

**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 APPROVAL OF ANTICIPATED TRANSFER OF ASSETS  
PURSUANT TO AN INDUSTRIAL REVENUE BOND FINANCING**

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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 approving the asset transfer to Harrison County of Bluebird’s electric solar generating facility (the “Bluebird Project” or “Project”), pursuant to agreement between Bluebird and Harrison County for an industrial revenue bond financing. In general, as a part of the issuance of industrial revenue bonds (the “IRBs” or “Bonds”) by Harrison County to finance the costs of Bluebird Project assets, Bluebird would transfer title of the Bluebird Project assets to the County and lease those assets back for up to thirty years.<sup>1</sup> The IRB transaction is in substance a financing, not a sale; Bluebird will retain economic ownership and complete responsibility and control of the Bluebird Project during the term of the Bonds. When the Bonds mature, they are paid off, the lease terminates, and the County is

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<sup>1</sup> By Order dated December 6, 2022, the Siting Board previously approved a corporate restructuring associated with project financing. Although the IRB also relates to financing, the IRB transaction contemplates transfer of title of assets, as opposed to corporate restructuring.

contractually required to transfer nominal title to the Project assets back to Bluebird for a de minimis payment. This nominal transfer of title to the County as part of the IRB financing has been contemplated since the outset of the Bluebird Project and was considered by the Siting Board in its August 3, 2022, Order granting Bluebird’s Application for a Certificate of Construction.<sup>2</sup>

Bluebird seeks to finalize the documentation governing issuance of the IRBs by the mid-August 2023 in anticipation of closing construction financing in early August. Accordingly, Bluebird respectfully requests a decision no later than **July 28, 2023**.

### **Description of the Transaction**

On July 10, 2018, the Harrison County Fiscal Court adopted a bond inducement resolution agreeing to issue one or more series of industrial revenue bonds to finance the costs of the Bluebird Project as an inducement for Bluebird to undertake development of the Project.<sup>3</sup> The resolution provided that the Bonds will have a term of up to thirty years and will be issued in an aggregate amount not to exceed \$220,000,000. Bluebird has organized a wholly-owned special-purpose, Kentucky limited liability company named Bluebird Solar Investments LLC (“Investments”) that will serve as the purchaser of the Bonds.<sup>4</sup> Upon substantial completion of the bond documentation, Harrison County will adopt and publish a Bond Ordinance (the “Bond Ordinance”) approving execution of the bond documents, issuance and sale of the Bonds and the lease of the Bluebird Project to Bluebird. Bluebird intends to execute the documents and for the County to issue the Bonds after closing third-party construction financing and recording all liens related to such third-party financing.

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<sup>2</sup> See *Bluebird Solar, LLC*, Case No. 2021-00141 at 17 (K.S.B.E.G.T.S. Aug. 3, 2022).

<sup>3</sup> The Harrison County Fiscal Court adopted a supplemental bond inducement resolution on July 11, 2019.

<sup>4</sup> Bluebird Solar Investments LLC is wholly owned by Bluebird.

The Bond Ordinance will authorize the County to issue and sell the Bonds and approve the execution, delivery, and acceptance of: (i) a Lease Agreement between the County, as lessor, and Bluebird, as lessee; (ii) a Bond Purchase Agreement between the County and Investments detailing the issuance, sale, and delivery of the IRB to Investments; (iii) a Payment in Lieu of Taxes Agreement (“PILOT Agreement”) requiring Bluebird to make certain payments to local governments during the term of the bonds; and (iv) any other related or necessary documents. The Harrison County Fiscal Court will read the Bond Ordinance at two meetings and then approve it; the Ordinance will become effective upon publication in *The Cynthiana Democrat*.

Following publication of the Ordinance, Bluebird, Investments and the Harrison County Fiscal Court will close on the IRB financing by executing and delivering the primary bond documents (the Assignment of Ground Leases, the Bill of Sale, the Lease Agreement, the Bond Purchase Agreement, the Assignment of Lease Agreement, a letter to County officials, the PILOT Agreement, and other miscellaneous closing certificates, resolutions, opinions, and disbursements and payments agreements) and disbursing bond proceeds. Investments will purchase the Bonds, and the proceeds of the sale will be paid to Bluebird as reimbursement for Bluebird’s costs incurred to acquire, construct, develop, equip, and install the Bluebird Project.

Under the Lease Agreement, Bluebird will lease back the Bluebird Project from the County for a term of thirty years and agree to make periodic lease payments equal to the amounts necessary to amortize the Bonds over their term. Bluebird’s obligation to make lease payments will be pledged as security<sup>5</sup> for the repayment of the Bonds, and the County will assign to Investments the right to receive those lease payments. With that assignment, the County will not be involved in processing debt service payments or lease payments.

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<sup>5</sup> This pledge of security has lower priority than liens and pledges of security to construction and permanent lenders.

When the Bonds mature (or earlier at Bluebird’s option), Bluebird will pay off any remaining principal and interest of the Bonds and the debt is discharged. The Lease Agreement will contractually obligate Harrison County to transfer nominal title to the Bluebird Project back to Bluebird in exchange for a *de minimis* payment. The bond documents will provide Bluebird the right to pay off, redeem, and discharge the IRBs and reacquire the Bluebird Project at any time prior to maturity.

### **Analysis**

In the Siting Board’s August 3, 2022, Order, the Siting Board required that Bluebird seek its approval for any acquisition or transfer of “ownership, control, or right to control the project by sale of assets . . .” and notify the Harrison County Fiscal Court.<sup>6</sup> The County is a party to the IRB transaction and since 2018 has been aware of Bluebird’s anticipated transfer of title to the County upon issuance of the Bonds. In addition, a copy of this Motion is being served on the Harrison County Judge/Executive, as evidenced by the Certificate of Service.

Bluebird requests Siting Board approval of Bluebird’s transfer of the Bluebird Project assets to Harrison County as part of the County’s the issuance of the IRBs. The Siting Board has been long aware of the negotiated financial agreement between Bluebird and Harrison County for the issuance of the IRBs, and even likened the IRBs and Bluebird’s making payments in lieu of tax to the comparable property taxes that Project landowners pay for agricultural uses of their land prior to the development of the Bluebird Project.<sup>7</sup> The transfer to the County of nominal title to the Bluebird Project assets is a necessary element of that financial agreement.

Despite the transfer of assets to the County, Bluebird through the Lease Agreement and its right to reacquire the Bluebird Project will retain economic ownership of the Bluebird Project and

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<sup>6</sup> *Id.* at Appendix A at 6

<sup>7</sup> *Id.* at 17.

remain in control of the Project. The County simply serves as a conduit for the IRB financing; Bluebird through its lease payments will bear the financial responsibility for the debt payments of the IRBs. In sum, the transfer to the County of nominal title to the Bluebird Project assets will not change Bluebird's economic ownership, control or operation of the Project and therefore will not change any premise upon which the Siting Board approved Bluebird's Application for a Certificate of Construction.<sup>8</sup> And as the Siting Board has previously found in its Order dated December 6, 2022, the Bluebird Project and its ownership structure "have good environment compliance history and have the financial, technical, and managerial capacity to construct and operate the project."<sup>9</sup>

Approval of this transfer is further supported by recent amendments to the statutes pertaining to the Siting Board. Although not directly applicable to the underlying Motion,<sup>10</sup> recently enacted 2023 House Bill 4 amends various statutes in KRS Chapter 278 to provide for primacy of a local ordinance, permit, or license for certain issues.<sup>11</sup> This recent codification of local deference clearly demonstrates the General Assembly's intent to support local government actions relating to the development of merchant electric generating facilities, which would include IRB financing partnerships such as the one between Bluebird and Harrison County.

The anticipated IRB financing is economically advantageous to the Bluebird Project and will have no effect on Bluebird's economic ownership, control, or operation of the Project.

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<sup>8</sup> Because transfer of title to the assets associated with the IRB does not alter Bluebird's control of the project, the transaction does not result in a "transfer of rights or obligations of the certificate" that triggers requirements under the current version of KRS 278.710(3). Bluebird will remain responsible for the Project and compliance with the Siting Board's conditions to the construction certificate.

<sup>9</sup> Order, *Bluebird Solar, LLC*, Case No. 2021-00141 at 17 (K.S.B.E.G.T.S. Dec. 12, 2022).

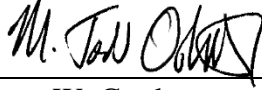
<sup>10</sup> This legislation will become effective June 29, 2023. See Ky. Atty. Gen'l. Op. No. 23-03 (April 4, 2023),

<sup>11</sup> See 2023 HB 4, Section 6 (amending KRS 278.718 to include a sentence stating: "An ordinance, permit, or license issued by a local government shall have primacy over the provisions and requirements of KRS 278.700 and Sections 2, 3, and 4 of this Act, and any conflict between an order of the board and a local ordinance, permit, or license shall be resolved in favor of the local government's ordinance, permit, or license.")

Accordingly, Bluebird requests the Siting Board approve Bluebird's transfer of title to the Bluebird Project assets to Harrison County pursuant to the County's issuance of the IRBs.

RESPECTFULLY SUBMITTED,

STURGILL, TURNER, BARKER & MOLONEY, PLLC




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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was electronically filed with the Siting Board through the Public Service Commission of Kentucky's electronic filing system and served on the County this 23rd day of June, 2023, by mail to:

Harrison County Judge/Executive Jason Marshall  
111 S. Main Street, Ste 201  
Cynthiana, KY 41031

By:   
M. Todd Osterloh