

**BEFORE THE PUBLIC SERVICE
COMMISSION OF MARYLAND**

IN THE MATTER OF THE APPLICATION OF	*	
ONEENERGY BLUE STAR SOLAR, LLC FOR		
A CERTIFICATE OF PUBLIC CONVENIENCE	*	Case No. 9387
AND NECESSITY TO CONSTRUCT A 6.0 MW		
SOLAR PHOTOVOLTAIC GENERATING	*	
FACILITY IN KENT COUNTY, MARYLAND		
	*	

IN THE MATTER OF THE APPLICATION OF	*	
ONEENERGY IBIS SOLAR, LLC FOR A		
CERTIFICATE OF PUBLIC CONVENIENCE	*	Case No. 9392
AND NECESSITY TO CONSTRUCT A 6.0 MW		
SOLAR PHOTOVOLTAIC GENERATING	*	
FACILITY IN SOMERSET COUNTY,		
MARYLAND	*	

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**JOINT REPLY FOREST CONSERVATION ACT BRIEF OF
ONEENERGY BLUE STAR SOLAR, LLC AND ONEENERGY IBIS SOLAR, LLC**

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OneEnergy Blue Star Solar, LLC and OneEnergy Ibis Star, LLC (“OneEnergy”), by their undersigned counsel, hereby file their joint reply Forest Conservation Act brief.

I. Introduction

As is often the case, this dispute is not black and white, but rather presents shades of grey. The Department of Natural Resources and the Power Plant Research Program (“State Agencies” or “PPRP”) are no longer taking the position that full FCA compliance is always and automatically required unless an Applicant can produce a previously-issued CPCN. Instead, they now concede that the law shifts authority from DNR and the local jurisdiction to the Commission for due consideration based on the record. However, the State Agencies nonetheless persist in arguing that only full FCA compliance is appropriate. They criticize OneEnergy’s reliance on clear and consistent Commission precedent. They criticize OneEnergy's efforts to comply with

the ever-shifting rules of FCA compliance. They criticize OneEnergy's offered compromise. But because of the State Agencies' insistence throughout this case that the law compels full compliance, they have failed to provide any factual record support for their *post hoc* justification in favor of full FCA compliance. The burden is on PPRP to demonstrate that its proposed FCA conditions are reasonable and PPRP has failed to meet that burden. *Re Potomac Edison Co.*, 83 Md. P.S.C. 272 (Oct. 6, 1992).

The administrative records in these cases admit only two possible conclusions: (1) no FCA obligations or (2) modified compliance that takes into account the unique attributes of utility-scale solar. OneEnergy respectfully requests that the Commission reject PPRP's Proposed Condition 2(e) in both cases and impose no FCA obligations on either project.

II. Argument

A. The Commission should reject PPRP's unsupported and unworkable standard of review.

In its initial briefs, PPRP proposes a novel standard of review where the burden is on OneEnergy to demonstrate to the Commission "that the benefits of siting [each project in its respective county] outweigh[s] compliance with the afforestation provisions of the FCA."¹ As support for this standard, PPRP cites to Order 86372 in Case 9318, which granted a CPCN to a natural gas generating station located at the Cove Point LNG facility. The Commission should reject PPRP's proposed standard of review in these cases for three reasons.

First, PPRP's proposed standard misstates the burden of proof. The Commission has held that in a CPCN proceeding when "DNR is the party sponsoring [a] proposed condition, it has the burden of proof to show that the condition is reasonable." *See Re Potomac Edison Co.*, 83 Md.

¹ *See e.g.*, PPRP Initial Blue Star Brief, 8.

P.S.C. 272 (Oct. 6, 1992).² In Case Nos. 9387 and 9392, it is PPRP that broken its own precedent and is proposing a brand new condition. Under Commission precedent, PPRP has the burden of demonstrating that its new FCA conditions are reasonable.

Second, regardless of burdens of proof, the Commission has never applied the standard articulated in Order 86372 in a solar CPCN case. For instance, in Case 9372 (Maryland Solar), the final order provides “the Commission shall take action on application for a [CPCN] only after due consideration of” the factors outlined in PUA § 7-207(e)(2). Case No. 9272, Order No. 84377, 5 (2011). In Case 9399 (LS-Egret), the final order provides the Commission must “take into account the impact of a proposed generating facility on” the factors outlined in PUA § 7-207(e)(2). Case No. 9366, Order No. 87004, 4-5 (2015). This standard is not unique to solar projects: the Commission has applied it as recently as 2015 to a natural gas plant. *See e.g.*, Case No. 9330, Order No. 87243 (2015). None of these cases articulate or apply the balancing test utilized in Order 86372. As explained by Staff, the General Assembly’s use of “due consideration” in the FCA exception language “strongly suggests [it] desired the Commission to treat FCA issues in the same manner as it treats other issues raised in a CPCN proceeding.”³ The Commission should not depart from its precedent in solar CPCN proceedings when considering the discrete FCA issue in the instant cases.

Third, even assuming Case 9318 is applicable to these projects, PPRP has proposed a new standard (different even from Order 86372) that is unduly narrow and would effectively prevent the Commission from requiring anything other than full FCA compliance. In Order 86372, the Commission required the applicant to “demonstrate that the benefits of the generating

² Case No. 8331, Order No. 70134.

³ Staff Initial Blue Star Brief, 8.

facility, including economic benefits, outweigh the environmental, safety, and societal costs of siting the generating facility within the liquefaction Project in Lusby, Maryland.” *Id.* at 63. However, PPRP has modified this standard for the FCA so that the Commission must consider “whether OneEnergy has shown that the benefits of the siting the [Blue Star project or Ibis project] in [Kent County or Somerset County] outweigh compliance with the afforestation provisions of the FCA.” In other words, PPRP’s standard *presumes* without support that full afforestation is the legal requirement for these cases. This approach is absolutely contrary to the legislature’s decision to remove projects subject to a CPCN cases local implementation of the FCA.⁴ The benefits of siting a project in a particular county over another is not relevant to the question of whether it is appropriate to impose afforestation obligations on solar projects that do not touch trees. As a result, PPRP’s standard would make it virtually impossible for the Commission to ever approve anything less than full FCA compliance.

For these reasons, the Commission should reject PPRP’s attempt to impose a novel and unduly high standard of review in these cases and instead conform to its precedent from all prior solar CPCN proceedings. The applicable standard does not establish a balancing test or require the applicant to prove that benefits outweigh costs. Rather, the Commission must consider the relevant statutory factors based on evidence in the record and, again based on evidence in the record, condition the projects as it deems necessary to serve the public interest. As explained by Staff in its initial briefs, “[c]onsideration is sufficient if the record supports the conclusion that each factor required by statute has been considered.”⁵ This is consistent with several appellate cases affirming this standard for CPCN proceedings. *See, e.g., Potomac Elec. Power Co. v.*

⁴ OneEnergy Joint Initial Forest Conservation Act Brief, 8-13; NR § 5-1602(b)(5); NR § 5-1603(f).

⁵ Staff Initial Blue Star Brief, 8.

Montgomery County, 80 Md.App. 107, 114 (1989); *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Service Com’n*, 2016 WL 617328, *11 (2016).

At the same time, the Commission must “impose CPCN conditions that reflect the evidence and information *in the record* and enable the project to serve the public interest.”⁶ PUA § 3-113(a). The burden of proof is on PPRP to support its proposed FCA conditions. *Re Potomac Edison Co.*, 83 Md. P.S.C. 272 (Oct. 6, 1992). If PPRP has not provided a sufficient factual basis to support its proposed condition, then it must be rejected. *Id.* (“DNR has cited no record evidence to support this recommendation. The non-evidentiary ‘rationale’ suggested by DNR is not adequate to support adopting this condition. Since DNR has the burden of proof, the condition will be rejected.”).

B. There is no record evidence supporting full compliance with the Forest Conservation Act.

PPRP’s initial briefs focus much attention on what county requirements would apply to the projects absent an exception, but do not attempt to explain why it is appropriate, under the Commission’s “due consideration” standard, to impose such requirements on these projects for the first time. This omission is not surprising because PPRP’s witnesses have failed to create an adequate record to support such an argument. As discussed below, each of the State and county witnesses conducted their analysis using a circular logic that presumes the only possible recommendation to the Commission is full compliance with the exact terms of the FCA as implemented locally.⁷ Consequently, not a single witness explained why --on the facts of these projects-- full FCA compliance is reasonable. In fact, the majority of the witnesses explicitly

⁶ *Id.* (emphasis added).

⁷ See Staff Initial Blue Star Brief at 6 (noting that under with State witnesses’ interpretation “the Applicant would be caught in a circular trap in which the Applicant must meet the requirements from which it is to be exempted before it can be exempted from meeting the same requirements”).

disqualified themselves by acknowledging that they: (1) did not give any consideration to the facts of the projects and (2) have no understanding of what “due consideration” means.⁸ Since PPRP bears the burden of proof to demonstrate its proposed conditions are reasonable – and it has failed to meet that burden – its proposed FCA conditions must be rejected.

Dr. Sherwell serves as the first illustration of PPRP’s failure to factually support full FCA compliance under the “due consideration” standard. At trial, Dr. Sherwell stated his view that PPRP functions as a mere conduit for State and local requirements and recommendations and thus conducts no independent analysis relevant to “due consideration” of the FCA.⁹ He explained that the FCA “is clearly enforced by the counties and an opinion from PPRP as to whether an Applicant would have to or have not to comply with the Forest Conservation Act is really irrelevant.”¹⁰ However, he also opined that counties do not have authority to recommend anything other than full compliance¹¹ and that any recommendation by a county of less than full compliance would not be tolerated by the State.¹² Dr. Sherwell’s position thus equates to full, unquestioned compliance with the terms of the FCA, regardless of the facts of the project. Perhaps because PPRP conducted no independent due consideration analysis, Dr. Sherwell

⁸ See e.g., Tr. Blue Star 131:22:132:1 (Honeczy) (Q. I don’t have a definition for due consideration.”)

⁹ Tr. Blue Star 62:2-10 (Sherwell) (“[W]e make recommendations and the recommendations that we make we, as you know have no enforcement or regulatory authority. We recount to all the relative agencies as best we can, gather the information that we think we need.”); Tr. Blue Star 65:9-10 (Sherwell) (“PPRP is a conduit for everything that we put into our CPCNs.”).

¹⁰ Tr. Blue Star 62:13-17 (Sherwell).

¹¹ Tr. Blue Star 66:11-17 (Sherwell) (“Q. Are the counties required to consider something other than full compliance with the Forest Conservation Act? A. I don’t believe so... It’s my understanding that the counties don’t have a lot of discretion in the matter”).

¹² Tr. Blue Star 84:14-20 (Sherwell).

acknowledged that he was not aware of anything unique about the projects that would justify a recommendation of full compliance.¹³

Mr. Sadzinski similarly failed to articulate any factual support for full FCA compliance. When asked directly why it is PPRP's position that the full terms of the FCA apply to projects that do not cut or clear trees, Mr. Sadzinski was unable to answer and punted the question to Ms. Honeczy.¹⁴ He also admitted that he is not "qualified to answer" questions on the exception because he "can't interpret due consideration"¹⁵ and explained that while he has read the FCA he is "certainly not an expert at all."¹⁶ While difficult to precisely discern, like Dr. Sherwell, Mr. Sadzinski's position seems to equate to automatic adoption of local afforestation requirements without any independent analysis.¹⁷ As he said at trial: "I don't believe there is an exemption."¹⁸

Ms. Honeczy's position is similarly circular and would require full FCA compliance unless a project received a CPCN prior to 1991. Due to this legally incorrect understanding, Ms. Honeczy admitted at trial to have conducted no independent analysis relevant to the Commission's resolution of this dispute under the "due consideration" standard. Like Dr. Sherwell and Mr. Sadzinski, Ms. Honeczy does not know what "due consideration" means¹⁹ and

¹³ Tr. Blue Star 65:23-66:3 (Sherwell) ("Q. There is nothing unique about the Blue Star or Ibis Project that results in the recommendation being carrier to the Commission for full compliance, correct? A. I don't believe that there is").

¹⁴ Tr. Blue Star 99:20-100:4 (Sadzinski).

¹⁵ Tr. Blue Star 102:12-16 (Sadzinski).

¹⁶ Tr. Blue Star 103:19-20 (Sadzinski).

¹⁷ Tr. Blue Star 103:1-6 (Sadzinski) (explaining that the Commission must apply the county's afforestation requirement simply because the county's requirement would exist absent the exemption).

¹⁸ Tr. Blue Star 103:15-16 (Sadzinski).

¹⁹ Tr. Blue Star 131:22-132:1 (Honeczy) ("Q. I don't have a definition for due consideration.")

she has no understanding of preemption law in Maryland.²⁰ Accordingly, Ms. Honeczy explained “there’s no special consideration given to any project”²¹ and that she “was not involved in actually sitting down with the plans and reviewing them.”²² She continued:

“The state did not review this project. The way the Forest Conservation Act works is the statute requires the local counties and towns, there’s 156 local jurisdictions, with Planning and Zoning authority. They all have forest conservation ordinances on their books. They are the ones that review those projects.”²³

At the same time Ms. Honeczy claimed that she defers to the local jurisdictions, she was quick to agree that she would not allow a local jurisdiction to propose anything other than full FCA compliance.²⁴ As with Dr. Sherwell and Mr. Sadzinski, Ms. Honeczy’s circular position has prevented her from conducting any independent analysis of the projects to explain why full PPRP’s condition imposing full FCA compliance is reasonable.

Finally, the county witnesses similarly failed to give any consideration to the facts of the projects. While Ms. Moredock for Kent County recommends full compliance,²⁵ she did not give any consideration to the facts of the Blue Star project because it is her understanding that the county ordinance leaves the determination of compliance obligations to the Commission.²⁶ When asked by counsel for PPRP what facts are necessary to support a decision under the “due

²⁰ Tr. Blue Star 121:13-16 (Honeczy) (“Q. You don’t have any understanding with respect to pre-emption law in Maryland, do you? A. I don’t know what that means.”).

²¹ Tr. Blue Star 120:1-5 (Honeczy).

²² Tr. Blue Star 124:11-13 (Honeczy).

²³ Tr. Blue Star 122:5-14 (Honeczy).

²⁴ Tr. Blue Star 124:14-18 (Honeczy) (“Q. If the local jurisdiction says that they don’t believe that the FCA applies, would you allow that to stand? A. No, because they do not have that ability.”) Ms. Honeczy is the state-wide program administrator for the FCA and presumably has final say over local implementation. Tr. Blue Star 132:2-5.

²⁵ Tr. Blue Star 182:21-183:1 (Moredock) (“Q. And so it’s your recommendation to the Commission that full compliance be required but it is ultimately the Commission’s decision? A. Correct.”).

²⁶ Tr. Blue Star 158:14-23 (Moredock); Tr. Blue Star 180:18-181-12 (Moredock).

consideration” standard, Ms. Moredock replied that the Commission should look at what compliance obligations would be applicable to the Blue Star project absent an exemption.²⁷ Consistent with the State’s because-we-say-so theme, Ms. Moredock simply explained the local processes for FCA compliance absent an exemption, as well as compliance options that may (but are not definitively) available to the Blue Star project.²⁸ Ms. Kudla for Somerset County provided similar testimony. Since the Somerset County Forest Conservation Ordinance does not include exemption language, she believes the exemption does not apply and thus did not provide any factual justification for why full compliance should be imposed on the Ibis Project.²⁹

In conditioning a CPCN, the Commission must base its decision on the evidence in the record and PPRP bears the burden of demonstrating its proposed conditions are reasonable. PUA § 3-113(a); *Re Potomac Edison Co.*, 83 Md. P.S.C. 272 (Oct. 6, 1992) (providing that when “DNR is the party sponsoring [a] proposed condition, it has the burden of proof to show that the condition is reasonable”). As discussed at length above, PPRP has not developed a factual record to support full FCA compliance and thus has failed to meet its burden. OneEnergy, on the other hand, has amply supported a Commission decision either requiring no FCA compliance or adopting a compromise solution.

²⁷ Tr. Blue Star 185:11-186:12 (Moredock). Ms. Moredock’s own testimony concerning the intent of the Kent County Forest Conservation Ordinance actually supports OneEnergy’s position. As stated by Ms. Moredock “[i]t is not the intent of the law to place unreasonable restrictions on development.” Tr. Blue Star 171:17-19 (Moredock). As explained by Ms. Clark, imposing full FCA compliance places an unreasonable restriction on development. It is thus consistent with the intent of the Kent County ordinance to exclude the project from full FCA compliance.

²⁸ Tr. Blue Star 165:1-22. (Moredock). Ms. Moredock also discussed other projects in Kent County (most of which are not subject to a CPCN), but did not discuss the specifics of the Blue Star project or provide any sort of rational basis for the Commission to impose full compliance. Tr. Blue Star 167:10-168:1 (Moredock).

²⁹ Tr. Ibis 68:19-69:2 (Kudla) (“Q. Would it be fair to say that ... [there being no exemption language in county ordinance] is one of the bases why the county believes full compliance is required? ... A. Yes, I guess so.”)

C. The record amply supports imposing no Forest Conservation Act compliance obligations.

PPRP asserts that the record does not support OneEnergy's position that the Commission not impose FCA obligations on either project. Contrary to PPRP's claims, the record amply supports OneEnergy's position. OneEnergy has demonstrated through record evidence that the Commission should not impose FCA obligations on the projects because: (1) the projects will have only temporary, limited, and managed on-site impacts; (2) the projects will offer wide environmental benefits in line with Maryland's aggressive environment and renewable energy policy requirements, including the FCA itself; and (3) imposition of an afforestation requirement on these projects would result in payment-in-lieus with a material financial impact on OneEnergy.

The record evidence in these cases demonstrates that the projects will have limited and temporary on-site impacts, and are likely beneficial compared to either existing or potential uses. The projects are located on leased property with leases of fixed durations and both properties will be returned to their original states pursuant to PPRP's standard decommissioning condition.³⁰ The land under the panels will remain pervious and will be actively managed with native grass species.³¹ The land will therefore be managed and provide benefits in ways that they would have not otherwise absent the projects.³² In its briefs, PPRP claims that the Commission should ignore this fact because it is possible both projects will not be decommissioned after their initial lease terms and thus are not temporary.³³ However, PPRP Witness Sherwell admitted that

³⁰ Tr. Ibis 32:6-17; Applicant Ex. 7 6:14-17; Ibis Ex. 6 4:17-5:7 (Clark Supplemental).

³¹ Applicant Ex. 8:8-10; Ibis Ex. 7 9:10-13 (Clark Rebuttal).

³² Applicant Ex. 7 6:10-14; Ibis Ex. 6 4:22-5:21 (Clark Supplemental).

³³ PPRP Initial Blue Star Brief, 11.

the life of both projects is shorter than other types of projects subject to the CPCN process, such as natural gas power plants.³⁴ PPRP Witness Sadzinski noted that, in his view, “it’s a fair statement” to assume that a project is temporary when it “is allowed to go back to the way it was” – just as OneEnergy has established as true for the projects.³⁵ PPRP has not provided evidence that these projects will, in fact, exist past their initial lease terms, and its own decommissioning conditions contemplate the temporary nature of these projects.

Additionally, the record shows that these projects support Maryland’s aggressive renewable energy and greenhouse gas policies and that imposing FCA obligations on these projects is inconsistent with these policies. PPRP acknowledges the undeniable societal benefits of solar generation.³⁶ The projects will assist in meeting Maryland’s aggressive solar RPS requirement, which will require 1,200MW of in-State solar capacity by the end of 2020.³⁷ PUA § 7-703; 7-704(a)(2)(i). Imposing full FCA obligations on utility scale solar projects would run counter to legislative intent by increasing the cost to consumers of electricity produced by RPS-eligible sources.³⁸ In-State utility scale solar projects are also an essential component of achieving compliance with the Greenhouse Gas Emissions Reduction Act. Md. Environment Article § 2-1204; 2-1205.³⁹ As explained by Ms. Clark, in her experience the added cost of FCA

³⁴ Tr. Blue Star 7:2-12 (Sherwell).

³⁵ Tr. Blue Star 113:19-114:1 (Sadzinski).

³⁶ PPRP Initial Blue Star Brief, 10.

³⁷ Applicant Ex. 2 at 11 (Blue Star ERD); Ibis Ex. 2 at 12 (Ibis ERD) (“Maryland’s solar energy requirement increases each year until 2020 and is projected to result in the development of at least 1,200 MW of solar capacity.”).

³⁸ Applicant Ex. 8 3:23-24; Ibis Ex. 7 4:18-19 (Clark Rebuttal) (“Adopting PPRP’s proposal of full compliance with the FCA would harm solar development in Maryland by increasing both uncertainty and costs.”). The General Assembly has expressed an intent to “lower the cost to consumers of electricity produced” by sources eligible for the RPS. PUA § 7-702(a)(3).

³⁹ Md. Environment Article § 2-1201(7) expresses the General Assembly’s intent that “[w]hile reductions of harmful greenhouse gas emissions are one part of the solution, the State should focus on developing and utilizing clean

compliance “could easily tip the scale again developing otherwise viable projects in Maryland” and make achieving these policy requirements more difficult and expensive.⁴⁰

PPRP claims that the “positive characteristics” of solar “do not obviate the statutory requirement to balance them against certain factors, including the requirements of the FCA ... and the environmental and ecological benefits derived from FCA compliance, such as the beneficial role of forest cover in reducing or eliminating nutrients and sediment inflow to local waterways and the Chesapeake Bay.”⁴¹ OneEnergy has addressed these issues through record evidence. Supporting the goals of the FCA, the projects will offer a carbon mitigating effect similar in concept to the planting of trees or placing existing trees into conservation easement⁴² and the land underneath the panels will remain pervious.⁴³ Both projects will address nutrient and sediment issues by filing and receiving approval of erosion and/or sediment control plans with the respective counties prior to construction.⁴⁴ Maryland has established processes other than the FCA to directly deal with Chesapeake Bay runoff issues, and the projects are both well on their way to compliance.

Finally, PPRP in its initial briefs claims that “viable options for on-site or off-site mitigation would have been more easily identified if OneEnergy coordinated in earnest with the

energies that provide greater energy efficiency and conservation, such as renewable energy from wind, *solar*, geothermal, and bioenergy sources.” (emphasis added); *See* Md. Environment Article § 2-1205(d) (requiring State agencies with statutory authority to achieve plan for greenhouse gas emissions reductions).

⁴⁰ Applicant Ex. 7 5:8-10; Ibis Ex. 7 6:8-10 (Clark Rebuttal).

⁴¹ PPRP Initial Blue Star Brief, 10.

⁴² Applicant Ex. 7 6:20-7:9; Ibis Ex. 6 5:8-20 (Clark Supplemental).

⁴³ . Utility-scale solar projects involve only a limited addition of impervious surface primarily for support posts. Applicant Ex. 8 8:4-6; Ibis Ex. 7 9:7-9 (Clark Rebuttal). The land underneath the panels remains permeable and, as result, the General Assembly has expressed a policy preference to consider the solar panels themselves permeable. Md. Land Use Article § 4-210(C).

⁴⁴ Applicant Ex. 2 at 17 (Blue Star ERD); Ibis Ex. 2 at 18 (Ibis ERD)

County earlier in the process.”⁴⁵ This statement is entirely speculative and contradicts the record in these cases. It ignores the fact that OneEnergy coordinated with both counties long before its applications for CPCNs, and both OneEnergy and the counties had relied on the Commission and PPRP’s strong precedent of excepting projects that do not impact trees from FCA compliance.⁴⁶ For Blue Star, OneEnergy had reached an agreement with Kent County to hold its payment-in-lieu in escrow until issuance of a CPCN.⁴⁷ It was only after PPRP reversed its long-standing position on the FCA very late in the CPCN process that OneEnergy was forced to begin assessing compliance options.⁴⁸ “There is no question that the introduction of this issue very late in the permitting processes has made compliance even more difficult.”⁴⁹ Effectively, PPRP faults OneEnergy for failing to see the future changes to PPRP’s FCA positions before they happened. Such an expectation is per se unreasonable.

Moreover, OneEnergy has demonstrated that for Ibis and Blue Star the only known feasible options for FCA compliance are payments-in-lieu totaling approximately \$78,000 and \$88,000, respectively. As a lessee, it is not feasible for OneEnergy to require the landowners to place a portion of their properties into a perpetual easement that will exist even after the leases end and decommissioning has occurred.⁵⁰ Furthermore, OneEnergy has investigated participation in a forest conservation bank in Somerset County for the Ibis Project, but at this late stage in the

⁴⁵ PPRP Initial Blue Star Brief, 17.

⁴⁶ Tr. Blue Star 41:10-19 (Clark). In fact, OneEnergy selected both project sites specifically because no tree clearing would be required which, under the Commission’s precedent, means that no FCA obligations will be imposed. Applicant Ex. 2 at 1 (Blue Star ERD); Ibis Ex. 2 at 1 (Ibis ERD).

⁴⁷ Tr. Blue Star 51:3-8 (Clark).

⁴⁸ Applicant Ex. 8 4:17-19; Ibis Ex. 7 5:19-21 (Clark Rebuttal).

⁴⁹ Applicant Ex. 8 2:7-9; Ibis Ex. 7 2:23-24 (Clark Rebuttal).

⁵⁰ Applicant Ex. 7 4:18-5:21; Ibis Ex. 6 4:18-5:12 (Clark Supplemental).

process has been unable to finalize discussions, much less enter a formal agreement.⁵¹ It is also unlikely that additional time would allow a cheaper compliance option to materialize for either project.⁵² Neither the State nor the counties have provided a factual basis for the proposition that anything other than a payment-in-lieu is a feasible option for either project. Payment of these fees would have a material impact on OneEnergy's expected revenue from both projects because they have cannot be wrapped into financing at this late stage in the development process, and PPRP has not offered evidence or argued in its briefs to the contrary.⁵³ The impact of these fees on OneEnergy strongly support the Commission not imposing FCA obligations on these projects.

Thus, contrary to PPRP's claims, OneEnergy has provided record evidence that strongly supports the Commission not imposing FCA obligations on these projects. OneEnergy respectfully requests that the Commission do what it has always done for solar projects that do not impact trees and not impose FCA obligations on either project.

D. The record also demonstrates that OneEnergy's alternative compliance option is reasonable.

As an alternative compliance solution, OneEnergy has proposed that the Commission calculate the square footage required for afforestation using a 1:1 ratio tied to the addition of impervious surface.⁵⁴ Impervious surface would include gravel access roads, the support posts that hold the solar modules, and the concrete pads that hold the project inverters and would not

⁵¹ Ibis Ex. 7 2:11-17 (Clark Rebuttal). Forest conservation banks are generally operated by private landowners. If the Commission were to require full FCA compliance in this Case 9392 without OneEnergy entering into an agreement beforehand to participate in such a bank, the landowner would have the ability raise the cost for participation up to slightly below the cost of a payment-in-lieu due to lack of other available options in the county.

⁵² Applicant Ex. 8 2:17-19; Ibis Ex. 7 2:24-3:2 (Clark Rebuttal)

⁵³ Applicant Ex. 8 2:22; Ibis Ex. 7 3:19 (Clark Rebuttal).

⁵⁴ Applicant Ex. 8 6:20-21; Ibis Ex. 7 7:23-24 (Clark Rebuttal).

include the surface of the solar panels.⁵⁵ Under this proposal, projects would be able to satisfy the afforestation requirement by a payment-in-lieu.⁵⁶

OneEnergy agrees that it bears the burden of proving its proposed condition is reasonable. *Re Potomac Edison Co.*, 83 Md. P.S.C. 272 (Oct. 6, 1992). Notwithstanding the strong evidence in the record, PPRP claims that “OneEnergy fails to provide sufficient evidence showing that its alternative FCA provision is reasonable.”⁵⁷ PPRP’s argument fails for several reasons. First, PPRP argues that the alternative compliance proposal would eviscerate the incentive for projects to work with counties. This is odd because PPRP’s position has been that it will not accept an alternative compliance proposal agreed to between a project and county because such a proposal would not align directly with the requirements of the FCA.⁵⁸ In the context of a CPCN proceeding, the parties all agree that the Commission ultimately decides what conditions, if any, apply to projects concerning the FCA. An order adopting the alternative compromise solution in these cases would serve as strong guidance for future cases, but projects would still need to work with counties to determine the precise square feet of required mitigation, and could still work with the counties to comply using an option other than a payment-in-lieu if they decide to do so. PPRP’s criticism would also apply to any Commission order requiring anything other than full, local FCA compliance and, if relied upon, suggests the Commission must always require full FCA compliance. OneEnergy’s request that a payment-in-lieu option be made available to the projects is supported by Ms. Clark’s testimony explaining

⁵⁵ Applicant Ex. 8 6:21:22; Ibis Ex. 7 7:24–25 (Clark Rebuttal); Maryland law prohibits the inclusion of solar panels in the calculation of added impervious surface. Md. Land Use Article § 4-210(C)

⁵⁶ Applicant Ex. 8 7:1-3; Ibis Ex. 7 8:3-5 (Clark Rebuttal).

⁵⁷ PPPR Initial Blue Star Brief, 16.

⁵⁸ Tr. Blue Star 134:13-20 (Honecny).

the burdens associated with subjecting projects to the FCA requirements of each of Maryland's 24 jurisdictions.⁵⁹ It is administratively burdensome to subject projects to a multitude of different requirements, and these cases represent a rare opportunity for the Commission to streamline FCA compliance based on the unique attributes of utility-scale solar projects.

Second, PPRP criticizes OneEnergy's use of added impervious surface as "irrelevant" to compliance under the Forest Conservation Act.⁶⁰ It is true added impervious surface is not a metric utilized in the FCA itself. But the parties all agree that the "due consideration" standard does not require strict adherence to the terms of the FCA, and allows the Commission to "impose CPCN conditions that reflect the evidence and information *in the record* and enable the project to serve the public interest."⁶¹ OneEnergy has established that utility-scale solar projects involve only a limited addition of impervious surface compared to the type of development traditionally subject to the FCA because the land underneath the panels remains permeable.⁶² PPRP's proposed conditions related to native grasses for both project explicitly recognize this fact.⁶³

OneEnergy has demonstrated that its proposal is more than reasonable than full compliance. It creates an incentive for developers to maintain as much pervious surface as possible, maintaining and even enhancing soil quality and wildlife habitat.⁶⁴ The factors supporting no FCA compliance – including the limited onsite impacts and widespread environmental benefits – also support OneEnergy's alternative compromise solution. PPRP has

⁵⁹ Applicant Ex. 8 3:23-4:2; Ibis Ex. 7 4:18-22 (Clark Rebuttal).

⁶⁰ PPRP Initial Blue Star Brief, 12.

⁶¹ *Id.* (emphasis added).

⁶² Applicant Ex. 8 8:4-6; Ibis Ex. 7 9:7-9 (Clark Rebuttal).

⁶³ Applicant Ex. 8:8-10; Ibis Ex. 7 9:10-13 (Clark Rebuttal).

⁶⁴ Applicant Ex. 8 8:10-13; Ibis Ex. 7 9:13-16 (Clark Rebuttal).

failed to meet its burden to impose any FCA conditions on these projects and, notwithstanding this fact, there is ample evidence supporting no compliance obligation. However, if the Commission determines it is appropriate to impose FCA obligations on these projects, OneEnergy respectfully requests that the Commission adopt OneEnergy's alternative compliance solution which, contrary to PPRP's claims, is amply supported by the administrative record in these cases as a reasonable.

III. Conclusion

Predictability and consistency are crucial hallmarks of the regulatory system. In these cases, we have had neither. It is undisputed that, upon filing these CPCN applications, OneEnergy could not have known, without a crystal ball, that PPRP would depart from its practice of exempting projects subject to a CPCN from FCA requirements and instead attempt to impose full compliance with local requirements. Instead, OneEnergy has been whipsawed at every turn, and to this day still does not know what, if any, FCA requirements these projects will face. And the inconsistency is downright jarring. After nearly a dozen solar CPCN project in Maryland permitted without FCA obligations – several obtained by OneEnergy – the State Agencies are now demanding for the first time that projects completely avoiding forest impacts must fully comply with FCA requirements. This tectonic policy change came with no advance warning and without any apparent legal justification or explanation.

The Commission's path in these cases is clear. "Due consideration" of the record requires a return to certainty and a respect for Commission precedent. Utility-scale solar is thriving in Maryland thanks to more than a decade of clear and consistent policy articulated by the General Assembly and applied through the relevant administrative agencies. This has allowed the industry to respond, investing in Maryland in carefully planned projects bestowing many environmental, economic, and electric system benefits. Inconsistent, last-second, and

unsupported policy changes will undermine the hard work Maryland has done. The need to consider these big picture considerations is precisely the reason the CPCN process was created, and why the Forest Conservation Act gives the Commission – not the Department of Natural Resources or local jurisdictions – the final word.

For all these reasons, OneEnergy respectfully reaffirms its request that the Commission make the following rulings:

1. As a matter of law, the FCA exempts projects subject to a CPCN from the FCA as implemented by DNR and local jurisdictions, provided “the cutting or clearing of forests is conducted so as to minimize the loss of forest,” and instead subjects such projects to the Commission’s alternative, more flexible, forestry review under NR § 5-1603(f); and
2. PPRP Proposed Conditions 2(e) are stricken and inapplicable to both Ibis and Blue Star after “due consideration” of the FCA’s provisions under NR § 5-1603(f) on the facts of the projects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

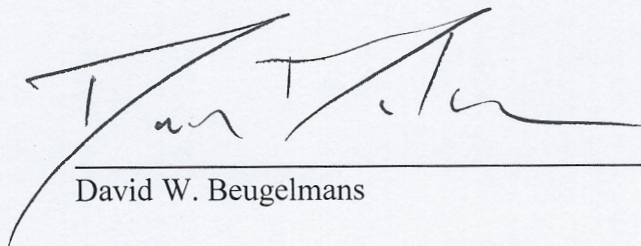
I HEREBY CERTIFY that on this 7th day of March, 2016, a copy of the foregoing Joint Reply Forest Conservation Act Brief was served electronically via e-mail, to:

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