

ESTERSON Sarah * ODOE

From: Sarah.ESTERSON@energy.oregon.gov
Subject: Daybreak Solar LLC - Notice and Amendment Determination Request
Attachments: Avangrid Daybreak_Amendment Determination Request to ODOE_10.17.24.pdf

From: Albrich, Elaine <ElaineAlbrich@dwt.com>
Sent: Thursday, October 17, 2024 12:50 PM
To: ESTERSON Sarah * ODOE <Sarah.ESTERSON@energy.oregon.gov>; Rowe Patrick G <Patrick.G.Rowe@doj.oregon.gov>
Cc: CHANG, MEGAN <megan.chang@avangrid.com>; Durocher, Jeffrey <Jeffrey.Durocher@avangrid.com>; Green, Derek <DerekGreen@dwt.com>; Jamin, Olivier <OlivierJamin@dwt.com>; Tom Grim <Tgrim@cablehuston.com>; tbrooks@cablehuston.com; Bainter, Allison <AllisonBainter@dwt.com>
Subject: Daybreak Solar LLC - Notice and Amendment Determination Request

Hi Sarah and Patrick –

Please see the attached and let me know if there are questions. Thank you! Elaine



Elaine Albrich she/her
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October 17, 2024

VIA EMAIL: Sarah.ESTERSON@energy.oregon.gov and Patrick.G.Rowe@doj.state.or.us

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Re: Daybreak Solar – Notice and Amendment Determination Request

Dear Sarah and Patrick:

Thank you for the telephone call last week to discuss a potential tax equity financing transaction involving our client Daybreak Solar, LLC (“Daybreak”) and the Daybreak Solar Project (“Project”). As we discussed, the potential transaction involves a national, reputable financial institution (“Bank”) acquiring legal title to the Project’s personal property (e.g., facility equipment, but not any real property rights) and simultaneously leasing the same personal property back to the Daybreak pursuant to a long-term lease. Daybreak would continue to control, possess, and operate the Project pursuant to the Daybreak Site Certificate, dated November 19, 2021 (“Site Certificate”).

For the reasons we presented in our letter and discussed on the phone, we maintain that this transaction does not trigger a transfer or amendment to the Site Certificate under the Department’s rules. We request your concurrence and present the enclosed amendment determination request (“ADR”) to support your determination. And while we maintain that OAR 345-027-0400 does not apply to this transaction, to the extent you disagree, we request that the Department consider this submittal the required notice under OAR 345-027-0400(2).

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Daybreak is not authorized to disclose the Bank's name or information until the transaction closes. Therefore, we have not included it in this ADR. If and when the contemplated transaction closes, Daybreak will provide ODOE the Bank's contact information as further detailed in the ADR.

We request that you process this ADR expeditiously to the extent possible. Thank you for your consideration, and we look forward to working with the Department to obtain your concurrence that no Site Certificate amendment is required.

Very truly yours,

Davis Wright Tremaine LLP



Elaine R. Albrich

Enclosure

cc: Avangrid: Jeffrey Durocher
Bank Outside Counsel: Tommy Brooks and Tom Grim
DWT: Derek Green and Olivier Jamin

Daybreak Solar, LLC
Daybreak Solar Project

Amendment Determination Request

October 17, 2024

I. Project Background

Daybreak Solar Project is an approved solar photovoltaic energy generation facility with a nominal generating capacity of approximately 140 megawatts alternating current (MWac) located in Wasco County, Oregon (“Project”). The Project is approved to share related or supporting facilities with two adjacent facilities (Bakeoven Solar Project and Sunset Solar Project), including a 100 MW battery storage system, collector substation, operations and maintenance building, and an approximately 11-mile 230 kilovolt transmission line. The facility site boundary includes approximately 10,640 acres with up to 1,817 acres of permanent footprint.

The Project was approved originally as part of the Bakeoven Solar Project and was subsequently split from the Bakeoven Site Certificate when the Oregon Energy Facility Siting Council (“EFSC”) issued the Daybreak Site Certificate, dated November 19, 2021 (“Site Certificate”). Daybreak Solar, LLC, a wholly owned subsidiary of Avangrid Renewables, LLC (“Avangrid”), holds the Site Certificate (“Certificate Holder”).

II. Amendment Determination Request

Certificate Holder seeks concurrence from the Oregon Department of Energy (“ODOE”) through this amendment determination request (“ADR”) that the Proposed Change (defined below) does not trigger an amendment to the Site Certificate. Specifically,

- The Proposed Change does not trigger an amendment to the Site Certificate under OAR 345-027-0350(1) because the Proposed Change does not amount to a “change in ownership * * * of the facility” within the meaning of OAR 345-027-0400.
- The Proposed Change does not trigger an amendment to the Site Certificate under OAR 345-027-0350(4) because upon closing, Certificate Holder will continue to operate the Project as described in the Site Certificate, consistent with the prior findings and conditions of approval.

Proposed Change

Certificate Holder is negotiating a tax equity financing transaction with a national financial institution with good standing (“Bank”). The transaction contemplates that Certificate Holder would enter into a sale-leaseback financing transaction whereby the Bank would acquire legal title to certain Project equipment as personal property (“sale”) and then simultaneously lease the same equipment back to Certificate Holder pursuant to a long-term lease (“leaseback”). At closing, the Bank would not take any ownership interest in the Certificate Holder itself; it would not control or possess the Project; and Certificate Holder would retain its interest in all underlying real property rights and some related or supporting facilities. Until the transaction closes, Certificate Holder cannot disclose the name of the Bank. Certificate Holder, however, is able to provide the following information to further describe the Proposed Change:

- *Term and Renewal.* The initial term of the leaseback is anticipated to be about 25 years. At the end of the initial term, the Certificate Holder has the option to renew the term of the leaseback at fair market rental values for the Project[, provided that (1) the renewal term must end no later than the date on which 20% of the Project’s remaining useful life remains and (2) at the end of

the renewal term, the fair market value of the Project is at least 20% of the Project's fair market value at the beginning of the renewal term.

- *Project Equipment.* At closing, Bank acquires ownership interest in equipment related to the 188.3 MWdc integrated solar photovoltaic system, comprised of SEG solar modules, Array Technologies trackers, and TMEIC inverters. It would not acquire ownership in related or supporting facilities (like the transformer, substation, gen-tie) that are shared with Bakeoven Solar Project and Sunset Solar Project pursuant to Condition GEN-GS-07 in the Site Certificate ("shared facilities"). Bank will only acquire a security interest in the shared facilities and Bank would have no right to own, control or possess the shared facilities unless triggered by a Future Scenario (defined below) under the leaseback.
- *Possession and Use.* Upon closing of the transaction, the Project is irrevocably accepted by Certificate Holder (as lessee) for the lease term and Certificate Holder is obligated to operate the Project as it was designed and shall not permanently discontinue the use or service of the Project.
- *Operation and Maintenance.* Certificate Holder is obligated, at its cost and expense, to operate, maintain, service and repair the Project in accordance with all applicable laws, including all permits and authorizations held by Certificate Holder. These permits and authorizations are defined in the leaseback and include the Site Certificate.
- *End of Term.* Certificate Holder has the right to renew the lease at the end of the term. If the lease is not renewed, Certificate Holder has the right to purchase the Project's equipment back from the Bank. Alternatively, Certificate Holder may elect to return the Project's equipment back to the Bank at the end of the term, in which case the Bank will be assigned the remainder of Certificate Holder's rights in the Project, including site control and Certificate Holder's obligations under all applicable laws, permits and authorizations, including the Site Certificate.
- *Event of Default.* If Certificate Holder defaults under the leaseback and is unable to cure the default, the Bank may step into the shoes of Certificate Holder and operate the Project, acquire and hold the Project's real property rights, and/or sell the Project.

III. Analysis

Certificate Holder has evaluated and concluded that the Proposed Change would not trigger a transfer of the site certificate or an amendment of the site certificate under EFSC's applicable rules.

A. Transfer Rules, OAR 345-027-0400 and OAR 345-027-0350(1)

A request for amendment ("RFA") to transfer a site certificate is required "for a transaction that results in a change in the ownership, possession, or control of the facility or the certificate holder" under OAR 345-027-0400(1)(a) ("transfer rule"). The Proposed Change does not involve a change in ownership or control of the Certificate Holder; therefore the below analysis is focused on whether the Proposed Change involves a "change of ownership, possession, or control of the facility." For purposes of this analysis, the following definitions are relevant:

- Facility. ORS 469.300(14) defines “facility” as the “*energy facility together with any related or supporting facilities.*”
- Energy facility. ORS 469.300(11)(a) defines “energy facility” by technology, including “*solar photovoltaic power generation facility*” under subpart (11)(a)(D).
- Related or supporting facilities. ORS 469.300(24) defines “related or supporting facilities” to include “*any structure, proposed by the applicant, to be constructed or substantially modified in connection with the construction of an energy facility, including associated transmission lines, reservoirs, storage facilities, intake structures, road and rail access, pipelines, barge basins, office or public buildings, and commercial and industrial structures.*”
- Solar photovoltaic power generation facility. OAR 345-001-0010(56) defines “solar photovoltaic power generation facility” to include “*an assembly of equipment that converts sunlight into electricity and then stores or transfers that electricity. This includes photovoltaic modules, mounting and tracking equipment, posts, electrical cabling, inverters, transformers, collection systems, fencing, and other components.*”

The Project is a solar photovoltaic power generation facility and includes related or supporting facilities that it shares with Bakeoven Solar Project and Sunset Solar Project including battery storage system, collector substation, operations and maintenance building, Supervisory Control and Data Acquisition system, 230 kV transmission line, collector system, access roads, fencing, gates, and temporary staging areas (“shared facilities”). See Final Order on Request for Amendment 1 to Bakeoven Solar Project Site Certificate, Table 2 and General Standard of Review Condition 7 (Daybreak Solar Project). Certificate Holder entered into a shared facilities agreement with Bakeoven Solar and Sunset Solar, as required by the Site Certificate.

The Proposed Change contemplates the Bank acquiring the ownership interest in the integrated solar photovoltaic system comprising the solar photovoltaic power generation facility. The Bank, however, would not acquire an ownership interest in certain related or support facilities e.g., the shared facilities. The Bank also would not acquire any right in the underlying facility site. Upon closing, the Bank would simultaneously acquire its interest in the Project’s equipment and lease back its interest to the Certificate Holder, who would continue to control, possess, and operate the Project under the leaseback as described in the Certificate.

It is Certificate Holder’s position that the Bank is not acquiring “ownership of the facility” as the terms are used in OAR 345-027-0400 because the Bank: (1) would not acquire any interest in the underlying facility site; (2) would not own certain related or supporting facilities e.g., shared facilities that comprise part of the “facility”; and (3) would have no right to control or possess the “facility.” The mere fact that the Bank does not take full ownership of the facility in and of itself supports a finding that OAR 345-027-0400 is not triggered by the Proposed Change. The context of the rule language also supports this conclusion.

First, OAR 345-027-0400(8) requires that in order for EFSC to approve an RFA to transfer the site certificate, EFSC must find that the “new owner is or will be lawfully entitled to possession or control of the site or the facility described in the site certificate.” OAR 345-027-0400(8)(a). EFSC would not be able to approve a transfer of the Site Certificate to the Bank because the Bank would have no legal right to possess or control the site or the facility under the leaseback. Consequently, the Proposed Change

cannot be the type of transaction EFSC meant to require a transfer or site certificate amendment. Further, the language in subpart (8)(a) seems to imply, notwithstanding the punctuation and the use of “or” in subpart (1)(a), that the new owner must not only own the facility but also have possession or control of the site or the facility. Finally, the language in OAR 345-027-0350 seems to support a reading that ownership, control, or possession are collective because subpart (1) simply states that an amendment is required for “[t]ransfer of ownership of the facility or the certificate holder as described in OAR 345-027-0400.”¹

For these reasons, ODOE may find that the Proposed Change does not involve a transfer requiring a site certificate amendment under OAR 345-027-0400 and OAR 345-027-0350(1).

There are two potential scenarios that may require a transfer and site certificate amendment in the future due to a change of the underlying facts – an event of default under the leaseback or the end of the leaseback term (individually, “Future Scenario” and collectively, “Future Scenarios”). Under the first Future Scenario, Certificate Holder could default on the leaseback, fail to cure the default, and the Bank could foreclose on the Project. Under this scenario, the Bank would acquire the rights to control and possess the facility along with all of Certificate Holder’s leasehold rights and obligations to the underlying facility site. Under the second Future Scenario, at the end of the leaseback, Certificate Holder could opt not to renew the lease and not to buy back the Project equipment. Under this scenario, the Bank would retain ownership in the Project equipment and also acquire the rights to control and possess the facility along with all of Certificate Holder’s rights and obligations to the underlying facility site.

Both these Future Scenarios are forward looking and the fact that these scenarios could occur do not in and of itself trigger the need for a site certificate transfer or amendment under the transfer rules. Should one of the Future Scenarios occur, Certificate Holder would be obligated to notify ODOE under GEN-GS-04 and the Bank would be obligated by operation of law to pursue an RFA to seek a transfer and site certificate amendment. Certificate Holder commits to providing the Bank’s contact information to ODOE after closing in case there was ever a scenario where ODOE needed to contact the Bank.

B. Three Could’s Test, OAR 345-027-0350(4)

A site certificate amendment may be required if the Proposed Change triggered one of the “three could’s” under OAR 345-027-0350:

(4) Design, construct, or operate a facility in a manner different from the description in the site certificate, if the proposed change:

(a) Could result in a significant adverse impact that the Council has not addressed in an earlier order and the impact affects a resource or interest protected by an applicable law or Council standard;

¹ Certificate Holder notes that the Site Certificate itself uses language broader than the rule. Condition GEN-GS-04 requires notice of any transfer of the facility or a “facility component.” To the extent notice is required under GEN-GS-04, Certificate Holder requests that ODOE consider this ADR the required notice. The condition language appears to come from OAR 345-025-0006(15), which does not include the “component” language.

(b) Could impair the certificate holder's ability to comply with a site certificate condition; or

(c) Could require a new condition or a change to a condition in the site certificate.

First, the Project is headed to commercial operation and Certificate Holder will retain all rights to control, possess, and operate the Project consistent with the Site Certificate, and will be subject to all existing conditions and obligations under the Site Certificate. Therefore, Certificate Holder maintains that the Proposed Change would not result in a significant adverse impact to a resource protected by an applicable law or EFSC standard. In fact, the transaction contemplated by the Proposed Change requires Certificate Holder to operate the Project as planned and approved in order for the Bank to qualify for certain tax credits generated by the Project's ongoing operation. Certificate Holder and its parent company, Avangrid, remain the basis for ongoing compliance with respect to EFSC's organizational expertise requirement. Further, the Proposed Change does not affect Certificate Holder's existing financial assurance or ODOE's ability to draw upon the bond.

Nonetheless, Certificate Holder acknowledges that OAR 345-027-0350(4)(a) may be triggered under one of the Future Scenarios. If such a situation arose, Certificate Holder would be obligated to notify ODOE under GEN-GS-04 and then Bank would be obligated by operation of law to pursue an RFA to seek a transfer and site certificate amendment at that time. There is mechanisms in place to ensure that if a Future Scenario arose, ODOE would be notified and could proceed as needed to ensure ongoing compliance. Accordingly, ODOE may find that the Proposed Change does not trigger an amendment under OAR 345-027-0350(4)(a).

Next, Certificate Holder has evaluated its obligations under the current Site Certificate conditions and nothing about the Proposed Change affects Certificate Holder's ability to comply with any condition. Of particular note related to general requirements, organizational expertise, financial assurance, and decommissioning:

- Certificate Holder continues to hold full operational control over the Project with its existing operational expertise and support from Avangrid. It will continue to meet all GEN-GS conditions. To the extent any notice was required under GEN-GS-04, Certificate Holder's communications to date, including this ADR, satisfy any such notice requirement.
- The Proposed Change does not impair Certificate Holder's ability to comply with GEN-OE-01. The contemplated transaction does not involve the corporate structure of Certificate Holder's parent company.
- The Proposed Change does not impair Certificate Holder's ability to comply GEN-OE-02 to GEN-OE-05, as Certificate Holder retains all control over the facility operation and any contractor.
- Certificate Holder will continue to be obligated to comply with the GEN-RT-01 and GEN-RT-02 unless one of the Future Scenarios occurs, at which point in time, Certificate Holder will be obligated under GEN-GS-04 to notify ODOE. At that point in time, a transfer or an amendment of the Site Certificate may be required.

The Proposed Change does not impair Certificate Holder's ability to comply with any existing condition at this point in time. Certificate Holder commits to providing the Bank's contact information to ODOE after

closing in case there was ever a scenario where ODOE needed to contact the Bank. Accordingly, ODOE may find that the Proposed Change does not trigger an amendment under OAR 345-027-0350(4)(b).

Finally, Certificate Holder has evaluated whether the Proposed Change would require a new or revised Site Certificate condition. Certificate Holder relies on GEN-GS-04 to ensure that should one of the Future Scenarios occur, proper notice and subsequent action would be taken in coordination with ODOE. Certificate Holder will provide the Bank's contact information upon closing to supplement this ADR, ensuring that ODOE has the relevant information needed should it need to initiate enforcement actions following one of the Future Scenarios. Again, the fact that a Future Scenario could occur does not in and of itself create the need for a new condition. Accordingly, ODOE may find that the Proposed Change does not trigger an amendment under OAR 345-027-0350(4)(c).

IV. Conclusion

In sum, Certificate Holder requests that ODOE concur that the Proposed Change does not trigger a transfer or amendment of the Site Certificate. If the transaction contemplated by the Proposed Change closes, Certificate Holder will provide ODOE the Bank's contact information within 10 days of closing.