

**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 8.0 MW	*	
SOLAR PHOTOVOLTAIC GENERATING	*	

**STATE OF MARYLAND, DEPARTMENT OF NATURAL RESOURCES,
POWER PLANT RESEARCH PROGRAM'S CONSOLIDATED REPLY BRIEF IN
OPPOSITION TO ONEENERGY'S "MOTIONS FOR EXPEDITED RULING ON
FOREST CONSERVATION ACT EXEMPTION"**

Applicants, OneEnergy Blue Star Solar, LLC ("Blue Star") and OneEnergy Ibis Solar, LLC (Ibis), collectively referred to as "OneEnergy," filed their joint opening brief in support of both of the above-referenced matters on February 29, 2016. Staff ("Staff") for the Maryland Public Service Commission ("PSC") filed separate briefs in Blue Star and Ibis, although with minor exceptions, the briefs are very similar. No briefs were filed by any other parties. This consolidated reply brief addresses the arguments of all parties. As shown below, none of the arguments raised in the parties' briefs are persuasive, and OneEnergy's motions should be denied. The Maryland Department of Natural Resources, Power Plant Research Program's ("PPRP") Recommended Licensing Condition 2(e), addressing applicability of Maryland's Forest Conservation Act ("FCA") in each case, should be adopted by the PSC.

As a prefatory matter, if the FCA is found to be applicable to solar generating stations, such as those at issue in Blue Star and Ibis, then the primary issue remaining to be resolved by the PSC is what due consideration should be given to the FCA's provisions. Since the FCA issues in the instant motions were vetted at contested evidentiary hearings, if the PSC adopts a recommendation different from PPRP's recommended condition 2(e), it must be based on "substantial evidence on the record considered as a whole." and not be arbitrary and capricious. See Public Utilities Article ("PUA"), §3-203(4), (6), Maryland Annotated Code. Staff provided a useful statement of the standard of review in context of the issues in the instant cases:

"This [PUA §7-207] strongly suggests that the General Assembly desires the [PSC] to treat FCA issues in the same manner as it treats other issues raised in the CPCN proceeding, which is to receive evidence and comment from many sources, develop a record, and (if a CPCN is granted) *impose CPCN conditions that reflect the evidence and information in the record and enable the project to serve the public interest.*"

Staff Blue Star Brief at 8, Ibis at 10 (emphasis added). In addition to the evidence set forth in PPRP's opening brief in support of PPRP Recommended Licensing Condition 2(e) (see PPRP's Brief at 13-15), as well as the testimony and evidence provided by PPRP, Somerset and Kent counties, Staff also pointed out that "[p]ublic comment expressed at the public hearing in this matter also strongly favored full compliance with the FCA by all developers." Staff Brief at 9. Accordingly, any deviation from the recommended language of PPRP Recommended Licensing Condition 2(e), as noted above, must be based on substantial evidence of record, and must not be based on an arbitrary and capricious standard. The burden on the motions remains OneEnergy's to meet.

1. The FCA Applies to CPCN Applications For Electric Generating Stations.

A review of the briefs filed shows a remarkable, though perhaps unintended, consensus on the applicability of the Maryland FCA, Md. Code Ann., Nat. Res. (NR), §§5-1601 through 5-

1613, to the facts of these cases. First, we note that Staff's summary of its position in both the Blue Star and Ibis cases states that "[a]pplicant is not exempt from the FCA, but it is entitled to an exception from the FCA's formula for determining compliance." Staff Blue Star Brief at 2. PPRP agrees with Staff's first assertion; that the FCA is applicable to solar generating stations, but disagrees that OneEnergy is entitled a blanket exception to the FCA's "formula" for determining compliance. Rather, as stated in PPRP's opening brief (Brief at 4-5), once an application for a Certificate of Public Convenience and Necessity (CPCN) is filed, the determination of how the FCA is to be applied, based on the facts unique to each case, is made by the PSC. The PSC must then give "due consideration" to the provisions of the FCA, a standard that vests the PSC with discretion to afford the FCA full, or less than full, compliance as long as its decision is supported by substantial evidence on the record and is not arbitrary or capricious.

PPRP's witnesses testified in support of PPRP's recommended FCA condition at the February 5, 2016 evidentiary hearing held in Blue Star. Both Dr. John Sherwell of PPRP and Marian Honecny of DNR testified that the ultimate decision on the applicability of FCA conditions lies with the PSC, a point recognized by OneEnergy. *See* OneEnergy Joint brief at 8, n. 24. There can be no dispute that the FCA, by the plain and unambiguous language of NR §5-1603(f), applies to all CPCN applicants seeking to build an electric generating station, without regard to the source of power that the station will generate or its relative merits when compared to other types of electric generation. Nothing in the FCA sets forth a balancing test based on the source of electric generation to determine the applicability of the FCA. Nowhere does OneEnergy cite to any authority in support of the concept that "'due consideration" of the FCA includes, as an option, no consideration of the FCA. That argument should be disregarded.

Thus, in a CPCN proceeding, the determination of how, not whether, the FCA should be applied is made by the PSC.

2. The Standard for the PSC's Exercise of "Due Consideration" Needs to be Based on Substantial Evidence.

The Commission, in giving "due consideration" of the FCA, must support any deviation from full compliance with the requirements of the FCA on the basis of the evidentiary record or other factual reasons, otherwise any deviation would be arbitrary and capricious. Thus, the formula for mitigation that is set forth in the Forest Conservation Manual is the controlling standard, and any variance must be supported by substantial evidence. In these cases, there is no basis to support any change in the mitigation required by the formula.

3. The PSC Should Adopt the Recommendations of PPRP and Kent and Somerset Counties Set Forth in PPRP Recommended Licensing Condition 2(e).

OneEnergy's expressed desire to get a "free ride" from FCA compliance (Joint Brief at 7, 13), is no more than a last gasp effort to evade the provisions of the FCA, and has no support in fact or law. Moreover, the argument is merely prefatory to OneEnergy's real objective - its alternative compliance plan. OneEnergy's suggested alternatives to the application of the FCA urged by PPRP and the counties do not merit serious consideration.

OneEnergy continues to belabor the point that PPRP and the host-counties allowed the very first solar CPCNs in Maryland to proceed without enforcing FCA compliance (Joint Brief at 15-16, n. 36), even though all of the licensing conditions for those CPCNs required compliance with the FCA. Yet, OneEnergy now terms the omission in enforcing the FCA condition "irrelevant" (Joint Brief at 16). That issue is not dispositive of the instant motions, and was addressed by the PPRP, both in the February 5th hearing, and in PPRP's opening brief. Stated simply, it was a mistake on the behalf of multiple parties – including OneEnergy (PPRP Brief at 3-4), and one that is now being corrected. An initial lapse in enforcing the FCA's conditions for

the first utility-scale solar generation stations in the State is certainly not a persuasive basis for extending the error, nor one that the PSC should endorse.

OneEnergy and Staff also question the purpose of an exception to the FCA's normal application, suggesting that in the instant cases, it has no effect. *See e.g.*, Joint Brief at 10-11, Staff Brief at 5-6. Without conceding the point, one answer, and the one that makes the most sense on these facts, is that by transferring FCA authority to the PSC, the legislature intended that once the PSC granted a CPCN in which it had given due consideration to the FCA's provisions, then the FCA condition approved by the PSC could not later be subverted by a county attempting to require a different level of compliance with its local FCA plan. This would normally happen when the developer applied for the necessary construction or grading permits. To allow such a result after the PSC had issued a final order for the CPCN would render the PSC's due consideration of the FCA's provisions a nullity. And contrary to suggestions that PPRP is blindly insisting on full compliance with the FCA in the instant cases, PPRP's opening brief explains in great detail why the suggested FCA licensing conditions, based on an established FCA formula, merits adoption by the PSC, and conversely, why the alternative compliance options offered by OneEnergy lack support in either the law or the record in each case (PPRP's Brief at 8-17).

OneEnergy also continues to claim that it was surprised by a "last minute position reversal" by PPRP in December 2015, requiring full FCA compliance. Joint Brief at 20. The record does not support that assertion. PPRP filed its draft licensing conditions on December 1, 2015 (PSC # 9387, Case Jacket entry # 26), and condition 2(e) addressing the FCA required OneEnergy to consult with Kent County to determine afforestation or reforestation requirements, which it accepted and agreed to do by letter dated December 7, 2015 (PSC # 9387, Case Jacket

entry # 30). In that letter, counsel for OneEnergy stated that their client had “reviewed and continues to agree with the proposed conditions of PPRP, including Condition 2(e)”, and further stated that consultations were ongoing with Kent County. Clearly, OneEnergy should have not been surprised. Moreover, OneEnergy’s plan to comply with the FCA by providing Kent County with an FCA mitigation check, and then to receive the same check back – uncashed – after the CPCN was granted, was, as PPRP’s Bob Sadzinski politely called it, “odd.” Blue Star Tr. at 115, lines 3-12. When asked why he thought it was odd, Mr. Sadzinski replied, “[b]ecause where’s the compliance?” *Id.*

OneEnergy, and to some extent Staff, further suggest that solar generation should be afforded special treatment when giving due consideration to the FCA, because it is clean power, and one that has received favorable endorsement from the State in its Renewable Portfolio Standards (“RPS”). Maryland’s RPS requires that 2% of Maryland’s energy come from solar generation by 2022, *See* Joint Brief at 22, and this is commonly referred to as the 2% solar “carve out,” but that fact is not dispositive of the FCA matter. Rather, the State’s RPS, set forth in PUA § 7-703 and in effect since July 1, 2004, covers many forms of renewable energy. But as OneEnergy’s cite to PUA § 7-704 also shows, these forms of renewable energy already receive special financial incentives from the State, as well as substantial federal investment tax credits.¹ In the 12 years since the RPS was adopted, the legislature could have, but has not, extended more benefits to solar development by expressly exempting it from the FCA, or affording other accommodation. That it has not done so is strong evidence that there is no legislative intent to

¹ *See* Emergency Economic Stabilization Act of 2008 (P.L. 110-343), as extended by Section 48, Consolidated Appropriations Act of 2015.

except solar generation at the expense of equally beneficial provisions like the FCA, and OneEnergy's argument is without merit.²

Staff's FCA compliance plan suggests that in giving due consideration to the FCA, the PSC simply "split the difference" between zero FCA compliance (which is not an option, *see* 100 *Opinions of the Attorney General*, 120, 121-24 (Oct. 21, 2015)) and the mitigation requested by PPRP and the counties, in view of the useful nature of solar generation. This Solomonic proposal lacks any citation to supporting authority. This plan to "split the baby" without any evidentiary basis in the record does not meet the standard for review.

Further, as Staff notes, adopting this approach "would be recognizing the importance the State of Maryland has placed on both forest conservation/afforestation and the development of solar energy generation." Staff Brief at 10. But adopting this approach, without any guidance from the legislature as to how, or whether, to weigh these mutually beneficial legislative goals, would assuredly result in a decision subject to challenge as being arbitrary and capricious. Moreover, nothing in either case record sets forth substantial evidence upon which such an apportionment could be made. Staff's suggestion should be rejected.

OneEnergy also argues that it's proposal - - that the PSC, in considering the FCA, consider only the impervious surface created by installation of the solar panels, is supported by Md. Land Use Art. §4-210(C), which requires excluding the surface area of the panels from impervious surface calculations. Joint Brief at 24-25. This proposal is unpersuasive and was rebutted in PPRP's Brief at 11-13. The core of the afforestation concept is that trees will be planted where they have never been, or have long been absent. PPRP Brief at 5, n.1. It is not credible to argue that solar generating stations occupying large acreage covered in solar panels,

² This is true whether the RPS, Greenhouse Gas Emissions Reductions (Environment Art. §2-1204-05), or other carbon mitigating measures are at issue.

and their associated connection facilities, will support growth of trees any more than a concrete pad underlying a building. On these facts, grass may grow; but trees will not. And the FCA applies to tree conservation and propagation, not grass. This proposal, as well as OneEnergy's arbitrary proposal to use a 1:1 ratio for calculating afforestation requirements to impervious surface should be discarded. There is no support for either the concept or ratio in the FCA or applicable county ordinances, and it is simply another attempt to avoid application of the FCA as the legislature intended.³ In contrast to OneEnergy's proffered 1:1 ratio for afforestation, PPRP's Recommended Licensing Condition 2(e) is based on application of a standard and consistent formula, based on the factual input from each county in which the specific site selected for the solar generating station will be located, and represents a considered and defensible application of the FCA to the facts of each of these cases.

CONCLUSION

Nothing in OneEnergy's or Staff's briefs shows that the FCA does not apply to electric generating stations, including solar facilities like Blue Star and Ibis. There is also no evidence that the Maryland legislature intended for a solar generating station to be treated differently than other forms of generation, including renewable energy generation. There is also no evidence supporting a special solar exemption or compromise over other County projects requiring FCA compliance. Accordingly, the PSC must give "due consideration" to the FCA's mitigation, reforestation and afforestation provisions, along with the recommendations of the host-county. The State's briefs in Blue Star and Ibis provide substantial evidence for why the FCA

³ PPRP's initial brief also addresses OneEnergy's argument that solar generating facilities, that are designed and contracted to run anywhere from 20-30 or more years, are "temporary" (*see* Testimony of Gia Clark, Tr. at 22, line 10 through p. 24) placements entitled to different treatment than buildings or other facilities. *See* PPRP's Brief at 11, *see also* Bob Sadzinski testimony, Tr. At 113-114. The argument that a project that will render a site unsuitable for afforestation for 20 years or more strains credulity and should not be accredited.

recommendations of the host-counties should be adopted by the PSC. In exercising its discretion, the Commission should adopt PPRP Recommended Condition 2(e) in each case as it appropriately reflects the evidence provided in support of the PSC's due consideration of the FCA's provisions.

March 7, 2016.

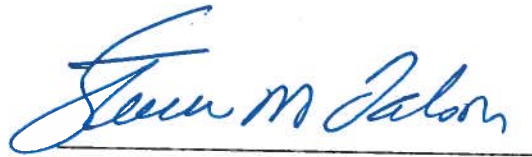
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that electronic copies of the foregoing brief were served on all parties of record on the service list this 7th day of March, 2016.



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