

**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 KAR)	
5:110)	

**BLUEBIRD SOLAR LLC’S
NOTICE OF FILING**

Bluebird Solar LLC (“Bluebird”), by counsel, hereby provides notice of filing of an unredacted copy of the Motion for Declaratory Order, as required by the Siting Board’s Order dated November 10, 2022.

RESPECTFULLY SUBMITTED,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

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

Bluebird Solar LLC (“Bluebird”), 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, Bluebird respectfully requests an expedited review and decision from the Siting Board by no later than **November 15, 2022**. In support of this motion, Bluebird states as follows:

I. Introduction

On August 3, 2022, the Siting Board approved a construction certificate to construct a merchant solar electric generating facility for Bluebird. The Siting Board’s approval required certain mitigation measures and conditions, one of which was the following:

26. 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).

See Order, Appendix A at 6.

Prior to achieving commercial operation, Bluebird 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.

Bluebird will be internally transferred from (1) BayWa r.e.'s U.S. solar development company, BayWa r.e. Solar Projects LLC, to (2) BayWa r.e.'s U.S. independent power producer, BayWa r.e. Solar Asset Holdings LLC. Both BayWa r.e. Solar Projects LLC and BayWa r.e. Solar Asset Holdings LLC are wholly-owned subsidiaries of BayWa r.e. USA LLC, which is a wholly-owned subsidiary of BayWa r.e. AG. Bluebird Solar LLC is a wholly-owned indirect subsidiary of BayWa r.e. Solar Projects LLC and currently anticipates it will remain as such until completing the foregoing transfer. Upon completing the transfer, BayWa r.e. Solar Asset Holdings LLC will own, directly or indirectly, 100% of Bluebird Class B LLC, which will own all of the nonpassive, controlling interests (called "Class B shares") in Bluebird Tax Equity Partnership LLC, which in turn will own 100% of Bluebird. Bluebird Class B LLC will also be the managing member of Bluebird Tax Equity Partnership LLC and will control day-to-day management and operation of Bluebird in this capacity.

At the time of this transfer described above, the project's tax equity investors¹ will own passive, non-controlling interests (or "Class A shares") in Bluebird Tax Equity Partnership LLC. 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, neither the internal transfer described above nor the tax equity transaction will affect the way the project is operated.

Bluebird is targeting closing of its first round of debt financing for the project in November and anticipates that lenders 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 Bluebird's initial lenders will want to ensure that Bluebird will be able to secure long-term financing. Accordingly, Bluebird respectfully requests a decision no later than **November 15, 2022**.

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

As quoted above, the Siting Board's Mitigation Measure 26 requires Siting Board approval "[i]f 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." This provision mirrors the same requirement found in KRS 278.020(6) related to ownership and control of utilities under the jurisdiction of the Public Service Commission ("Commission"). The Commission has previously explained² that this statutory provision was a codification of the decision in *Public Service Com'n*

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.

² See *Kentucky-American Water Co.*, Case No. 2006-00197 (Ky. PSC Aug. 14, 2006) and Order on Rehearing (Ky. PSC Apr. 16, 2007).

v. City of Southgate, 268 S.W.2d 19, 21 (Ky. 1954), which held that the Commission had jurisdiction to review a proposed sale of a utility based on the Commission's statutory authority to regulate the service of utilities.

There are obvious similarities and differences between the Siting Board and the Commission. Notably, the Commission has broad jurisdiction over utilities pursuant to KRS 278.040, whereas the Siting Board's authority is limited to the siting of a merchant electric generating facility and continued compliance with that order. Because the Siting Board does not have the expansive jurisdiction similar to the Commission's jurisdiction, the Siting Board may not have the same ability to review a proposed transfer of control as the *Southgate* Court held that the Commission possessed. As such, the Siting Board explained in the order approving Bluebird's construction certificate that approval of transfers of control are necessary to ensure a subsequent owner has the requisite expertise to comply with the mitigation measures.³

The anticipated transactions will not impact Bluebird's ability to comply with the mitigation measures and will not interfere with the expertise and project management that BayWa r.e. AG and its subsidiaries will bring to the project. In fact, the transfer from BayWa r.e.'s U.S. solar development company to its U.S. independent power producer will facilitate the provision of appropriate expertise within BayWa r.e. for the management and long-term ownership of the operational project. The tax equity investors will have passive interests only and will not have day-to-day operational control over the project.⁴ Control of Bluebird will remain with BayWa r.e. AG and its subsidiaries. Accordingly, there will be no change in Bluebird's ability to comply with the Siting Board's mitigation measures as a result of having tax equity investors. In fact, Bluebird

³ See Order at 20-21.

⁴ To the extent that these investors would subsequently seek to gain a controlling, non-passive interest, Bluebird acknowledges that subsequent Siting Board approval would be necessary.

expects that the tax equity investors will contractually require the project to comply with the Siting Board’s mitigation measures. Accordingly, Bluebird believes that Mitigation Measure 26 does not apply to these anticipated transactions and that no approval is necessary.

Commission cases support Bluebird’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 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).⁵ The same argument applies to Bluebird’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.⁶ 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

⁵ *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).

⁶ *Ad Hoc Renewable Energy Financing Group*, Docket No. EL17-26-000, 161 FERC ¶ 61,010, 2017 WL 4547242 (2017).

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, Bluebird respectfully requests an order from the Siting Board confirming that Siting Board approval of the anticipated transactions is not required under Mitigation Measure 26 of the Siting Board's Order.

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

If the Siting Board disagrees with Bluebird's position that the anticipated transactions do not require Siting Board approval, Bluebird 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 Bluebird by BayWa r.e. AG. Bluebird will still be responsible for complying with the mitigation measures ordered by the Siting Board, and BayWa r.e. AG 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 Bluebird's construction certificate that was premised on BayWa r.e. AG control of Bluebird, which is not changing as a result of the transactions. In addition, nearly all of the criteria set forth in KRS 278.710(1) 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. In fact, the only factor that could arguably apply is whether "the applicant has a good environmental compliance history." The Siting Board has indicated that this is the primary focus of its approval for a sale or transfer of control of a merchant electric generating facility, as it has ordered requests for approval be accompanied by certification Bluebird's good environmental compliance.

In its Application, Bluebird stated that “Bluebird Solar 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 Bluebird Solar LLC, nor any entity with ownership interest in the Project.” In further support of that statement, Bluebird is attaching a certification of good environmental compliance to this Motion as Exhibit 2.

Accordingly, if the Siting Board disagrees with Bluebird’s position that the anticipated transactions do not require Siting Board approval, Bluebird respectfully requests the Siting Board approve the anticipated transactions because Bluebird 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, Bluebird respectfully requests an order declaring that Bluebird’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 Bluebird’s financing parties, Bluebird respectfully requests an expedited review and decision from the Siting Board by no later than **November 15, 2022**.

RESPECTFULLY SUBMITTED,

STURGILL, TURNER, BARKER & MOLONEY, PLLC

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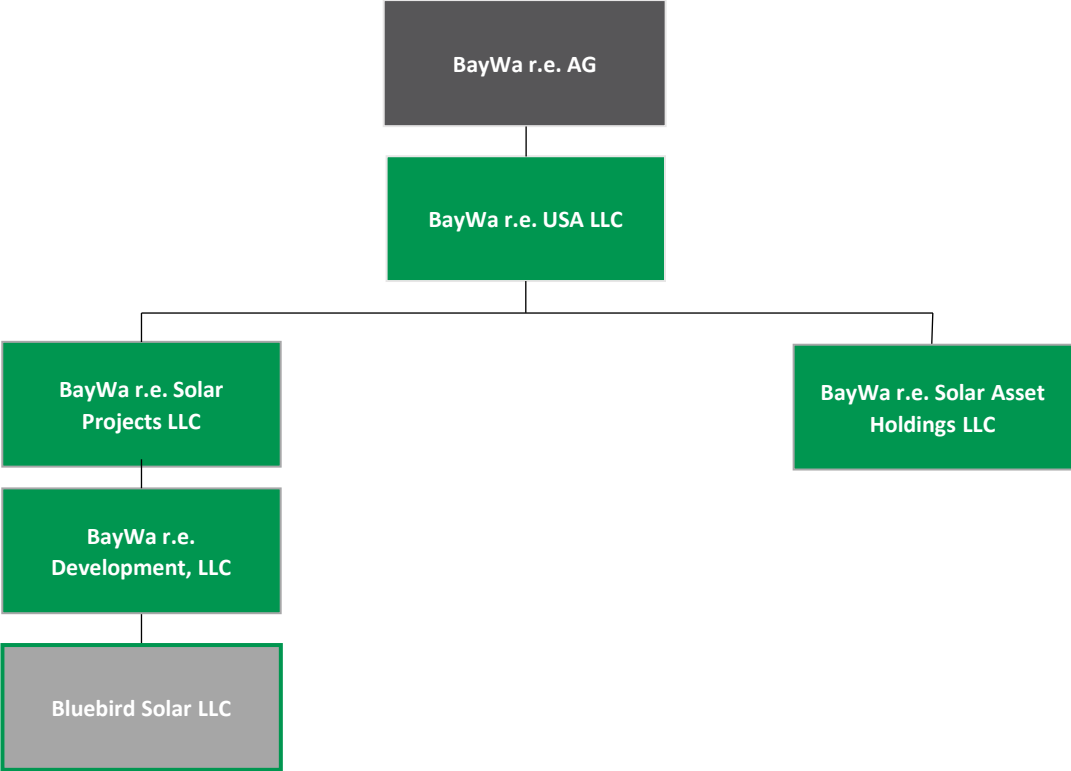
E-mail: tosterloh@sturgillturner.com

Counsel for Bluebird Solar LLC

Exhibit 1

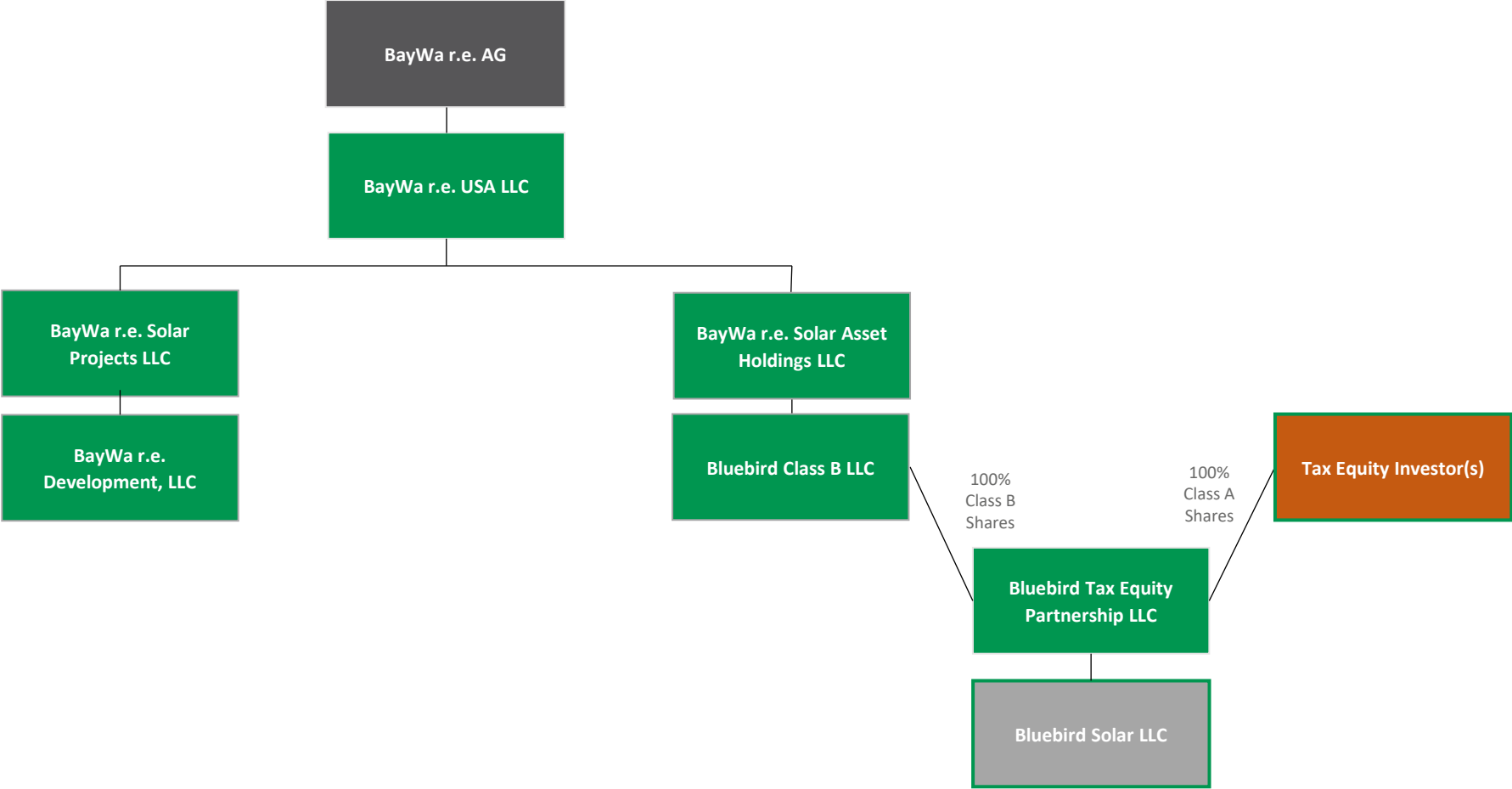
Current Structure

Lines represent 100% ownership unless indicated otherwise



Post-Transaction Structure

Lines represent 100% ownership unless indicated otherwise



* Bluebird Class B LLC will be the managing member of Bluebird Tax Equity Partnership LLC.

Exhibit 2

Affidavit

AFFIDAVIT

Comes the affiant, William Gulley, and after first being duly sworn states as follows:

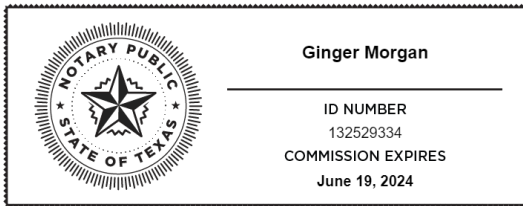
1. I am over 18 years of age, of sound mind, and otherwise competent to make this affidavit. The statements in this affidavit are based on my personal knowledge and current recollection.
2. I am the Chief Financial Officer of BayWa r.e. Solar Projects LLC, the parent company of Bluebird Solar LLC, and an authorized signatory for Bluebird Solar LLC. I am also an officer of BayWa r.e. Solar Asset Holdings LLC.
3. As of the date hereof and to the best of my knowledge upon reasonable inquiry, neither Bluebird Solar LLC, nor any entity with controlling interest in the Project, nor BayWa r.e. Solar Asset Holdings LLC, has violated any state or federal environmental laws or regulations. There are no pending environmental actions against Bluebird Solar LLC, any entity with controlling interest in the Project, or BayWa r.e. Solar Asset Holdings LLC.

William Gulley

William Gulley

STATE OF ~~CALIFORNIA~~ ^{Texas} *Sam*)
)
 COUNTY OF ~~ORANGE~~ ^{Collin} *Sam*) ss
)

Subscribed, sworn to and acknowledged before me by William Gulley on this the 14th day of October, 2022.



Ginger Morgan

NOTARY PUBLIC, ~~STATE AT LARGE~~
 State of Texas *Sam*

I.D. No. 132529334

Notarized online using audio-video communication

My Commission Expires:

06/19/2024