

**COMMONWEALTH OF KENTUCKY
BEFORE THE KENTUCKY STATE BOARD
ON ELECTRIC GENERATION AND TRANSMISSION SITING**

**IN THE MATTER OF THE APPLICATION OF)
ASHWOOD SOLAR I, LLC, FOR A) Case No. 2020-00280
CONSTRUCTION CERTIFICATE TO)
CONSTRUCT A MERCHANT ELECTRIC)
GENERATING FACILITY)**

**ASHWOOD SOLAR I, LLC’S MOTION FOR DECLARATORY ORDER
OR IN THE ALTERNATIVE
FOR APPROVAL OF ANTICIPATED TRANSACTIONS**

Ashwood Solar I LLC (“Ashwood”), by counsel, moves the Kentucky State Board on Electric Generation and Transmission Siting (the “Siting Board”) for an order declaring that anticipated transactions described in this Motion do not require Siting Board approval, or in the alternative, for an order approving the anticipated transactions. An affirmative response from the Siting Board on this motion is necessary in order to obtain financing and ensure the project is constructed. Due to the urgent nature of this matter, Ashwood respectfully requests an expedited review and decision from the Siting Board by no later than **October 21, 2024**. In support of this motion, Ashwood states as follows:

I. Introduction

On June 21, 2021, the Siting Board approved a construction certificate to construct a merchant solar electric generating facility for Ashwood. During the processing of the case, Ashwood stated that it would comply with applicable rules and regulations that govern its

operations, including if there was a requirement for Siting Board approval of a change in ownership.

KRS 278.710(3)(b) states as follows:

A person that has received a construction certificate for a merchant electric generating facility shall . . . [n]ot transfer rights and obligation under the certificate without having first applied for and received a board determination that:

1. The acquirer has a good environmental compliance history; and
2. 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.

Prior to achieving commercial operation, Ashwood anticipates being transferred between its upstream affiliates and obtaining funding for the project through one or more tax equity investors, who will have a passive, non-controlling interest in the project. This will require certain corporate transfers, as shown in Exhibit 1 and described below.

Ashwood is 100% owned by RWE Investco EPC Mgmt, LLC (“EPC Mgmt”). Currently, the day-to-day management and operation of Ashwood is controlled by RWE Clean Energy, LLC.

As a part of the planned transfer, EPC Mgmt will then contribute Ashwood up to its 95% owner, RWE Investco Mgmt, LLC (“Investco”). Investco will then contribute Ashwood down its subsidiary, TEP Financing Six, LLC (the “TEP 6”). Each of EPC Mgmt and Investco are indirect subsidiaries of RWE Clean Energy, LLC (f/k/a RWE Renewables Americas, LLC). TEP 6 has TEP Financing Six Class B, LLC as its Managing Member, and TEP Financing Six Class B, LLC is also an indirect subsidiary of RWE US Holdings, LLC. Following the transfer, the day-to-day management and operation of Ashwood will still be controlled by RWE Clean Energy, LLC.

At the time of this transfer described above, the project's tax equity investor¹ will own passive, non-controlling interests in Ashwood. The tax equity investors will have the benefit of standard protections offered to minority investors but will not be involved with the day-to-day management and operation of the project. Accordingly, the tax equity transaction will affect the way the project is operated.

Ashwood is targeting closing of its first round of tax equity financing for the project in the near future and anticipates that its Tax Equity Investor will want certainty that the transactions described above do not require any further governmental approvals. These transactions are essential to being able to raise long-term financing for the project, and Ashwood's tax equity investor will want to ensure that Ashwood will be able to secure long-term financing. Accordingly, Ashwood respectfully requests a decision no later than **October 21, 2024**.

II. The anticipated transactions do not require approval under the Siting Board's ordered mitigation measures.

As quoted above, KRS 278.710 requires a person transferring the rights or obligations of the construction certificate to obtain Siting Board approval. In this case, Ashwood is not transferring its rights or obligations of the construction certificate. After the corporate reorganization, Ashwood will continue to hold the construction certificate, and Ashwood will maintain the rights and obligations under the certificate.

The anticipated transactions will not impact Ashwood's ability to comply with the mitigation measures and will not interfere with the expertise and project management that RWE Clean Energy, LLC and its subsidiaries will bring to the project. The tax equity investors will

¹ A Tax Equity Investor is an upstream investor who obtains a class of shares with fewer voting rights and no day-to-day management responsibilities. Tax Equity Investors usually obtain a target return by buying an equity interest or by making capital contributions to a partnership holding company in return for the majority of the tax benefits of a renewable energy project.

have passive interests only and will not have day-to-day operational control over the project.² Control of Ashwood will remain with RWE Clean Energy, LLC and its subsidiaries. Accordingly, there will be no change in Ashwood’s responsibility and ability to comply with the Siting Board’s mitigation measures as a result of having tax equity investors. In fact, Ashwood expects that the tax equity investor will contractually require the project to comply with the Siting Board’s mitigation measures. Accordingly, Ashwood believes that KRS 278.710(3)(b) does not apply to these anticipated transactions and that no approval is necessary.

This position is consistent with the Siting Board’s decision involving Bluebird Solar LLC. In an order issued on December 6, 2022, the Siting Board explained that “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.”³ Because Bluebird Solar LLC was retaining the construction certificate, KRS 278.710(3) did not apply to that project. The Siting Board, however, determined that a mitigation measure from the final order required Bluebird Solar LLC to obtain approval for the tax-equity transaction. In Ashwood’s case, however, there is no comparable mitigation measure similar to the one pertaining to Bluebird Solar LLC.

In addition, comparisons between the approval requirements of KRS 278.710(3)(b) and KRS 278.020(6) and (7), which relate to transfer of ownership and control of utilities under the jurisdiction of the Public Service Commission (“Commission”), further support Ashwood’s position. Notably, Commission cases support Ashwood’s position that approval of these anticipated transactions are not required by the Siting Board’s Order. Passive investors such as T. Rowe Price Associates and Vanguard Group Inc. have applied for determination that their

² To the extent that these investors would subsequently seek to gain a controlling, non-passive interest, Ashwood acknowledges that subsequent Siting Board approval would be necessary.

³ *Bluebird Solar LLC*, Case No. 2021-00141 at 8 (K.S.B. Dec. 6, 2022).

investment in and acquisition of beneficial ownership of utilities in Kentucky did not require approval under Subsection (7) of KRS 278.020. In their applications, the investors explained that no approval was necessary under Subsection (6)—the provision that mirrors the Siting Board’s mitigation measure—because no control was conferred by the transaction. The Commission agreed with the investors, and it did not require separate consideration of approval under Subsection (6).⁴ The same argument applies to Ashwood’s passive investors—no Siting Board approval should be required because these tax equity investors will not have controlling interests.

Likewise, this position is consistent with Federal Energy Regulatory Commission (“FERC”) policy. In a Declaratory Order issued in 2017, FERC confirmed that the purchase and sale of passive tax equity interests in project companies or their upstream owners does not require authorization from FERC.⁵ It explained that under FPA section 203, prior authorization is required if “a public utility seeks to sell, lease, or otherwise dispose of jurisdictional facilities.” Acknowledging that there are several factors to consider regarding whether there is a transfer of control, FERC held that tax equity investors did not need FERC approval to invest and obtain passive interests in a jurisdictional facility.

For these reasons, Ashwood respectfully requests an order from the Siting Board confirming that Siting Board approval of the anticipated transactions is not required under KRS 278.710(3)(b).

⁴ *Application of T. Rowe Associates, Inc. for A Declaratory Order Regarding the Acquisition of Common Stock*, Case No. 2020-00256, 2020 WL 4818783 (Ky. PSC Aug. 14, 2020); *Application of the Vanguard Group, Inc. for A Declaratory Order Regarding Investment Fund Ownership*, Case No. 2020-00209, 2020 WL 4735168 (Ky. PSC Aug. 10, 2020); *Application of T. Rowe Price Associates, Inc. for A Declaratory Order Regarding the Acquisition of Common Stock*, Case No. 2015-00389, 2016 WL 1045584 (Ky. PSC Mar. 14, 2016).

⁵ *Ad Hoc Renewable Energy Financing Group*, Docket No. EL17-26-000, 161 FERC ¶ 61,010, 2017 WL 4547242 (2017).

III. Alternatively, the Siting Board should grant approval of the anticipated transactions.

If the Siting Board disagrees with Ashwood's position that the anticipated transactions do not require Siting Board approval, Ashwood respectfully requests the Siting Board approve the anticipated transactions that require approval. As described above, the anticipated transactions will not affect the ultimate control of RWE Clean Energy, LLC. Ashwood will still be responsible for complying with the mitigation measures ordered by the Siting Board, and RWE Clean Energy, LLC will dedicate appropriate resources to ensure such compliance both before and after the anticipated transactions.

The anticipated transactions would not have affected the Siting Board's analysis in approving Ashwood's construction certificate that was premised on RWE Clean Energy, LLC's control of Ashwood, which is not changing as a result of the transactions. In addition, the criteria set forth in KRS 278.710(3)(b) on which the Siting Board must make its determination are not impacted by the direct corporate parent or existence of passive investors of the project. Subparagraph (b)(1) focuses on whether "the applicant has a good environmental compliance history." In its Application, Ashwood stated that "Ashwood Solar I LLC, nor any entity with ownership interest in the Project, has violated any state or federal environmental laws or regulations. There are no pending actions against Ashwood Solar I LLC, nor any entity with ownership interest in the Project." In further support of that statement, Ashwood is attaching a certification of good environmental compliance to this Motion as Exhibit 2.

Subparagraph (b)(2) focuses on whether the acquiring entity has the financial, technical, and managerial capacity to meet or contract to meet the obligations of the project. As discussed above, the proposed tax equity financing will not have any impact on who is controlling the project. Ashwood, through its corporate parents including RWE Clean Energy, LLC, will continue to have

the financial, technical, and managerial capacity to comply with regulatory requirements. In addition, the tax equity financiers will provide the project with necessary capital infusion to ensure appropriate operation of the project.

Accordingly, if the Siting Board disagrees with Ashwood's position that the anticipated transactions do not require Siting Board approval, Ashwood respectfully requests the Siting Board approve the anticipated transactions because Ashwood has no prior environmental compliance problems and because it has the requisite experience to comply with the Siting Board's mitigation measures.

IV. Conclusion

For the foregoing reasons, Ashwood respectfully requests an order declaring that Ashwood's anticipated transactions do not require Siting Board approval, or in the alternative, for an order approving the anticipated transactions. In order to provide necessary information to Ashwood's financing parties, Ashwood respectfully requests an expedited review and decision from the Siting Board by no later than **October 21, 2024**.

RESPECTFULLY SUBMITTED,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

M. Todd Osterloh

James W. Gardner

M. Todd Osterloh

333 West Vine Street, Suite 1500

Lexington, KY 40507

Phone: (859) 255-8581

E-mail: jgardner@sturgillturner.com

E-mail: tosterloh@sturgillturner.com

Counsel for Ashwood Solar I LLC

1) Ashwood Solar I, LLC is 100% owned by RWE Investco EPC Mgmt, LLC

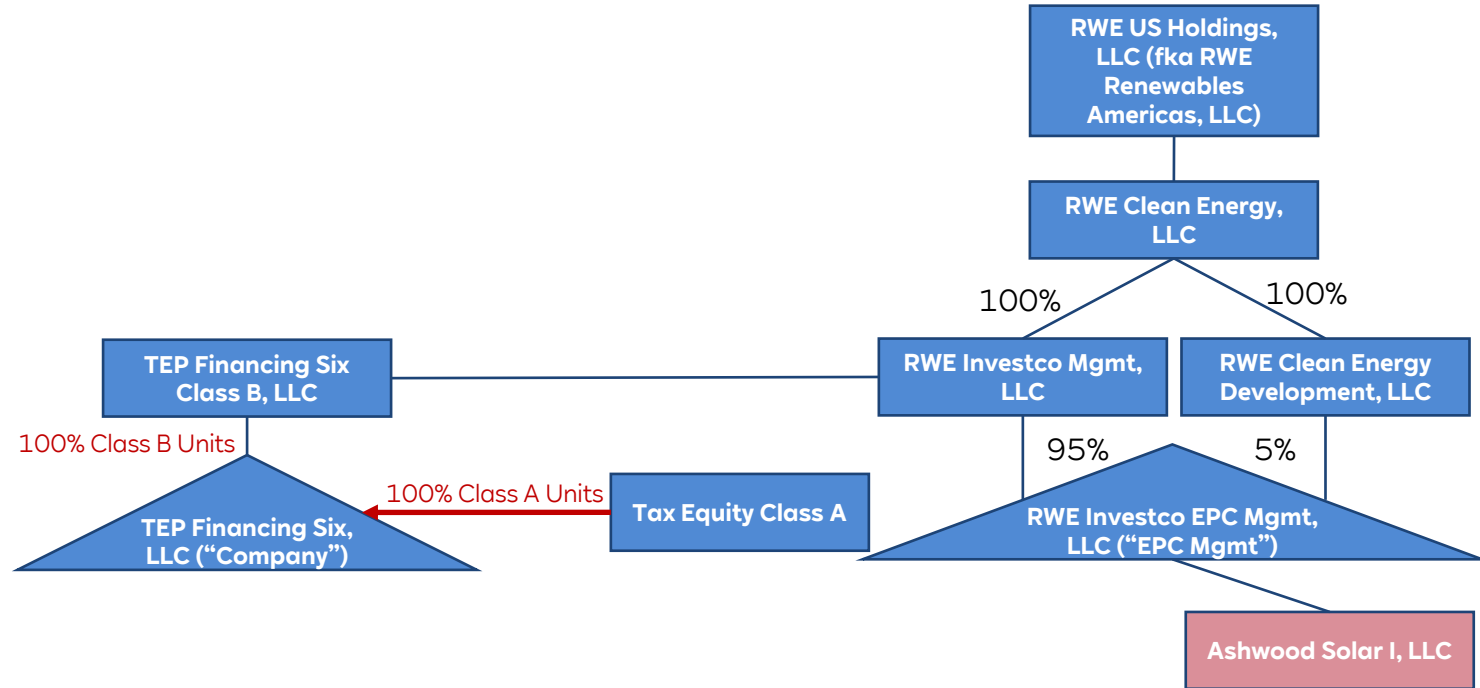
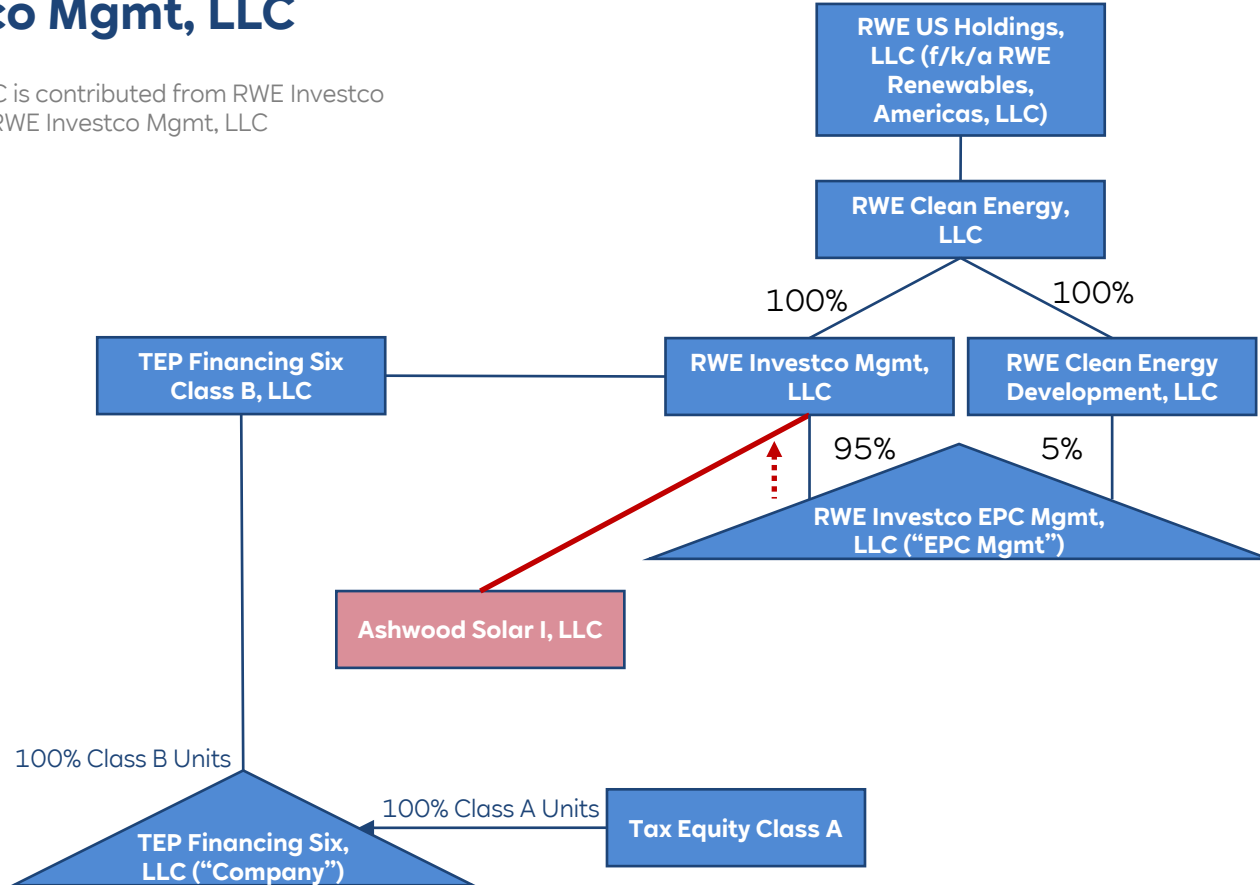


Exhibit 1

2) RWE Investco EPC Mgmt, LLC contributes the project company 100% to RWE Investco Mgmt, LLC

Ashwood Solar I, LLC is contributed from RWE Investco EPC Mgmt, LLC to RWE Investco Mgmt, LLC



3) RWE Investco Mgmt, LLC then then contributes project company down to TEP Financing Six

Ashwood Solar I, LLC is contributed from RWE Investco Mgmt, LLC to TEP Financing Six, LLC

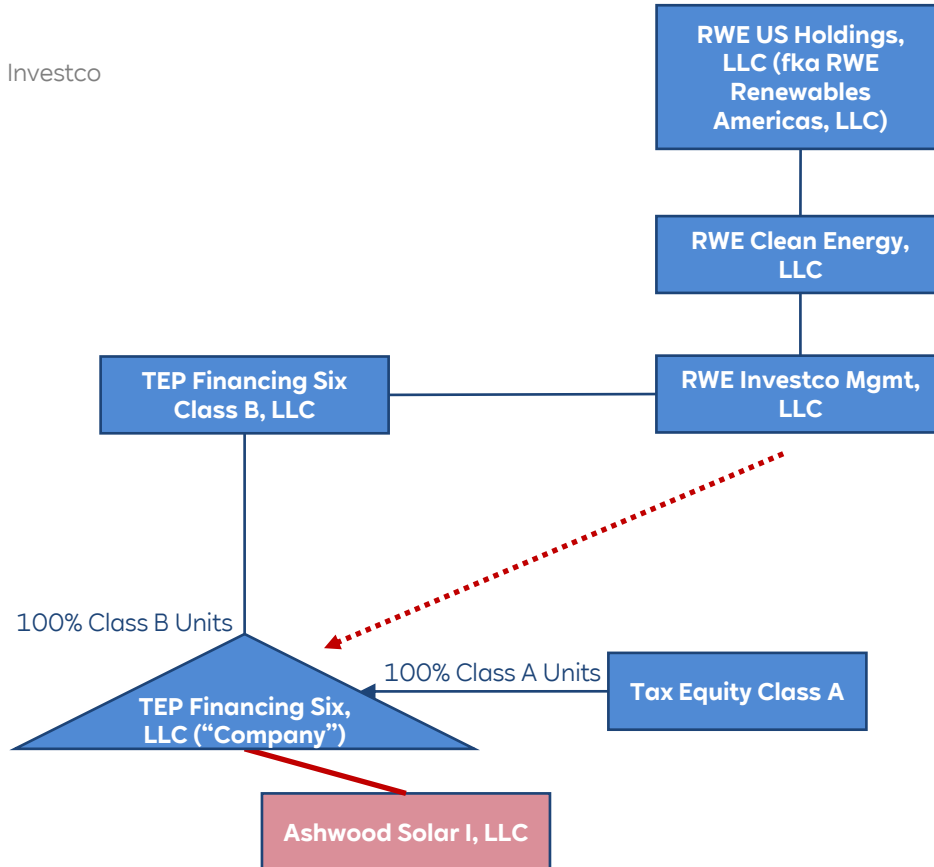


Exhibit 2

AFFIDAVIT

Comes the affiant, PAUL BOWMAN, and after first being duly sworn states as follows:

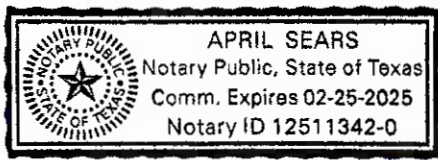
- 1. I am over 18 years of age, of sound mind, and otherwise competent to make this affidavit. The statements in this affidavit are based on my personal knowledge and current recollection.
- 2. I am the Vice President of Ashwood Solar I LLC, and an authorized signatory for Ashwood Solar I, LLC.
- 3. As of the date hereof and to the best of my knowledge, neither Ashwood Solar I, LLC, nor any entity with controlling interest in the Project has violated any state or federal environmental laws or regulations with respect to the project. There are no pending environmental actions against Ashwood Solar I, LLC, any entity with controlling interest in the Project. In addition, there are no entities who will have a controlling interest of Ashwood Solar I, LLC after tax equity financing that have violated any state or federal environmental laws or regulations or have pending environmental actions against them.



[Signature]

STATE OF TEXAS)
) ss
 COUNTY OF TRAVIS)

Subscribed, sworn to and acknowledged before me by Paul Bowman this the 18th day of September, 2024



April Sears
 NOTARY PUBLIC, STATE OF TEXAS

I.D. No. 12511342-0

My Commission Expires:

02/25/2025