

COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY STATE BOARD ON ELECTRIC GENERATION  
AND TRANSMISSION SITING

In the Matter of:

ELECTRONIC APPLICATION OF BLUEBIRD	)	
SOLAR LLC FOR A CERTIFICATE OF	)	
CONSTRUCTION FOR AN APPROXIMATELY 100	)	CASE NO.
MEGAWATT MERCHANT ELECTRIC SOLAR	)	2021-00141
GENERATING FACILITY IN HARRISON	)	
COUNTY, KENTUCKY PURSUANT TO KRS	)	
278.700 AND 807 KAR 5:110	)	

ORDER

On October 14, 2022, Bluebird Solar LLC (Bluebird Solar) filed a motion for a declaratory order that Siting Board approval is not necessary for an anticipated transaction, or in the alternative, an order approving the transaction. Bluebird Solar requested the Siting Board address one of the mitigation measures contained in the August 3, 2022 Order (Final Order) that restricted transfers of ownership of the project.<sup>1</sup>

BACKGROUND

Bluebird Solar filed an application to construct an approximately 100-megawatt merchant solar generating facility in Harrison County, Kentucky on February 4, 2022.<sup>2</sup> During the pendency of the case, Bluebird Solar responded to two rounds of discovery,<sup>3</sup> a site visit was conducted, the Siting Board hired a consultant who issued a report about

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<sup>1</sup> Order (Ky. PSC Aug. 3, 2022), Appendix A, mitigation measure 26.

<sup>2</sup> Bluebird Solar filed the application on February 3, 2022, and it was found deficient. Bluebird Solar filed the application again on February 4, 2022, and the application was accepted for filing.

<sup>3</sup> Bluebird Solar's Response to Siting Board Staff's First Request for Information (filed Apr. 8, 2022) and Bluebird Solar's Response to Siting Board Staff's Second Request for Information (filed May 6, 2022).

the project,<sup>4</sup> Bluebird Solar responded to the consultant's report<sup>5</sup>, and a hearing was held. The Siting Board evaluated the entire record before issuing the Final Order on August 3, 2022. In the Final Order, the Siting Board conditioned its approval of the construction certificate on thirty-four mitigation measures that Bluebird Solar must comply with during the construction and operation of the project. As part of the underlying motion before the Siting Board, Bluebird Solar requests the Siting Board address Mitigation Measure 26, which states:

If any person shall acquire or transfer ownership of, or control, or the right to control the project, by sale of assets, transfer of stock, or otherwise, or abandon the same, Bluebird Solar or its successors or assigns shall request explicit approval from the Siting Board with notice of the request provided to the Harrison County Fiscal Court. In any application requesting such abandonment, sale, or change of control, Bluebird Solar shall certify its compliance with KRS 278.710(1)(i).<sup>6</sup>

Bluebird Solar requests the Siting Board issue a declaratory order in anticipation of a transfer of the project. Bluebird Solar requested a declaratory order that the transaction does not require Siting Board approval. In the alternative, should the Siting Board find the transaction does require approval, Bluebird Solar request Siting Board approval for the anticipated transfer.

#### Proposed Transaction

Bluebird Solar is owned by BayWa.r.e. Development, LLC (BayWa.r.e. Development). BayWa.r.e. Development has owned the Bluebird Solar throughout the application process. BayWa.r.e. Development is a direct subsidiary of BayWa.r.e. Solar

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<sup>4</sup> Wells Engineering Report (filed May 20, 2022).

<sup>5</sup> Bluebird Solar's Response to Consultant Report (filed May 27, 2022).

<sup>6</sup> Order, Appendix A at 6, mitigation measure 26.

Projects LLC (BayWa.r.e. Solar Projects).<sup>7</sup> BayWa.r.e. Solar Projects is a direct subsidiary of BayWa.r.e. USA LLC (BayWa.r.e. USA).<sup>8</sup> BayWa.r.e. USA is a subsidiary of BayWa.r.e. AG.<sup>9</sup>

The transaction that Bluebird Solar is anticipating is that Bluebird Solar would be transferred from one subsidiary of BayWa.r.e. USA to another subsidiary of BayWa.r.e. USA, from BayWa.r.e. Development to BayWa.r.e. Solar Asset Holdings LLC (BayWa.r.e. Solar Asset Holdings).<sup>10</sup> Bluebird Solar would then be transferred into Bluebird Tax Equity Partnership LLC (Bluebird Tax Equity Partnership), a subsidiary of BayWa.r.e. Solar Asset Holdings.<sup>11</sup> BayWa.r.e. Solar Asset Holdings would create Bluebird Class B LLC (Bluebird Class B) which would own 100 percent of all Class B shares of Bluebird Solar Tax Equity Partnership. Tax equity investors would own 100 percent of all Class A shares of Bluebird Solar Tax Equity Partnership.<sup>12</sup> Bluebird Solar stated that the Bluebird Class B would be the managing member of the Bluebird Solar Tax Equity Partnership. Bluebird Class B will control the day-to-day operations and management of Bluebird Solar.<sup>13</sup> The tax equity investors will not have any control of the operations of Bluebird Solar.<sup>14</sup>

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<sup>7</sup> Motion for Declaratory Order at 2.

<sup>8</sup> Motion for Declaratory Order at 2.

<sup>9</sup> Motion for Declaratory Order at 2.

<sup>10</sup> Motion for Declaratory Order at 2.

<sup>11</sup> Motion for Declaratory Order at 2.

<sup>12</sup> Motion for Declaratory Order at 2.

<sup>13</sup> Motion for Declaratory Order at 2.

<sup>14</sup> Motion for Declaratory Order at 3. See *also* Exhibit 1 of the Motion for Declaratory Order for a pre-transfer organizational chart and a post-transfer organizational chart.

## Arguments for the Transaction

Bluebird Solar made two arguments in its motion regarding Mitigation Measure 26. Bluebird Solar first argued that the transaction it is proposing does not require Siting Board approval. Bluebird Solar stated that Mitigation Measure 26 is worded very similarly to the language found in KRS 278.020(6) regarding the transfer of ownership or control of a utility. Bluebird Solar stated that the Commission has previously held that KRS 278.060(2) is a codification of *Public Service Com'n v. City of Southgate*<sup>15</sup> which held the Commission has jurisdiction over the proposed sale of utilities because it has the statutory authority to regulate the rates and services of utilities.<sup>16</sup>

Bluebird Solar argued that the Commission has broad jurisdiction over the regulation of utilities pursuant to KRS 278.040, but the Siting Board has limited jurisdiction pursuant to KRS 278.700-278.710.<sup>17</sup> Bluebird Solar argued that the jurisdiction of the Siting Board is only the siting of a proposed facility and the continued compliance with its orders.<sup>18</sup> Bluebird Solar argued that the Siting Board should only be concerned with whether the subsequent owner has the experience to comply with the mitigation measures as stated in KRS 278.710(3)(a).<sup>19</sup>

Bluebird Solar also argued that prior Commission precedent supports its position that Siting Board approval is not necessary. Bluebird Solar cited a line of cases that held, under KRS 278.060(7), the Commission did not have to give approval for stock purchases

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<sup>15</sup> *Public Service Com'n v. City of Southgate*, 268 S.W.2d 19, 21 (Ky. 1954).

<sup>16</sup> Motion for Declaratory Judgment at 3–4.

<sup>17</sup> Motion for Declaratory Judgment at 4.

<sup>18</sup> Motion for Declaratory Judgment at 4.

<sup>19</sup> Motion for Declaratory Judgment at 4.

of passive investors in a utility because control was not transferred to the investors.<sup>20</sup> Bluebird Solar stated this is consistent with a Federal Energy Regulatory Commission (FERC) policy that its approval is not necessary for the sale of passive tax equity interests.<sup>21</sup>

In the alternative, Bluebird Solar's argued that if the Siting Board believes approval is necessary for the transaction, it should be approved.<sup>22</sup> Bluebird Solar stated that the transaction does not affect the control of the project by BayWa.r.e. AG. Bluebird Solar stated that the transfer of the company to BayWa.r.e. USA's independent power producer, BayWa.r.e. Solar Asset Holdings, would facilitate the project's long-term management.<sup>23</sup> Bluebird Solar reiterated that the tax equity investors would have no control over the project and all the criteria used in making its decisions would still apply.<sup>24</sup> Bluebird Solar also argued that all of the criteria in KRS 278.710(1), that the Siting Board considers when determining if a construction certificate should be granted, are not impacted by the direct corporate parent or passive investors of the project.<sup>25</sup>

Bluebird Solar stated the one factor the Siting Board must consider and would not have been addressed in the initial review of the case, is whether BayWa.r.e. Solar Asset Holdings has a good record of environmental compliance<sup>26</sup>. An affidavit was filed stating

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<sup>20</sup> Motion for Declaratory Judgment at 5.

<sup>21</sup> Motion for Declaratory Judgment at 5.

<sup>22</sup> Motion for Declaratory Judgment at 6.

<sup>23</sup> Motion for Declaratory Judgment at 4.

<sup>24</sup> Motion for Declaratory Judgment at 6.

<sup>25</sup> Motion for Declaratory Judgment at 6.

<sup>26</sup> Motion for Declaratory Judgment, Exhibit 2.

that Bluebird Solar, BayWa.r.e. Solar Asset Holdings, and no other entity with a controlling interest in the project has violated any state or federal environmental regulations. The affidavit further stated that none of the parties have any pending environmental actions against them.<sup>27</sup>

### LEGAL STANDARD

KRS 278.020(6) requires Commission approval before a utility may transfer ownership or control by a sale of assets, transfer of stock, or abandonment. The Commission must determine if the entity acquiring the utility has the financial, technical, and managerial abilities to provide reasonable service.<sup>28</sup> KRS 278.020(7) requires any entity proposing to acquire control of a utility entity to first have Commission approval. Control is assumed if the entity acquires more than ten percent of voting securities of a utility.<sup>29</sup>

KRS 278.710(3) states that a company who has received a construction certificate for a merchant electric generating facility shall not transfer rights or obligations of the certificate without a Siting Board determination that the acquirer has a good environmental compliance history, and the acquirer has the financial, technical, and managerial capacity to meet the obligations imposed by the terms of the approval.<sup>30</sup>

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<sup>27</sup> Motion for Declaratory Judgment at 7 and Exhibit 2.

<sup>28</sup> KRS 278.020(6).

<sup>29</sup> KRS 278.020(7).

<sup>30</sup> KRS 278.710(3)(a)-(b).

## DISCUSSION AND FINDINGS

KRS 278.702(3) allows the Siting Board to promulgate administrative regulations to implement the provisions of KRS 278.700-278.716. The regulations governing the Siting Board procedures do not allow for declaratory orders.<sup>31</sup> However, Bluebird Solar raised issues in its motion the Siting Board believes should be addressed; therefore, the Siting Board will consider the motion.

Bluebird Solar stated that Mitigation Measure 26 is similar to KRS 278.020(6) regarding the Commission's approval of the sale or transfer of utilities. Although that may be correct, KRS 278.020 is inapplicable to Bluebird Solar, as it is not a utility under the jurisdiction of the Kentucky Public Service Commission. Additionally, although Mitigation Measure 26 also reflects the standards of KRS 278.710(3) which requires Siting Board approval before the transfer of any rights or the obligations of a construction certificate, it is not applicable to the transfer or sale of the actual entity holding the construction certificate.<sup>32</sup> KRS 278.710(3)(a) requires that the acquirer have a good environmental compliance history. KRS 278.710(3)(b) states that the Siting Board make a determination that:

The acquirer has the financial, technical, and managerial capacity to meet the obligations imposed by the terms of the approval or has the ability to contract to meet these obligations.<sup>33</sup>

This language is the same as the language in KRS 278.020(6) that gives the Commission jurisdiction to approve the transfer of a utility.

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<sup>31</sup> 807 KAR 5:100 and 807 KAR 5:110.

<sup>32</sup> KRS 278.710(3).

<sup>33</sup> KRS 278.710(3)(b).

Bluebird Solar's argument, that the Siting Board has jurisdiction for the siting of a merchant electric generating facility and continued compliance with its Orders, is correct. Ensuring continued compliance with the Siting Board's Order, and in particular the mitigation measures contained therein, is the purpose of Mitigation Measure 26. As part of its inquiry in the underlying matter, the Siting Board presumed, based on Bluebird Solar's representations, that the applicant had no employees and was instead operating via a number of member managed LLCs, some of which themselves have employees.<sup>34</sup> As KRS 278.710(3) applies only to the transfer of a construction certificate and not to the transfer of a person having a construction certificate, and since Bluebird Solar depends on the efforts and employees of parent entities to ensure compliance with the obligations contained in the Final Order, Mitigation Measure 26 is necessary so that Bluebird Solar is not transferred or disposed of in a manner that leads to noncompliance with other important mitigation measures or to entities with a poor environmental compliance history. Mitigation Measure 26 allows the Siting Board to ensure that any transfer of the entity having received the construction certificate is to another person that is able to help ensure compliance with all of the mitigation measures and other applicable law. Additionally, the proposed transfer is the type contemplated by Mitigation Measure 26.

For these reasons, the Siting Board finds that approval is necessary for Bluebird Solar's proposed transfer. However, based upon the information provided in the motion, the Siting Board will consider the proposed transfer.

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<sup>34</sup> See Statement Regarding Certifications Required by KRS 278.706(2)(d) (filed Feb. 3, 2022).



Bluebird Solar stated that the transfer will be from one direct subsidiary of BayWa.r.e. USA to another as a corporate transfer.<sup>35</sup> After the transfer to BayWa.r.e. Solar Asset Holdings, Bluebird Solar will then be transferred into Bluebird Solar Tax Equity Partnership. Bluebird Solar stated that the only material change after the transfer is that tax equity investors would own Class A stock of the Bluebird Solar Tax Equity Partnership. The tax equity investors would be offered the standard protections given to minority investors but would not have any control over the operations of Bluebird Solar.<sup>36</sup> Bluebird Solar stated that the internal transaction nor the tax equity investments will change the information presented to the Siting Board regarding Bluebird Solar's ability to manage the property.<sup>37</sup>

BayWa.r.e. Solar Asset Holdings will be responsible for the management and day-to-day operations of the project, just as BayWa.r.e. Development and BayWa.r.e. Solar Projects would have been before a transfer. According to the motion, Bluebird Solar's ability to comply with all mitigation measures contained in the Final Order will not be harmed by the transfer of corporate ownership and the transfer is being contemplated for investment purposes for the construction of the project. Additionally, Bluebird Solar asserts that BayWa.r.e. Solar Asset Holdings is the independent power producer for BayWa.r.e. USA and has the requisite expertise to comply with all mitigation measures. Furthermore, BayWa.r.e. Solar Asset Holdings provided sufficient evidence that it has a good history of environmental compliance.

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<sup>35</sup> Motion for Declaratory Order at 2.

<sup>36</sup> Motion for Declaratory Order at 3.

<sup>37</sup> Motion for Declaratory Order at 3.

Based upon the motion and being otherwise sufficiently advised, the Siting Board finds that the transfer of Bluebird Solar to BayWa.r.e. Solar Asset Holdings and then into Bluebird Tax Equity Partnership should be approved. BayWa.r.e. Solar Asset Holdings and Bluebird Tax Equity Partnership have good environment compliance history and have the financial, technical, and managerial capacity to construct and operate the project. The transaction is only for financing purposes. The tax equity investors that were not party to the original consideration of the case are not going to have a controlling interest in the project and substantially the same entities will ensure compliance with the Siting Board's orders post-transfer as they are today. As the substantially same entities that ensure Bluebird Solar's compliance with mitigation measures today will continue to do so post transfer and the new entities with a managing ownership interest have a good environmental history, the Siting Board finds that the proposed transfers of Bluebird Solar should be approved subject to the continuing compliance with its Final Order. The Siting Board further finds that, before the transaction can occur, Bluebird Solar must comply with the entirety of Mitigation Measure 26 and provide proof to the Siting Board that the Harrison County Fiscal Court was provided notice of the proposed transaction.

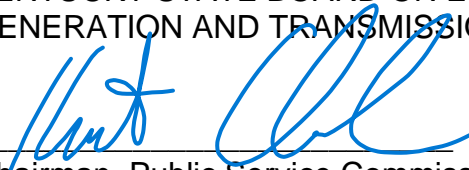
IT IS THEREFORE ORDERED that:

1. Bluebird Solar's motion for a declaratory judgment is denied.
2. Bluebird Solar's request to make corporate transfers of the project to allow for tax equity investments is granted.
3. Bluebird Solar shall provide proof to the Siting Board that the Harrison County Fiscal Court was provided notice before any transfer of the project.

4. Bluebird Solar shall provide proof to the Siting Board when the transaction has been completed.

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KENTUCKY STATE BOARD ON ELECTRIC  
GENERATION AND TRANSMISSION SITING

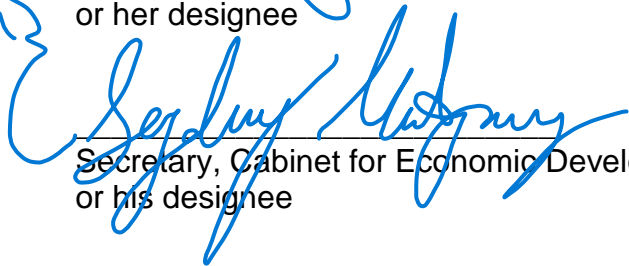
  
Chairman, Public Service Commission

Vice Chairman, Public Service Commission

  
Commissioner, Public Service Commission

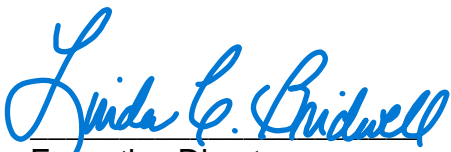
  
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Secretary, Cabinet for Economic Development,  
or his designee



ATTEST:

  
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