

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	)	

ORDER

On April 8, 2022, Bluebird Solar LLC (Bluebird Solar) filed a motion, pursuant to 807 KAR 5:110, Section 5, and KRS 61.878, requesting that the Siting Board grant confidential protection for an indefinite period for material terms of leases provided in response to Siting Board Staff’s First Request for Information (Staff’s First Request) Item 14.

LEGAL STANDARD

The Siting Board is a public agency subject to Kentucky Open Records Act,<sup>1</sup> which requires that all public records “be open for inspection by any person, except as otherwise provided by KRS 61.870 to KRS 61.884.”<sup>2</sup> The exceptions to the free and open examination of public records should be strictly construed.<sup>3</sup> The party requesting that the materials be granted confidential protection has the burden of establishing that one of the

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<sup>1</sup> KRS 61.870 through 61.884.

<sup>2</sup> KRS 61.872(1).

<sup>3</sup> KRS 61.878.

exemptions is applicable.<sup>4</sup> KRS 61.878(1)(c)(1) provides an exception to the requirement for public disclosure of records that are “generally recognized as confidential and proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records.”

### DISCUSSION AND FINDINGS

In support of its motion, Bluebird Solar argued that the leases included in the response to Staff’s First Request, Item 14 should be granted confidential protection because if disclosed it faces significant commercial disadvantage. Bluebird Solar argued this information is normally considered confidential or proprietary. Bluebird Solar argued it would not be able to negotiate the most favorable terms in other leases if these leases are disclosed. Bluebird Solar noted it is Siting Board precedent to hold material terms of leases confidential.

Included in the leases provided in response to Staff’s First Request is a Real Estate Swap Agreement.<sup>5</sup> The Real Estate Swap Agreement contained multiple documents Bluebird Solar requested portions of be granted confidential treatment including; the agreement, Exhibit 3 containing the title commitment for the owner property, Exhibit 4 containing the title commitment for the buyer property, Exhibit 9 the owner’s certification of trust, and Exhibit 11 the sole member’s certificate.

Having considered the motion and the material at issue, the Siting Board finds that the material terms of the leases contained in the response to Item 14 of Staff’s First Request are generally recognized as confidential or proprietary; and therefore, meet the

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<sup>4</sup> 807 KAR 5:110, Section 5(2)(d).

<sup>5</sup> Bluebird Solar LLC’s Responses to Siting Board’s First Request for Information (filed Apr. 11, 2021) at 124.

criteria for confidential treatment and are exempted from public disclosure pursuant to 807 KAR 5:110, Section 5, and KRS 61.878(1)(c)(1). Material terms are defined as including:

1. The lease amounts;
2. Escalation of lease payments;
3. Remedies available to the parties of the lease for nonperformance of the terms;
4. Economic terms other than lease terms and related escalations such as signing payments, crop damage calculations, construction rent amounts, extension fees, and holdover rent amounts; and
5. The structure of the lease term including the outside date for the rent commencement date.

The Siting Board finds the material terms, as defined above, of the Real Estate Swap Agreement, are confidential and are exempted from public disclosure pursuant to 807 KAR 5:110, Section 5, and KRS 61.878(1)(c)(1).

The Siting Board further finds that the request for confidential treatment for the additional portions of the Real Estate Swap Agreement contain information that are not material terms of property agreements normally exempt from disclosure. There was no reasoning given by Bluebird Solar as to why the terms of title insurance, a certification of a trust, or a sole member's agreement should be given confidential protection pursuant to KRS 61.878(1)(c)(1).

IT IS THEREFORE ORDERED that:

1. Bluebird Solar's motion for confidential treatment of material terms of leases provided in response to Staff's First Request, Item 14, is granted in part and denied in part.

2. Bluebird Solar's motion for confidential treatment for the material terms of leases and the Real Estate Swap Agreement is granted and shall not be placed in the public record or made available for public inspection for an indefinite period or until further order of the Siting Board.

3. Bluebird Solar's motion for confidential treatment for all other portions of the Real Estate Swap Agreement is denied.

4. Use of the designated material granted confidential treatment by this Order in any Siting Board proceeding shall comply with 807 KAR 5:110, Section 5.

5. Bluebird Solar shall inform the Siting Board if the designated material granted confidential treatment becomes publicly available or no longer qualifies for confidential treatment.

6. If a nonparty to this proceeding requests to inspect the material granted confidential treatment by this Order and the period during which the material has been granted confidential treatment has not expired, Bluebird Solar shall have 30 days from receipt of written notice of the request to demonstrate that the material still falls within the exclusions from disclosure requirements established in KRS 61.878. If Bluebird Solar is unable to make such demonstration, the requested material shall be made available for inspection. Otherwise, the Siting Board shall deny the request for inspection.

7. The Siting Board shall not make the requested material for which confidential treatment was granted available for inspection for 30 days from the date of service of an Order finding that the material no longer qualifies for confidential treatment in order to allow Bluebird Solar to seek a remedy afforded by law.

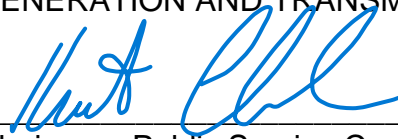
8. The designated material denied confidential treatment by this Order is not exempt from public disclosure and shall be placed in the public record and made available for public inspection.

9. If Bluebird Solar objects to the Siting Board's determination that the requested material not be granted confidential treatment, it must seek either rehearing pursuant to 807 KAR 5:110, Section 5(4), or judicial review of this Order pursuant to KRS 278.712(5). Failure to exercise either of these statutory rights will be deemed as agreement with the Siting Board's determination of which materials should be granted confidential treatment.

10. Within 30 days of the date of service of this Order, Bluebird Solar shall file a revised version of the designated material for which confidential treatment was denied, reflecting as unredacted the information that has been denied confidential treatment.

11. The designated material for which Bluebird Solar's request for confidential treatment has been denied shall neither be placed in the public record nor made available for inspection for 30 days from the date of service of this Order to allow Bluebird Solar to seek a remedy afforded by law.

KENTUCKY STATE BOARD ON ELECTRIC  
GENERATION AND TRANSMISSION SITING



Chairman, Public Service Commission

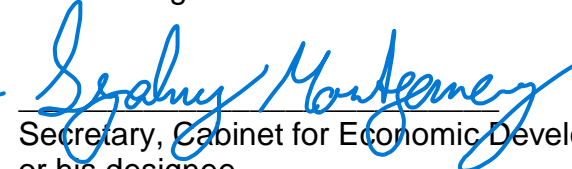
Vice Chairman, Public Service Commission

Commissioner, Public Service Commission

by KAC  
w/ permission



Secretary, Energy and Environment Cabinet,  
or her designee



Secretary, Cabinet for Economic Development,  
or his designee



ATTEST:



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