

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)	

PROPOSED ORDER

On September 13, 2024, Bluebird Solar LLC (Bluebird Solar) filed a motion requesting the Siting Board approve a transfer of ownership and control of the project.

Background

Bluebird Solar filed an application to construct an approximately 100-megawatt merchant solar generating facility in Harrison County, Kentucky on February 4, 2022.¹ During the pendency of the case, Bluebird Solar responded to two rounds of discovery,² a site visit was conducted, the Siting Board hired a consultant who issued a report about the project,³ Bluebird Solar responded to the consultant’s report,⁴ and a hearing was

¹ 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.

² 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).

³ Wells Engineering Report (filed May 20, 2022).

⁴ Bluebird Solar’s Response to Consultant Report (filed May 27, 2022).

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. One of those conditions (Mitigation Measure 26) states as follows:

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).⁵

On October 14, 2022, Bluebird Solar filed a motion, requesting the Siting Board issue a declaratory order in anticipation of a transfer of the project resulting from tax-equity financing. Bluebird Solar requested a declaratory order that the tax-equity transaction did not require Siting Board approval. In the alternative, Bluebird Solar requested Siting Board approval for the anticipated tax-equity transfer if the Siting Board found the transaction does require approval. The proposed tax-equity transaction would have resulted in a tax-equity investor(s) owning 100% of Class A shares that did not carry any controlling interests over the project and a subsidiary of BayWa.r.e. USA LLC owning 100% of Class B shares that would control the day-to-day operations and management of Bluebird Solar.

On December 6, 2022, the Siting Board issued an order denying Bluebird Solar's argument that the tax-equity transaction did not require Siting Board approval, but it

⁵ Order (Ky. PSC Aug. 3, 2022), Appendix A, mitigation measure 26.

granted approval for the tax-equity transaction. In that order, the Siting Board held that KRS 278.710 was not applicable because Bluebird Solar was not transferring the construction certificate to another entity,⁶ explaining:

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.⁷

In approving the tax-equity transaction, the Siting Board noted that the BayWa.r.e. USA LLC subsidiary that would hold the Class B shares provided sufficient evidence of good history of environmental compliance.⁸

On September 13, 2024, Bluebird Solar filed a motion requesting the Siting Board approve a transfer of ownership and control of the project from a subsidiary of BayWa.r.e. USA LLC to MN8 DevCo 3 LLC (MN8) which is an indirectly owned subsidiary of MN8 Energy LLC. In addition, Bluebird Solar requested approval for a tax-equity structure under MN8.

Proposed Transaction

The proposed transaction would involve two steps. Initially, MN8 DevCo 3 LLC

⁶ In 2023 HB 4, the General Assembly amended KRS 278.710. The current wording of the statute in KRS 278.710(3)(b) was contained in KRS 278.710(3) when the Order was issued in December 2022.

⁷ Order at 8 (Ky. PSC Dec. 6, 2022).

⁸ In the pending motion, Bluebird Solar indicated that it has not completed the tax equity transaction that was contemplated by its Motion filed on October 14, 2022, and approved on December 6, 2023. See Motion at 2 n.1.

will purchase 100% of the membership interests in Bluebird Solar LLC from BayWa r.e. Development Portfolio I LLC in order to be the long-term owner and operator of the project.⁹ Shortly thereafter, MN8 will complete a tax-equity transaction that is similar to the one proposed by Bluebird in its October 13, 2022, motion that was granted on December 6, 2023.

Upon completing this second step, MN8 Energy LLC will own, directly or indirectly, 100% of the nonpassive, controlling interests (called “Class B shares”) in a subsidiary of MN8 Energy LLC, which in turn will own 100% of Bluebird. In addition, the project’s tax equity investors will own passive, non-controlling interests (or “Class A shares”). 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.

Bluebird Solar has indicated that the project has made significant construction progress, and it anticipates that the project will begin generation of electricity for sale in January 2025.¹⁰ There will be no change of construction management as a result of MN8’s acquisition of Bluebird. After the initial closing, an affiliate of BayWa r.e. USA LLC will continue managing the construction of the Bluebird project until the construction is completed through a contract.

⁹ Bluebird has not completed the tax equity transaction that was contemplated by its Motion filed on October 14, 2022, and approved on December 6, 2023. Bluebird is still directly owned by BayWa r.e. Development Portfolio I LLC.

¹⁰ Motion at 2

Analysis

Mitigation Measure 26 from the Siting Board’s August 3, 2022, Order mandates Bluebird Solar obtain approval from the Siting Board prior to transferring ownership or control of the project. The condition explicitly requires Bluebird Solar to provide notice to the Harrison County Fiscal Court and certify its compliance with KRS 278.710(1)(i), which relates to environmental compliance history.

With respect to the first element identified above, certified that it served a copy of this motion on the Harrison County Judge/Executive and County Attorney.¹¹ In addition, Bluebird Solar indicated that its representatives have discussed this proposed transaction with the Harrison County Judge/Executive.¹²

With respect to the second element identified above, Bluebird Solar certified its lack of environmental violations as contemplated by KRS 278.706 in its application.¹³ Bluebird Solar indicated that nothing has changed with respect to Bluebird Solar on this issue since the filing of the application. In addition, Bluebird Solar submitted an affidavit of good environmental compliance as it relates to the post-closing corporate structure of Bluebird Solar under MN8 ownership. Specifically, the affidavit indicates that MN8 nor any entity who will have a direct controlling interest in Bluebird Solar has violated any state or federal environmental laws or regulations.

The Siting Board also finds that MN8 has the financial, technical, and managerial capacity to construct and operate the project. Bluebird indicated that MN8 was originally

¹¹ See *id.* at 6.

¹² *Id.* at 3.

¹³ See Application, Section 11 “Record of Environmental Violations.”

founded inside of Goldman Sachs Asset Management in 2017, and has quickly grown to be one of the largest owners and operators of renewable energy projects in the United States.¹⁴ MN8’s fleet is composed of over 875 projects spread across 28 states with an aggregate capacity of approximately 3.2 gigawatts (“GW”) of operating and under construction solar projects and approximately 270 megawatts (“MW”) or 1 gigawatt hour + of operating battery storage projects.¹⁵

MN8 has hundreds of operating assets that vary in size including utility scale projects of over 100MWs of Solar and Battery Energy Storage.¹⁶ Accordingly, MN8 expertise and experience in operating assets similar to the Bluebird Solar project. In addition, MN8 brings significant financial capability and backing, as indicated through reported operating company revenue of over \$290 million in 2021 as reported in its S1 filing with the SEC and maintains a continued level of financial outperformance as compared with others in the industry.¹⁷

The Siting Board finds that it is beneficial that a MN8 will contract with a BayWa subsidiary for continued construction management following the transaction. With the project scheduled to begin generation in January 2025, consistency in construction management and retaining historical knowledge will help promote a seamless transition to MN8.

The Siting Board also finds that MN8’s proposed tax-equity structure is appropriate and should be approved. The proposed tax-equity structure is similar to the

¹⁴ See Motion at 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

structure previously approved by the Siting Board, whereby tax-equity investors would receive passive, non-controlling Class A shares and an MN8 subsidiary would receive the non-passive, controlling Class B shares. As with the structure previously approved, this transaction is for financial purposes only.¹⁸

IT IS THEREFORE ORDERED that:

1. Bluebird Solar's request to transfer ownership and control of the project from a BayWa subsidiary to an MN8 subsidiary and to allow for tax equity investments is granted.
2. Bluebird Solar shall provide proof to the Siting Board when the transaction has been completed.

Tendered by:
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¹⁸ Order at 10.