Commonwealth of Kentucky

Before the Public Service Commission

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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

NOTICE BY BLUEBIRD SOLAR LLC OF FERC RULING AFFECTING INTERVENTION REQUEST

By Motion filed and served July 21, 2017, Bluebird Solar LLC ("Bluebird") requested intervention as a party in the above-captioned matter; there has been no ruling on that motion as of this date. An intervening decision by the Federal Energy Regulatory Commission ("FERC") raises the possibility that Bluebird's interest in the subject of this proceeding may be more efficiently and no less effectively addressed in an individualized complaint proceeding as any issues may arise and thus no longer supports intervention in this matter. Alternatively, a binding stipulation by East Kentucky Power Cooperative, Inc. ("EKPC") and any relevant member distribution cooperative could obviate Bluebird's interest supporting intervention in this tariff case.

Specifically, the FERC Order issued September 7, 2017, in Docket No. QM17-5-00 — a copy of which was filed in this proceeding with an EKPC Notice of Filing on September 8, 2017 — finds that "[b]arring any restrictions under state law" Bluebird had a previously-established legally enforceable obligation ("LEO") that would be grandfathered, unaffected by the grant of EKPC's termination petition. Order p.8 ¶21. If Bluebird has an LEO that predates June 9, 2017, and may contest — in a complaint case — the terms and conditions of any relevant currently-effective tariffs or that are approved by the Commission in this or a later tariff case <u>and</u> the application of those terms and conditions to its individual circumstances, then Bluebird may not have a special interest in this tariff case that would support intervention. On the other hand, if Bluebird does not have an LEO predating June 9, 2017, then due process and Commission regulations require that it be granted intervention. As part of this Notice, Bluebird states as follows:

1. In its Motion to Intervene (¶¶ 2, 5, 7), Bluebird describes EKPC's series of petitions to FERC to terminate its mandatory purchase obligation under PURPA with respect to qualifying facilities (QFs) like Bluebird, of more than 20 MW of net capacity (">20MW QFs"). It also describes its opposition to those petitions, in part on the grounds that there was an LEO under 18 C.F.R. § 292.304 as to all of the Bluebird Solar Project output. *See* Motion ¶¶ 3-6. In the Motion, Bluebird sets out both its special interest in the proceeding that is not otherwise adequately represented (¶¶ 11-14) and that it was likely to present issues or develop facts that will assist the Commission in fully considering the matter (¶¶ 15-18).

2. In its Response, among other things, EKPC disputes whether Bluebird has an LEO (pp. 8-9), and reserves "the right to address the question of what factors and cir-

cumstances give rise to [an LEO] under Kentucky law at such time as the issue might be properly raised and ripe for an adjudication." Response p.9 fn.26. Bluebird's Joint Reply with Great Blue Heron Solar LLC (at ¶3) points out that EKPC's challenge to the existence of an LEO "only highlights their interest in the existing tariff and the proposed revisions."

3. FERC's 9/7/17 Order granted EKPC's Application to terminate the requirement under 18 C.F.R. § 292.303(a) that EKPC enter into new power purchase obligations or contracts to purchase electric energy and capacity from >20MW QFs — effective June 9, 2017, the date EKPC filed the Application. 160 FERC ¶ 61,053 p.9. As FERC notes in the Order (pp.7-8, ¶¶ 19-20), any LEO that exists prior to that date is grandfathered.

4. FERC perceived that Bluebird's LEO might date back to more than six months before the 6/9/17 termination date:

> Here, Bluebird potentially established a legally enforceable obligation on December 5, 2016, when it notified East Kentucky of its intent to sell its output to East Kentucky pursuant to PURPA. .... Since Bluebird and [another entity] notified East Kentucky of their intention to sell their output under PURPA, this Application does not foreclose Bluebird ... from having established a legally enforceable obligation under PURPA. Barring any restrictions under state law, Bluebird ... would be grandfathered such that Commission approval of this Application would not include Bluebird....

Order p.8 ¶ 21. Bluebird maintains its position that it had an LEO prior to the 6/9/17 termination date, and there are no barring "restrictions under state law." In filings at

FERC and in communications with Bluebird representatives, as well as in its Response herein, EKPC has denied the existence of an LEO and has not committed to what would be sufficient to give rise to an LEO.

5. The issue of whether and when an LEO arose affects not only whether a >20MW QF is grandfathered, but possibly also the rates at which energy or capacity must be purchased. Under FERC regulations, a QF may opt to provide energy or capacity pursuant to an LEO for delivery over a specified term,

> in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either:
> (i) The avoided costs calculated <u>at the time of delivery</u>; or
> (ii) The avoided costs calculated <u>at the time the obligation is incurred</u>.

18 C.F.R.§ 292.304(d)(2) (emphases added). Avoided costs rates calculated when the LEO is incurred requires not only reference to the tariff then in effect, but also substantive constraints on the avoided cost rates calculation. *See, e.g.*, Declaratory Order, *Windham Solar LLC and Allco Finance Ltd.*, 157 FERC ¶61,134, Dkt. No. EL16-115-000 (Nov. 22, 2016), p.3 ¶4 ("Thus, regardless of whether a QF can provide firm output, that QF has the option to sell its output pursuant to a legally enforceable obligation with a forecasted avoided cost rate."); Memorandum and Order, *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, Civil No. 15-13515 (D. Mass. Sep. 23, 2016) (fluctuating rates necessarily calculated at time of delivery fail to properly implement FERC's regulations as mandated for the states by PURPA, 16 U.S.C. § 824a-3(f)(1)).

6. For example, if Bluebird had no LEO as of June 9, 2017, FERC's grant of EKPC's termination petition would leave only the obligation in the currently-effective tariff to purchase from Bluebird or another >20MW QF. On the other hand, if Bluebird has an LEO that predated June 9, 2017, Bluebird is not only grandfathered with respect to the 18 C.F.R. § 292.303(a) requirement; it also may sell at rates no less than those in the tariffs effective on June 9, 2017.

7. FERC found that Bluebird potentially established an LEO as early as December 5, 2016, "when it notified East Kentucky of its intent to sell its output to East Kentucky pursuant to PURPA." Order, 160 FERC ¶ 61,053, p.8 ¶21. That reference is to a 12/5/16 email from Bluebird, attached to the 7/21/17 Motion and hereto as Exhibit A. EKPC responded in part by providing the Power Purchase Rate Schedule over 100 kw (eff. 6/1/16) from the tariff of Blue Grass Energy Cooperative Corporation ("Blue Grass Energy"). Bluebird then confirmed its commitment to sell all of its output (energy and capacity) to EKPC, formally notified EKPC that it chose to establish an LEO in accordance with 18 C.F.R. §292.304(d)(ii), and attempted to begin negotiations using the Blue Grass Energy tariff as a baseline. *See* 12/16/16 letter from George Veit (Geenex) to David Crews (EKPC), attached to the 7/21/17 Motion and hereto as Exhibit B.

8. As noted in the 12/16/16 letter and confirmed in a 12/21/16 letter from EKPC's FERC counsel (attached to the 7/21/17 Motion and hereto as Exhibit C), EKPC was "not currently interested in pursuing the purchase of the project's output at this

time," because if FERC granted its then-pending termination application, it would "not be obligated under FERC's QF regulations to purchase the electrical output of Bluebird Solar's project...."[1] FERC did not grant EKPC's pending application, or its next one.

9. By letter dated March 8, 2017 (see Exhibit D), Bluebird notified this Commission of an update of its self-certification to reflect the transfer of Bluebird to BayWa r.e. Solar Projects, LLC. On May 17, 2017, before EKPC's 6/9/17 termination petition filing, Bluebird had a meeting with EKPC representatives for negotiations relating to the output from the Bluebird Solar Project. According to EKPC:

> EKPC reiterated its position that it was not under a mandatory obligation to purchase power from Bluebird's 80MW project. Bluebird disagreed, but requested the opportunity to provide EKPC with an unsolicited offer for the purchase of 80 MWs. In response, EKPC reiterated that it had no actual need for such a large power purchase at this time and, if it did, its standard practice was to conduct a request for proposals process to establish what supply options would qualify as the reasonable, least cost option.

7/28/17 Response p.12. Thus, EKPC acknowledges the offer by Bluebird to sell all of its output, pursuant to its December 2016 commitment.

10. FERC's orders are clear that an LEO "is broader than simply a contract between an electric utility and a QF, and that a state may not limit the methods through which a legally enforceable obligation may be created to only a fully executed contract." *FLS Energy, Inc.*, 157 FERC ¶ 61,211 (2016) p.9 ¶24. The utility cannot block formation of

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[1] The obligation to enter into new contracts and obligations is generally suspended on the filing of a termination application. *See* New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, Order No. 688, FERC Stats & Regs. ¶ 31,233, at P 228 (2006), *order on reh'g*, Order No. 688-A, 119 FERC ¶61,305 (2007).

an LEO by refusing to enter into a contract with a QF. *Id.*[2] "[T]he establishment of [an LEO] turns on the QF's commitment and not the utility's actions," *id.*:

> [A] QF has the option to commit itself to sell all or part of its electric output to an electric utility.... Accordingly, a QF, by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.

Declaratory Order, *JD Wind 1, LLC,* 129 FERC ¶ 61,148, pp. 10-11 ¶25 (2009) (emphasis added), *reh'g denied,* 130 FERC ¶ 61,127 (2010). Thus, Bluebird's December 2016 commitment to sell all its output to EKPC gave rise to an LEO.

11. A December 2016 date for Bluebird's LEO based on Bluebird's commitment is reinforced by Kentucky's regulations that parallel FERC's in giving a QF the option to sell its entire output to the interconnecting utility (807 KAR 5:054, § 7(1)(b)), and to choose rates for offers "on a legally enforceable basis" to be based on avoided costs at the time of delivery or the LEO is incurred (*id.*, § 7(4)(b)). Furthermore, pursuant to 807 KAR 5:054, § 7(4), utilities are to provide a standard rate schedule for QFs as a baseline for negotiations. Such tariffs for purchase from QFs with a design capacity of over 100 kW were in effect in December 2016 for EKPC, Blue Grass Energy, and each other member distribution co-op. The tariffs contemplate a contract with EKPC and one of its distribution co-ops to be negotiated for EKPC's purchase of power and require the com-

[2] Citing Order No. 69, Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978, FERC Stats. & Regs. ¶ 30,128 at 30,880 *order on reh'g,* Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part sub nom. Am. Elec. Power Serv. Corp. v. FERC,* 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402 (1983)

mitment made by Bluebird in December 2016, that all the power from the QF "will be sold only to East Kentucky Power Cooperative." *See, e.g.*, EKPC Tariff P.S.C. No. 8, Fourth Revised Sheet No. 2, item 1.

12. There is no restriction under Kentucky state law which might prevent an LEO arising in December 2016 from Bluebird's commitment. EKPC has not specified any statute, regulation, or case law to the contrary. Furthermore, even if anything beyond Bluebird's commitment were required, then EKPC's providing the Blue Grass Energy tariff contemplating a negotiated contract (while disclaiming any interest "in pursuing the purchase of the project's output," *see* 12/21/16 letter attached as Exhibit C), Bluebird's attempt to negotiate final purchase rates and terms from the tariff baseline, and its offer of a contract — all before June 9, 2017 — would more than suffice.

13. With an LEO that predates the 6/9/17 termination date and the effective date of any of the proposed tariff revisions, the focus of Bluebird's interests shifts to the currently-effective tariffs and negotiating a purchase contract from the tariff's minimums and baselines. The Commission has indicated that issues arising from contract negotiations or about specific purchase rates are to be resolved through its complaint process:

- "If the electric utility and qualifying facility cannot agree on the purchase rate, then the commission shall determine the rate after a hearing." 807 KAR 5:054, § 7(4).
- "[I]f a QF and utility cannot arrive at an agreement on purchase rates it is the Commission's responsibility to undertake an investigation at any time

> to determine the proper elements of purchase rates if it receives a complaint from either the QF or utility." 6/28/84 Order, Case No. 8566, p.33.

The tariff regulation anticipates that negotiated rates might be different from the tariffed rates schedule and sets substantive standards for negotiated rates. 807 KAR 5:054, § 7(4), (5). Commission review of issues with respect to negotiated rates cannot occur in the context of a tariff case, but can in reviewing a filed special contract or in a complaint case.

14. Many of the same issues that Bluebird's intervention is likely to present in this tariff case, *see, e.g.*, Motion to Intervene ¶17, <u>might</u> arise in a complaint case after a utility refused to negotiate or to purchase on terms compliant with PURPA and other mandates. In a complaint case, the issues would be presented in a concrete, focused form allowing for more efficient resolution from Bluebird's standpoint, especially since only those issues that actually are affecting Bluebird would need to be litigated.

15. If it had a pre-6/9/17 LEO and an individualized complaint case also was a no less effective way to challenge rates and other terms and conditions of a purchase power arrangement, then Bluebird would have no remaining special interest in this proceeding that would support intervention. However, Bluebird cannot be prejudiced in any (at this point, hypothetical) complaint case if its request to intervene in this proceeding were denied and it thus had no opportunity to participate in the Commission's decision of whether to approve the proposed tariffs. Any decision to deny Bluebird intervention should specify that it will not be precluded, in any complaint case that it

might file relating to the purchase obligations of EKPC or its member distribution cooperatives, from contesting any relevant tariff provision in either the currently-effective tariffs or that may be approved in this proceeding.

Respectfully submitted,

Katherine K. Yunker
kyunker@mmlk.com
McBRAYER, McGINNIS, LESLIE & KIRKLAND 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 September, 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 and by emailing it to counsel appearing in this proceeding on behalf of the Commission (quangd.nguyen@ky.gov), EKPC (david@gosssamfordlaw,com), and the Attorney General's Office of Rate Intervention (Kent.Chandler@ky.gov).

Attorney for Bluebird Solar LLC

Kent A. Chandler
Rebecca W. Goodman
OFFICE OF THE ATTORNEY GENERAL
700 Capital Ave., Suite 20
Frankfort, KY 40601-8204

East Kentucky Power Cooperative, Inc.
4775 Lexington Road
P.O. Box 707
Winchester, KY 40392-0707

Chris Brewer, President & CEO
Clark Energy Cooperative, Inc.
2640 Ironworks Road
P.O. Box 748
Winchester, KY 40392-0748

Charles G. Williamson, III
Blue Grass Energy Cooperative Corp.
1201 Lexington Road
P. O. Box 990
Nicholasville, KY 40340-0990

Joni K. Hazelrigg, President & CEO
Fleming-Mason Energy Cooperative, Inc.
1449 Elizaville Road
P.O. Box 328
Flemingsburg, KY 41041

Carol Wright, President & CEO
Jackson Energy Cooperative Corporation
115 Jackson Energy Lane
McKee, KY 40447

Kerry K. Howard, CEO
Licking Valley R.E.C.C.
P.O. Box 605
271 Main Street
West Liberty, KY 41472

Mark Stallons, President & CEO
Owen Electric Cooperative, Inc.
8205 Highway 127 North
P.O. Box 400
Owenton, KY 40359

Debbie J. Martin, President & CEO
Shelby Energy Cooperative, Inc.
620 Old Finchville Road
Shelbyville, KY 40065

Barry L. Myers, Manager
Taylor County R.E.C.C.
625 W. Main Street
P.O. Box 100
Campbellsville, KY 42719

David Samford
L. Allyson Honaker
GOSS SAMFORD, PLLC
2365 Harrodsburg Rd.; Ste. B-325
Lexington, KY 40504

David Estepp, President
Big Sandy R.E.C.C.
504 11th Street
Paintsville, KY 41240-1422

Bill T. Prather, President & CEO
Farmers R.E.C.C.
504 South Broadway
P.O. Box 1298
Glasgow, KY 42141-1298

Ted Hampton, Manager
Cumberland Valley Electric, Inc.
Highway 25E
P.O. Box 440
Gray, KY 40734

Carol Ann Fraley, President & CEO
Grayson R.E.C.C.
109 Bagby Park
Grayson, KY 41143

James L. Jacobus, President & CEO
Inter-County Energy Cooperative Corp.
1009 Hustonville Road
P.O. Box 87
Danville, KY 40423-0087

Michael L. Miller, President & CEO
Nolin R.E.C.C.
411 Ring Road
Elizabethtown, KY 42701-6767

Tim Sharp, President & CEO
Salt River Electric Cooperative Corp.
111 West Brashear Avenue
P.O. Box609
Bardstown, KY 40004

Allen Anderson, President & CEO
South Kentucky R.E.C.C.
925-929 N. Main Street
P.O. Box 910
Somerset, KY 42502-0910

Georg Veit
Great Blue Heron Solar LLC
7804-C Fairview Road #257
Charlotte, NC 28226

From: Donna Robichaud [mailto:drobichaud@qf-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, 1016. 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

geenex

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.

Exhibit B

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

Carolyn Elephant
Law Offices of Carolyn Elephant PLLC
2200 Pennsylvania Avenue N.W. 4th Flr. E.
Washington D. C 2037
Phone: 202-297-6100
Carolyn@carolynelefant.com

If you have any questions, please let me know.

Kind Regards,

G. Veit

Georg Veit
Manager
Bluebird Solar LLC
Georg.veit@geenexsolar.com
(929) 240-3357

Cc:
Daniel E. Frank, Daniel.frank@sutherland.com
Allison E. Speaker, Allison.speaker@sutherland.com
Sutherand Asbill & Brennan LLP
700 Sixty Street, N. W. Suite 700
Washington, DC 2001-3980

David A. Smart, david.smart@ekpc.coop
General Counsel
East Kentucky Power Cooperative, Inc.
P. O. Box 707
Winchester, KY 40392-0707

SUTHERLAND

SUTHERLAND ASBILL & BRENNAN LLP
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980
202.383.0100 Fax 202.637.3593
www.sutherland.com

DANIEL E. FRANK
DIRECT LINE: 202.383.0838
E-mail: daniel.frank@sutherland.com

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.

Exhibit C

cc: Georg Veit, Bluebird Solar LLC
David Crews, East Kentucky Power Cooperative, Inc.
David Smart, East Kentucky Power Cooperative, Inc.

BayWa r.e.
renewable energy

March 8, 2017

Dr. Talina R. Matthews
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602-0615

Re: Bluebird Solar LLC

Dear Dr. Talina R. Matthews,

This letter is being provide to inform the Kentucky Public Service commission that a FERC form 556 was submitted to FERC for Bluebird Solar LLC. Pursuant to 18 C.F.R. §292.207 (a) (ii), a copy of the self-certification shall be provided to the State regulatory authorities of the state in which the facility resides. Bluebird Solar plans to interconnect and/or transact with East Kentucky Power Coop. Please see the attached FERC Form 556 that have been submitted with the last filing reflecting the sale of Bluebird Solar LLC to BayWa.

Sincerely,

Jam Attari
Manager
Bluebird Solar LLC

BayWa r.e. Solar Projects, LLC | 17901 Von Karman Avenue, Suite 1050 | Irvine, CA 92614
Phone +1 949 398 3915 | Fax +1 949 398 3914 | www.baywa-re.us

Exhibit D