice that, in Absence of Final Determination by Commission Due to Absence of Quorum, Application Is Deemed Denied, 159 FERC ¶62,265 (issued June 13, 2017) (giving notice that EKPC petition is deemed denied on June 9, 2017 in light of Commission's failure to act within the statutorily required 90-day deadline).

filed a third petition to terminate its purchase obligation, which is pending at FERC as docket number QM 17-5-000.

8. Ky. Tariff Filings: On March 31, 2017 — after the first FERC petition was denied, the second FERC petition was filed, and EKPC was aware of the bases for Bluebird’s opposition — EKPC and its distribution co-ops filed changes to their Cogeneration and Small Power Production Power Purchase Rate Schedules, including implementation of a tariff specifically for purchases from solar generation. The changes proposed substantially reduce all the capacity and energy rates at which power would be purchased from non-solar QFs.⁸

9. The proposed Cogeneration and Small Power Production Power Purchase Rates Schedule from Solar Generation (“the Solar Tariff”) further disadvantages solar generation relative to other QFs by providing not even a nominally avoided-cost rate, but only referring to the hourly real-time locational marginal price for energy set by PJM at the zonal node and to the capacity rate “valued” in the applicable PJM capacity auction. In addition, the proposed Solar Tariff and the Purchase Rate Schedule over 100kW from Non-Solar Generation each specify (twice) that “EKPC is no longer obligated to purchase electric energy and/or capacity from qualifying cogeneration or small

⁸ See EKPC redlined tariff sheet, PSC No. 8, ~~Sixth~~ Seventh Revised Sheet No. 4, which is PDF page 4 to the 3/31/17 tariff filing, http://psc.ky.gov/PSCSCF/2017%20cases/2017-00212/20170331_EKPC%20and%20Member%20Distribution%20Cooperatives%20Tariff%20Filings.pdf (last visited July 21, 2017).

power production facilities with a net capacity of over 20 MW.”⁹ The proposed changes to Blue Grass Energy’s power-purchase tariff are parallel to EKPC’s proposals.

10. EKPC filed revisions to the tariff filings on April 27, 2017.¹⁰ The proposed revised tariffs were to become effective June 1, 2017. By Order entered May 24, 2017, this Commission found that an investigation was necessary to determine the reasonableness of the proposed revisions and suspended the proposed tariff revisions up to and including October 1, 2017.

INTERVENTION GROUNDS

11. Special Interest: As a solar-power QF in EKPC territory, which has an LEO with EKPC and has begun negotiations with EKPC for a power-purchase agreement, Movant has a significant, concrete interest in the existing and proposed tariff rates and terms for EKPC’s (and Blue Grass Energy’s) purchase of power from solar generation. Bluebird has a special interest in the proceeding that is not otherwise adequately represented, which is one of the two bases for intervention provided in 807 KAR 5:001, Section 11(b).

12. The Bluebird Solar Project being developed will have 80 MW net capacity, well over the proposed 20-MW limit on EKPC’s (and its member co-op’s) obligation to purchase power from solar or non-solar QFs. Although the proposed changes leave it

⁹ *Id.*, PDF pp. 4, 6, 11.

¹⁰ This filing is mentioned in the Commission’s 5/24/17 Order at p.1, but is not available as part of the online case file. See http://www.psc.ky.gov/PSC_WebNet/ViewCaseFilings.aspx?case=2017-00212 (last visited July 21, 2017).

in the purchasing utility's discretion to purchase from a QF with over 20 MW net capacity, EKPC has made it clear that it will not purchase power from the Bluebird Solar Project if FERC grants its termination petition or its proposed tariff revisions become effective.¹¹

13. As an intended seller of solar-generated power, Bluebird also has an obvious interest in the tariff rates and other terms at which EKPC and its member co-ops must offer to purchase power. The Solar Tariff's subjection of QF power to PJM market rates would mean that there would be little practical difference between a power purchase agreement with EKPC and direct participation in the PJM markets (to which EKPC seeks to limit the Bluebird Solar Project by its FERC petitions to terminate). A separate Solar Tariff is unjustified; like other QF generation, solar power should also have definite, tariffed purchase rates. Bluebird is thus also concerned about the significant, and unsupported, proposed reduction in existing tariff rates.

14. Bluebird's special interest in maintaining its rights under PURPA to sell power to EKPC at avoided-cost rates is not represented in this proceeding. No QF from which EKPC (or its member coops) purchases power or which has been certified and has an LEO within EKPC territory has been made a party to this proceeding.¹² Furthermore, Bluebird is unaware of the existence of any other QF located within EKPC

¹¹ See, e.g., 12/21/16 letter from counsel for EKPC to Bluebird counsel, attached as Exhibit C.

¹² See List of Potentially Affected Qualifying Facilities, Atchmt.A to Application, FERC dkt. ZM 17-3-000, available as EKPC 3/31/17 tariff filing, PDF pp. 33-34.

territory for solar generation of its size or that has its particular claim to have an LEO with EKPC that pre-dates the series of attempts to terminate obligations as to QFs with over 20 MW net capacity. Thus, Bluebird's circumstances and interests appear to be unique and cannot be adequately represented by another party.

15. Present Issues/Develop Facts: Intervention by Movant is also likely to present issues or develop facts that will assist the Commission in fully considering the matter without unduly complicating or disrupting the proceedings, which is the other basis for intervention provided in 807 KAR 5:001, Section 11(b). Indeed, the timing of EKPC's FERC petitions and the filing of these tariff revisions suggest that its efforts to limit its purchase obligations and discourage QF solar power generation within its territory are in reaction to Bluebird's self-certification, LEO notices, and positions taken in opposition to the petitions to terminate.

16. Bluebird's experience in seeking to establish whether and on what terms EKPC will purchase power from the Project and the effect on the Projects of aspects of the proposed tariff revisions will develop a fuller array of relevant facts and provide a different perspective to assist the Commission in its decision. For example, an unchanged part of the non-solar tariff that is carried over into the proposed Solar Tariff is the minimum term of five years. Bluebird's participation in the case will bring forward facts about the probable effect on the Great Blue Solar Project of proposed tariff terms,

negotiation of power-purchase agreements under PURPA, and the development of successful projects in other jurisdictions..

17. Furthermore, Movant's intervention is likely to present issues to assist the Commission in fully considering the matter. In addition to other issues relating to the lawfulness and reasonableness of the proposed revisions, including the attempted exclusion of QFs with greater than 20 MW net capacity from the tariff, Bluebird's intervention will present issues about:

- a. the requirement that, regardless of whether it can provide firm output, a QF must have the option to sell its output with an avoided cost rate forecasted at the time the LEO is incurred — a fixed rate. *See* 18 C.F.R. § 292.304(d)(2); Declaratory Order, *Wyndham Solar*, 157 FERC ¶61,134 (Nov. 22, 2016) at P. 4; Memorandum and Order, *Allco Renewable Energy Ltd. v. Mass. Electric Co.*, Civil Action No. 15-13515 (D. Mass. Sep. 23, 2016) (finding that Mass. DPU regulation setting standard avoided cost rates as the spot market ISO New England rate failed the PURPA § 210(f)(1) mandate to properly implement FERC regulations).¹³
- b. the avoided costs rate for QF purchases, which should be equal to full avoided costs. *See* FERC Order 69, Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, 45 Fed. Reg. 1223 (Feb. 25, 1980)

¹³ The *Allco* Memorandum and Order is available online at https://scholar.google.com/scholar_case?case=1995356597289468930&hl=en&as_sdt=4000006 (last visited July 21, 2017).

at 12223; *Independent Energy Producers Ass'n, Inc. v. California PUC*, 36 F.3d 848, 854-55 (9th Cir. 1994)

- c. technology-specific avoided cost rates, which must be based on supply characteristics affecting factors required to be considered. *See* 18 C.F.R. § 292.304.
- d. a requirement that EKPC provide data from which avoided cost rates can be calculated. *See* 18 C.F.R. § 292.302; FERC Order 69, 45 Fed. Reg. at 12214 (such information “enables project investors to evaluate the economic feasibility of the project before it is constructed”).
- e. a five-year term as substantively insufficient to allow a QF reasonable opportunities to attract capital from potential investors and as discriminatory *vis-a-vis* the effective term for EKPC. *See Wyndham Solar*, 157 FERC ¶ 61,134 at P. 8; 18 C.F.R. § 292.304(a)(ii) (nondiscrimination requirement).

18. The development of facts and presentation of issues enabled by granting Bluebird leave to intervene can be accomplished without unduly complicating or disrupting the matter. It will add one party and one “side” to the proceedings (that of those “served” under the tariff, *i.e.*, selling QFs), but that is not an undue complication. No scheduling or procedural order or information requests have yet been issued, no deadlines have been set, and there will be no delay or disruption caused by Bluebird’s intervention.

19. Timeliness: This motion is timely. No schedule or deadlines have been set, and Bluebird has not missed anything other than the opportunity to participate in the informal conferences held on June 12 and July 17, 2017. In its Order entered May 24, 2017, the Commission found that an investigation was necessary to determine the reasonableness of the proposed tariff revisions; Bluebird has moved to intervene in time to participate fully in any formal steps of that investigation.

20. There is no procedural schedule in existence at this time to which Movant might be subject pursuant to 807 KAR 5:001, Section 4(11). Bluebird respectfully suggests that the Commission enter a procedural schedule forthwith that provides for information requests and the possibility of a hearing in this matter. If a procedural schedule is entered shortly before intervention is granted, Bluebird agrees to be subject to that schedule.

SERVICE

21. The persons authorized to receive service of papers in this proceeding on behalf of Bluebird Solar LLC are:

Vitaly A. Lee
Vitaly.Lee@baywa-re.com
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17901, Von Karman Ave.; Suite 1050
Irvine, CA 92614

Katherine K. Yunker
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201 E. Main Street: Suite 900
Lexington, KY 40507

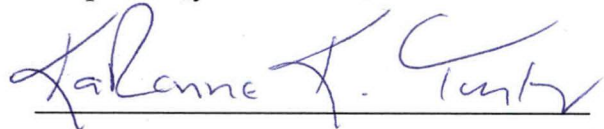
Bluebird respectfully requests that these persons be added to the service list used by the Commission and the other parties to this case.

22. The persons listed in ¶21 are capable of receiving electronic transmissions and the electronic mail addresses to which all electronic notices and messages related to the above-style proceeding should be served are provided in ¶21.

CONCLUSION

WHEREFORE, Movant Bluebird Solar LLC respectfully requests that it be granted intervention as a party to this proceeding.

Respectfully submitted,



Katherine K. Yunker

kyunker@mmlk.com

MCBRAYER, MCGINNIS, LESLIE & KIRK-

LAND PLLC

201 E. Main Street; Suite 900

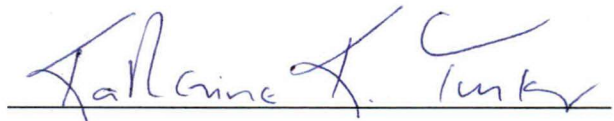
Lexington, KY 40507

859-231-8780 x137

ATTORNEY FOR BLUEBIRD SOLAR LLC

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 21st day of July, 2017, the original and 10 copies of the foregoing were filed by hand-delivery to the Public Service Commission, 211 Sower Boulevard, Frankfort, KY 40601, and that a copy of the foregoing was served by mailing it via first-class U.S. Mail, postage prepaid, to the addressees listed on the attached Service List.



Attorney for Bluebird Solar LLC

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From: Donna Robichaud [mailto:drobichaud@gf-solutions-llc.com]
Sent: Monday, December 5, 2016 9:34 PM
To: David Crews
Cc: David Smart; David Samford; Frank, Dan; Georg Veit; Juergen Fehr
Subject: Re: FW: EKPC QF Filing

Hi David,

Please see the contact information for Bluebird Solar LLC on the attached FERC Form 556. Bluebird Solar LLC filed this self-certification on November 2, 2016. This form can be found in FERC docket number QF17-259-000.

http://elibrary.ferc.gov/0/idmws/file_list.asp?document_id=14509865

No other legal contact information is available at this time.

As discussed last Friday, Bluebird Solar wants to sell all of its energy and capacity to East Kentucky Power Cooperative in accordance with PURPA. The point of interconnection for Bluebird Solar is on EKPC's transmission system near the Jacksonville substation. Bluebird Solar LLC filed for interconnect to PJM on September 29, 2016 and was assigned queue number AC1-074.

If you need any other information, please let us know. We look forward to further discussions with you regarding this project.

Warm Regards,
Donna Robichaud

Exhibit A



December 16, 2016

Mr. David Crews
East Kentucky Power Cooperative Inc.
4775 Lexington Road
PO Box 707
Winchester, KY 40392
David.Crews@ekpc.coop

RE: Bluebird Solar LLC – Purchase of Electric Output

Dear Mr. David Crews,

I would like to introduce myself as manager of Bluebird Solar LLC and CEO of Geenex Solar LLC. Geenex Solar is a developer of utility scale solar power facilities and manages the development of an 80 MW Solar PV plant owned by Bluebird Solar LLC (“Bluebird”). As you are aware, Bluebird is a Qualified Facility and commits to sell all of its output to East Kentucky Power Corporation Inc. (“EKPC”). Attached is a revised FERC Form 556 for your reference.

We understand that EKPC doesn’t currently have an interest in purchasing the output from Bluebird and that EKPC has filed to FERC for relief of their purchase obligation from QFs above 20 MW. However, Bluebird committed to sell energy and capacity to EKPC which creates a legally enforceable obligation under §292.304. Until such relief is granted from FERC, EKPC has an obligation to purchase from qualifying facilities under §292.303 with rates consisted with §292.304. Bluebird is choosing to established an legally enforceable obligation in accordance with §292.304 (d)(ii).

We appreciate you providing Blue Grass Energy Cooperative Corp.’s tariff for Cogeneration and Small Power Production Power Purchase Rate Schedule over 100 kw filed with the Public Service Commission of Kentucky effective on June 1, 2016, but view the term as discriminatory and insufficient for funding of the facility. EKPC should offer a twenty five (25) year term contract. This term is consisted with the terms requested and granted to EKPC by the Public Service Commission of Kentucky in Case No. 2016-00269 on November 22, 2016 for a certificate of public convenience and necessity and wholesale license contract related to EKPC’s 8.5 MW solar facility.

For your information, we engaged FERC Legal Representation. Her contact information is below:

Carolyn Elephant
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2200 Pennsylvania Avenue N.W. 4th Flr. E.
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If you have any questions, please let me know.

Kind Regards,



Georg Veit
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Cc:

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December 21, 2016

Via E-mail

Carolyn Elefant
Law Offices of Carolyn Elefant PLLC
2200 Pennsylvania Ave., N.W., 4th Flr.
Washington, DC 20037

Re: Bluebird Solar LLC

Dear Ms. Elefant:

This responds to the December 16, 2016 letter from Georg Veit, Manager of Bluebird Solar LLC, to David Crews of East Kentucky Power Cooperative, Inc. (EKPC) regarding the proposed purchase and sale of the electrical output from the 80-MW solar generating project being developed by Bluebird Solar.

EKPC's application to terminate its obligation to purchase power from qualifying facilities (QFs) larger than 20 MW is pending before the Federal Energy Regulatory Commission (FERC) (Docket No. QM17-2). If EKPC's application is granted by FERC, EKPC will not be obligated under FERC's QF regulations to purchase the electrical output of Bluebird Solar's project, should it be completed. Accordingly, EKPC is not currently interested in pursuing the purchase of the project's output at this time.

Please contact me if you have any questions regarding this matter.

Kind regards,

/s/ Daniel E. Frank

Daniel E. Frank

*Counsel to
East Kentucky Power Cooperative, Inc.*

Carolyn Elefant
December 21, 2016
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cc: Georg Veit, Bluebird Solar LLC
David Crews, East Kentucky Power Cooperative, Inc.
David Smart, East Kentucky Power Cooperative, Inc.