

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

**In the Matter of:**

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

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**BLUEBIRD SOLAR LLC'S  
MOTION FOR CONFIDENTIAL TREATMENT**

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Bluebird Solar LLC (“Bluebird”), by counsel, moves the Kentucky State Board on Electric Generation and Transmission Siting (the “Siting Board”) for an order granting confidential treatment to certain information and documents submitted in response to the Siting Board Staff’s Post-Hearing Request for Information. Specifically, Bluebird requests confidential treatment for the Virtual Purchase Power Agreement (“VPPA”).<sup>1</sup> In support of this motion, Bluebird states as follows:

- I. The Virtual Purchase Power Agreement should be afforded confidential treatment by the Siting Board because it is confidential and proprietary, and if openly disclosed would present an unfair commercial advantage to competitors of the entity that disclosed the records.**

Administrative Regulation 807 KAR 5:110, Section 5 sets forth the procedure by which certain information filed with the Commission shall be treated as confidential. Specifically, the

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<sup>1</sup> A description of virtual purchase power agreement is included in Section I(C) below.

party seeking confidential treatment must establish “each basis upon which the petitioner believes the material should be classified as confidential” in accordance with the Kentucky Open Records Act, KRS 61.878. 807 KAR 5:110 Section 5(2)(a)(1).

The Kentucky Open Records Act exempts certain records from the requirement of public inspection. *See* KRS 61.878. In particular, KRS 61.878(1)(c)(1) exempts from disclosure:

Records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would present an unfair commercial advantage to competitors of the entity that disclosed the records.

This exception “is aimed at protecting records of private entities which, by virtue of involvement in public affairs, must disclose confidential or proprietary records to a public agency, if disclosure of those records would place the private entities at a competitive disadvantage.” Ky. OAG 97-ORD-66 at 10 (Apr. 17, 1997). One “obvious disadvantage” is created when proprietary information is disclosed “without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *See Marina Management Service, Inc. v. Commonwealth of Ky., Cabinet for Tourism*, 906 S.W.2d 318, 319 (Ky. 1995).

KRS 61.878.878(1)(c)(1) requires consideration of three elements: (1) whether the record is confidentially disclosed to an agency or required by an agency to be disclosed to it; (2) whether the record is generally recognized as confidential or proprietary; and (3) whether the record, if openly disclosed, would present an unfair commercial advantage to competitors of the entity that disclosed the records. The VPPA meets each of these elements, as described below.

- A. The VPPA is being confidentially disclosed to the Siting Board and required by the Siting Board to be disclosed to it.

In Item 1 of the Post-Hearing Request for Information, the Siting Board Staff requested a copy of the PPA, and Bluebird is submitting it with the understanding that it be maintained as confidential. The parties to the VPPA have always intended that it be maintained as confidential, as evidenced by the detailed Confidentiality provisions contained in Section 21 of the VPPA. It is clear that the parties to the VPPA have always intended to protect the VPPA as confidential. Bluebird's submission of the VPPA to the Siting Board is not intended to waive the PPA's confidential nature.

B. The VPPA is generally recognized as confidential or proprietary.

The VPPA consists of confidential terms agreed upon by the contracting parties. As mentioned above, detailed confidentiality provisions contained in Section 21 of the VPPA mandate that it be maintained confidentially. Moreover, the VPPA is not publicly available, is not disseminated within Bluebird except to those employees and professionals with a legitimate business need to know and act upon the information, and is not disseminated to others without a legitimate need to know and act upon the information. As such, the VPPA is generally recognized as confidential and proprietary.

C. The open disclosure of the VPPA would present an unfair commercial advantage to competitors of the entity that disclosed the records.

There should be no question that Bluebird and its corporate affiliates would suffer a competitive disadvantage if the VPPA was publicly disclosed.<sup>2</sup> A virtual power purchase agreement is a financial arrangement between an owner/developer of an energy generation project

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<sup>2</sup> Throughout this section, reference to Bluebird is intended to include its corporate affiliates, BayWa r.e Solar Projects LLC and its subsidiaries.

and an end-user of power (such as a corporation), which guarantees a stable cash flow for the energy project based on its output while also allowing the buyer to hedge against volatile energy prices. The electricity generated from the project is sold into the wholesale electricity market, and the project receives the market price for the electricity when it is sold. If the market price is greater than the fixed price agreed to in the contract, then the project pays the difference to the buyer. If the market price is less than the fixed price in the contract, then the buyer pays the difference to the project. This contrasts from a physical power purchase agreement because the buyer in the virtual power purchase agreement does not own and is not responsible for taking title to the physical electrons generated by the project.

In general, virtual power purchase agreements are highly complex contracts that set the calculation of the contract price, treatment of renewable energy credits and facility attributes, availability requirements, and a variety of other highly sensitive provisions. These terms are negotiated independently with each counterparty. The VPPA was the result of extensive negotiations by sophisticated businesses that are parties to a complex transaction and includes unique terms specific to the parties.

Disclosure of these terms would threaten Bluebird's and its affiliates' competitive standing in negotiating future power purchase agreements because potential counterparties would have knowledge of prior terms to which Bluebird has agreed. In addition, other developers would obtain knowledge as to Bluebird's practices and potentially change strategies to gain a competitive edge. Public disclosure of the VPPA, therefore, would undermine Bluebird's and its affiliates' ability to negotiate with future virtual and physical purchase power agreements.

Numerous legal authorities support the confidential treatment of the VPPA. For example, in 03-ORD-235 (a copy of which is attached as Exhibit 1), the Attorney General found that a

contract between the Kentucky Department for the Blind and the U.S. Department of Defense for provision of food services at Fort Knox met this statutory exception. The documents requested included the prime contract between the parties and the pricing schedules. The Department for the Blind refused to produce any of the documents, relying on KRS 61.878(1)(c)(1), calling the contract a “hard fought victory” in a “highly competitive field.” It also noted that disclosure of contractual terms would provide competitors an unjust advantage because competitors could simply copy and refine the Department’s work. The Attorney General agreed with these arguments and found that the entire contract, including pricing schedules, was properly excluded from disclosure under KRS 61.878(1)(c)(1). Likewise, in this case, Bluebird is involved in the highly competitive wholesale power market. The VPPA could be used by competitors of Bluebird and future purchasers to undermine Bluebird’s negotiation strategy, thereby harming Bluebird’s and its affiliates’ ability to secure future sales on competitive and favorable terms.

In *Marina Management Services, Inc. v. Cabinet for Tourism*, 906 S.W.2d 318 (Ky. 1995), the Kentucky Supreme Court held that records containing financial information of privately owned marina operators were exempt from disclosure because disclosure would have provided an unfair advantage to competitors by allowing them to ascertain the economic status of the marina operators. The Court explained that disclosure of detailed financial information would present an “obvious disadvantage” because it would enable competitors “to ascertain the economic status of the entities without the hurdles systematically associated with acquisition of such information about privately owned organizations.” *Id.* at 318. The same is true with the VPPA, which reflects the results of complex negotiations and was prepared by sophisticated professionals. Bluebird’s competitors should not be able to obtain this information without the hurdles systematically

associated with acquisition of such information about privately owned organizations, such as Bluebird and its counterparty.

Even KRS 278.160 recognizes that contracts of this nature may be subject to this statutory exemption from disclosure. It allows non-disclosure of special contracts with regulated utilities if that contract would otherwise meet the elements of KRS 61.878(1)(c)(1). This is notable because KRS 278.160 applies to public utilities, which are highly regulated. In contrast, Bluebird is a private corporation and is not subject to Public Service Commission (“Commission”) oversight.

Bluebird acknowledges that the Commission has received publicly filed power purchase agreements with redactions to commercially sensitive terms. The Commission has required the contract price in those cases to be open to the public, reasoning that the price must be considered by the Commission in fuel adjustment clause proceedings and the Commission that must be able to address the payments and cost impact associated with these Solar Contracts with transparency.” *See, e.g., Big Rivers Elec. Coop.*, Case No 2020-00183 (Ky. P.S.C. Mar. 25, 2021).

The regulated nature of the utilities provides a distinguishing feature between those agreements filed with the Commission and Bluebird’s submission of the VPPA to the Siting Board, such that the Siting Board should maintain the entire VPPA as confidential. Neither Bluebird nor the VPPA buyer is a regulated entity that is subject to the jurisdiction of the Commission. The Commission does not have jurisdiction to review the VPPA or determine the VPPA’s impact on utility rates. Rather, the VPPA is a proprietary document between two private parties that will suffer competitive harm if it is publicly disclosed.

Moreover, the entire VPPA should be maintained by the Siting Board as confidential. In negotiating virtual power purchase agreements, the agreed-upon terms or the concessions given for one or more items directly affect the pricing or other terms of the agreement. The complexity

and uniqueness of a virtual power purchase agreement requires that all terms be examined as a “whole” and if public disclosure is allowed, such disclosure to competitors could adversely affect the ability of the developer to negotiate competitive agreements in the future. In addition, a buyer under a virtual power purchase agreement will likewise refuse disclosure because disclosure may adversely affect the ability of buyers to negotiate a more favorable agreement with a different provider in the future.

For the reasons described above, the VPPA is a “[r]ecord[] confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would present an unfair commercial advantage to competitors of the entity that disclosed the records.” It, therefore, is entitled to confidential treatment pursuant to KRS 61.878(1)(c)(1) and Siting Board regulations.

## **II. The Virtual Purchase Power Agreement is not relevant to the Siting Board’s approval of a certificate of construction under KRS 278.710.**

Bluebird desires to be cooperative and transparent with the Siting Board, and as such, Bluebird is submitting the VPPA with the understanding that it be maintained by the Siting Board as confidential. The VPPA, however, is not relevant to the Siting Board’s approval of a construction certificate.

KRS 278.710(1) establishes the following criteria on which the Siting Board must consider in granting or denying a construction certificate:

- (a) Impact of the facility on scenic surroundings, property values, the pattern and type of development of adjacent property, and surrounding roads;
- (b) Anticipated noise levels expected as a result of construction and operation of the proposed facility;

(c) The economic impact of the facility upon the affected region and the state;

(d) Whether the facility is proposed for a site upon which existing generating facilities, capable of generating ten megawatts (10MW) or more of electricity, are currently located;

(e) Whether the proposed facility will meet all local planning and zoning requirements that existed on the date the application was filed;

(f) Whether the additional load imposed upon the electricity transmission system by use of the merchant electric generating facility will adversely affect the reliability of service for retail customers of electric utilities regulated by the Public Service Commission;

(g) Except where the facility is subject to a statewide setback established by a planning and zoning commission as provided in KRS 278.704(3) and except for a facility proposed to be located on a site of a former coal processing plant and the facility will use on-site waste coal as a fuel source, whether the exhaust stack of the proposed merchant electric generating facility and any wind turbine is at least one thousand (1,000) feet from the property boundary of any adjoining property owner and all proposed structures or facilities used for generation of electricity are two thousand (2,000) feet from any residential neighborhood, school, hospital, or nursing home facility, unless a different setback has been requested and approved under KRS 278.704(4). If a planning and zoning commission has established setback requirements that differ from those under KRS 278.704(2), the applicant shall provide evidence of compliance. If the facility is proposed to be located on site of a former coal processing plant and the facility will use on-site waste coal as a fuel source, the applicant shall provide evidence of compliance with the setback requirements provided in KRS 278.704(5);

(h) The efficacy of any proposed measures to mitigate adverse impacts that are identified pursuant to paragraph (a), (b), (e), or (f) of this subsection from the construction or operation of the proposed facility; and

(i) Whether the applicant has a good environmental compliance history.

Subsection (2) of KRS 278.710 also indicates that the Siting Board “may consider the policy of the General Assembly to encourage the use of coal as a principal fuel for electricity generation.”

Simply put, the VPPA does not relate to any of the criteria found in KRS 278.710. Again, Bluebird is willing to submit the VPPA to the Siting Board with the understanding that it be



maintained as confidential. But the lack of statutory relevance of the VPPA to the Siting Board's decision further underscores the importance that it be maintained as confidential.

### **III. Conclusion**

For the foregoing reasons, Bluebird respectfully requests confidential treatment of the PPA in perpetuity. If the Siting Board disagrees with this request for confidential protection, it must hold an evidentiary hearing (a) to protect Bluebird's due process rights and (b) to supply the Siting Board with a complete record to enable it to reach a decision with regard to this matter.

RESPECTFULLY SUBMITTED,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

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