

STATE OF MARYLAND
PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF *
ONEENERGY IBIS SOLAR, LLC FOR A *
CERTIFICATE OF PUBLIC CONVENIENCE *
AND NECESSITY TO CONSTRUCT A 6.0 MW *
SOLAR PHOTOVOLTAIC GENERATING FACIL- *
ITY IN SOMERSET COUNTY, MARYLAND *

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9392

PROPOSED ORDER OF PUBLIC UTILITY LAW JUDGE

Before: Ryan C. McLean
Public Utility Law Judge

Issued: April 6, 2016

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Appearances:

Todd R. Chason and David W. Beugelmans, for OneEnergy
Ibis Solar, LLC.

Sandra Simpson McLemore for the Department of Natural
Resources, Power Plant Research Program.

Lloyd J. Spivak and Michael A. Dean, for the Staff of
the Maryland Public Service Commission.

Theresa V. Czarski and Joyce R. Lombardi, on behalf of
the Office of Maryland People's Counsel.

Kirk G. Simpkins, on behalf of Somerset County,
Maryland.

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I. Procedural History

On August 21, 2015, an application was filed by OneEnergy Ibis Solar, LLC ("OneEnergy" or "the Applicant") requesting a Certificate of Public Convenience and Necessity ("CPCN") to construct a 6.0 MW solar photovoltaic generating facility in Somerset County, Maryland. The solar photovoltaic generating facility will be known as the Ibis Solar Farm ("the Project"). The application included a request for a waiver of the two-year notice requirement in *Maryland Annotated Code*, Public Utilities Article ("PUA") § 7-208(c)(1). The Application also requested expedited treatment so that OneEnergy could begin construction in the late spring/early summer of 2016 in order that the Project can produce power prior to the end of 2016 which will allow the Project to qualify for Investment Tax Credits. The Application included an explanation of the CPCN standard and addressed the CPCN filing requirements. Additionally, the Application included an Environmental Review Document ("ERD") prepared by Davis, Moore, Shearon & Associates in support of the Project.¹

On August 24, 2015, the Commission docketed the application as Case No. 9392 and delegated it to the Public Utility Law Judge Division. A Notice of Pre-hearing Conference was subsequently issued which directed the Applicant to notify the respective members of the General Assembly, in accordance with PUA

¹ A copy of the Environmental Review Document was admitted into the administrative record as Ibis Ex. 2.

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§ 7-207(c)(1)(iv-v), who represent any part of a county in which any portion of the generating station is proposed to be constructed, as well as any member representing a county within one mile of the generator's proposed location.

On August 26, 2015, the Applicant filed a Certificate of Service indicating that the respective members of the Maryland General Assembly were notified in accordance with PUA § 7-207(c)(1)(iv-v).²

On September 16, 2015, a pre-hearing conference was held at which a procedural schedule was agreed upon and adopted. Additionally, pursuant to OneEnergy's request, good cause was found to grant the Applicant's request for a waiver of PUA § 7-208(c)(1).

On October 13, 2015, in support of the Application, OneEnergy filed the Direct Testimonies of Leslie "Gia" Clark,³ who helped develop the Project, and Kevin J. Shearon, who assisted in drafting the ERD and coordinated the site planning efforts of the project.⁴

On December 22, 2015, OneEnergy filed a motion for an expedited ruling on the Forest Conservation Act ("FCA") exemption and the Supplemental Direct Testimony of Leslie "Gia" Clark in support of the Motion.⁵ After initially setting a date for

² The letters to the respective members of the General Assembly were admitted into the administrative record as Ibis Ex. 3.

³ The Direct Testimony of Leslie "Gia" Clark was admitted into the administrative record as Ibis Ex. 4.

⁴ The Direct Testimony of Kevin J. Shearon was admitted into the administrative record as Ibis Ex. 5.

⁵ The Supplemental Direct Testimony of Leslie "Gia" Clark was admitted into the administrative record as Ibis Ex. 6.

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responses to be filed, the Power Plant Research Program ("PPRP") of the Department of Natural Resources ("DNR") filed a motion to extend the response time and to suspend the procedural schedule.

On January 11, 2016, based upon the parties' agreement, a modified procedural schedule was issued that set dates for submission of direct testimony of PPRP, OPC and Staff, as well as the evidentiary hearing and briefing dates.

On January 22, 2016, PPRP filed the Direct Testimonies of Dr. John Sherwell, Marian Honeczy, and Robert Sadzinski, and PPRP's Initial Recommended License Conditions and its Draft Environmental Review.⁶

Somerset County, Maryland ("the County") filed the Direct Testimony of Kymberly Kudla, and Staff filed the Direct Testimony of DeAndre Wilson.⁷

On January 29, 2016, OneEnergy filed the Rebuttal Testimony of Ms. Clark.⁸

⁶ The Direct Testimony of Robert A. Sadzinski was admitted into the administrative record as PPRP Ibis Ex. 1, PPRP's Initial Licensing Conditions, dated January 25, 2016, were admitted into the administrative record as PPRP Ibis Ex. 2, and PPRP's Draft Environmental Review was admitted into the administrative record as PPRP Ibis Ex. 3. The Direct Testimonies of Dr. John Sherwell and Marian Honeczy were admitted into the administrative record as PPRP Ibis Exs. 4 and 5, respectively. PPRP Ibis Ex. 2 did not contain all of the necessary signatures; therefore, on March 24, 2016, PPRP filed a fully executed letter which I admitted into the record as PPRP Ibis 2A. ML 186637.

⁷ The Direct Testimony of Kymberly Kudla was admitted into the administrative record as Somerset Ex. 1, and the Direct Testimony of DeAndre T. Wilson was admitted into the administrative record as Staff Ex. 1.

⁸ The Rebuttal Testimony of Leslie "Gia" Clark was admitted into the administrative record as Ibis Ex. 7.

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On February 3, 2016, a public comment hearing was held in Princess Anne, Maryland.⁹

On February 5, 2016, an evidentiary hearing was held in Baltimore, Maryland. At the start of the hearing, all parties agreed that PPRP witnesses' testimonies from Case No. 9387 relating to the overall policy and implementation of the State's FCA would be adopted in this proceeding, as the exact same issue in Case No. 9387 was presented in this case. As a result, no PPRP witnesses were cross-examined during the hearing and only Ms. Clark and Ms. Kudla took the witness stand for cross-examination.¹⁰

On February 25, 2016, OneEnergy filed a response to a bench data request, and the County provided a copy its Forest Conservation Ordinance.¹¹

On February 29, 2016, OneEnergy,¹² PPRP and Staff filed initial briefs, all focused upon the application of the FCA, as it was the only contested issue. The County did not file a brief.

On March 7, 2015, OneEnergy, PPRP and Staff all filed joint reply briefs that addressed this case and Case No. 9387. The County did not file a reply brief.

⁹ The Affidavit of Publication was filed with the Commission on February 10, 2016. ML 183198. No party raised an objection to the publication, therefore, I admitted it into the administrative record as Ibis Ex. 8.

¹⁰ Tr. 6-7 (9392). The County agreed to the stipulation even though it did not participate in Case No. 9387. Tr. 7 (9392). Given the adoption of the testimony from Case No. 9387, all footnoted citations to the transcripts shall specify the specific transcript to avoid confusion.

¹¹ The responses were entered into the administrative record as Commission Ex. 1, and the County's FCO was admitted into the administrative record as Somerset Ex. 2.

¹² The Applicant filed a "joint brief" with OneEnergy Blue Star Solar, LLC in Case No. 9387.

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II. Summary of the Parties' Positions

A. OneEnergy

Mr. Shearon and Ms. Clark sponsored the Applicant's ERD. Mr. Shearon sponsored Sections 4.D-G, 5A-B.1, 5B.5-6 and 6, while Ms. Clark sponsored Sections 1, 2, 3, 4.A-C, 5.B.2-4, 5.B.7, and 5.C-J. In order to secure financing, Ms. Clark testified that OneEnergy must obtain revenue from selling Renewable Energy Credits ("RECs") from the Project.¹³ She stated that OneEnergy hoped to receive all necessary local and state approvals and engineering documents by early spring 2016 in order to begin construction by late spring/early summer, and commence operations by late summer/early fall 2016.¹⁴

The Project's ERD contained a Project Overview (Section 1), a Statement of Need and Purpose (Section 2), the Applicant's information (Section 3), the State and Local Permits and Approvals (Section 4); COMAR 20.79.03.01 - Description of the Generating Station (Section 5); and COMAR 20.79.03.02 - Environmental Information (Section 6), as well as several figures, tables and appendices.

According to the ERD, the Project will be located on a portion of a 55-acre parcel approximately 2.5 miles from the town of Crisfield in an unincorporated part of Somerset County, Maryland.¹⁵ The Project, once completed, will sell energy into the

¹³ Ibis Ex. 4 at 3.

¹⁴ *Id.*

¹⁵ Ibis Ex. 2 at 1.

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PJM Interconnection, LLC ("PJM") wholesale market.¹⁶ The Project consists of approximately 21,000 350 watt solar PV panels, which will be on a single-axis tracking system that will rotate the panels to follow the path of the sun, and will cost approximately \$15 million to \$17 million.¹⁷ OneEnergy indicated that approximately fifty temporary construction jobs and twenty additional jobs throughout the supply chain.¹⁸

The Applicant anticipated that the Project will have minimal ground disturbance for the installation of the panels and interconnection with Delmarva Power and Light Company's ("DPL") system.¹⁹ The disturbance was anticipated to be limited to forty-five acres of the site.²⁰

OneEnergy stated that the Project "will deliver emissions free, renewable energy to the DPL electric distribution network and the PJM wholesale market through a Wholesale Market Participation Agreement," and "represents a clean source of electric power that will offset fossil fuel generation and associated pollution."²¹ The Applicant noted Maryland's EmPower Energy Efficiency Act and Renewable Portfolio Standard ("RPS"), and that the Project will add 6 MW of solar power to Maryland's

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 12.

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portfolio.²² Therefore, once completed, the Project will bring Maryland closer to its 2016 goal of 0.70% of solar energy, as well as reduce the amount of out-of-state energy imports.²³

In terms of green jobs, OneEnergy indicated that it will utilize local resources for the design, management, construction, and start-up process for the Project.²⁴ Additionally, the Applicant asserted the tax revenue generated from the Project will support County and State tax-funded programs.²⁵

The Project will interconnect with DPL's distribution system on a circuit that emanates from the Crisfield Substation.²⁶ The Project's PJM queue position is AA1-059.²⁷ OneEnergy indicated that the line tap will feed energy from the Project into a circuit and protection equipment, which will include a recloser and communication equipment that permit DPL to isolate the Project from the grid if necessary.²⁸ The Applicant will be responsible for all costs associated with the interconnection upgrades referenced in the Application.²⁹

OneEnergy noted that a National Pollutant Discharge Elimination System ("NPDES") General Permit was required because

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.* at 15.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

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the Project's total disturbance will be greater than one acre.³⁰ Additionally, the County's review and permitting requirements must also be met, including obtaining site plan approval, and grading and building permits.³¹ The Project will be located within a FEMA 100-year floodplain, which will require special engineering considerations.³² OneEnergy indicated that certain electrical equipment may need to be installed at a greater height which will be subject to County approval.³³

The Applicant noted that the Project site consists largely of cleared agricultural fields with two residential structures, although one of the structures is in poor condition and the owner of the site stated the structure had not been used in approximately seventy years.³⁴ There are also undeveloped wooded areas in the southern and southwestern sections of the site.³⁵

In terms of noise, OneEnergy noted that the closest residential property boundary from where the pile driver will be used is approximately 70 feet, with the nearest residences (ten parcels) being located on the northeast side of Plantation Road and northwest of the site (two parcels).³⁶ The Applicant anticipated that "sound levels may be higher than usual in the semi-residential

³⁰ *Id.* at 16.

³¹ *Id.* at 16-17. A summary of necessary permits and approvals are set forth in Ibis Ex. 2 at 18.

³² *Id.* at 20.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 23.

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area. However, as a temporary, daytime occurrence, construction sound of this magnitude is not anticipated to create an adverse impact³⁷ The Applicant also noted the Project's close proximity to the Crisfield Municipal airport which has sustained noise from single engine aircraft.³⁸

When the Project is operational, the only noise will be from inverters and transformers on each pad. OneEnergy noted that the closest residence is more than 200 feet from the nearest inverter pad and the noise will be below the 65/55 decibel levels; however, the Applicant will take steps to mitigate the noise by locating the inverters within the solar array.³⁹

The Applicant explained that there would be limited lighting requirements for the Project and may be necessary for security or required by the County.⁴⁰

OneEnergy conducted multiple glare analyses to determine the potential ocular impact from the Project. The eight separate analyses indicated that there would be no glare.⁴¹ The Applicant indicated its intent to surround the Project site with an eight foot high chain link fence, as well as a 25-foot deep screen of native evergreen trees and shrubs, where necessary, in accordance with County requirements and approval.⁴²

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 24.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

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During construction, OneEnergy estimated that 100-200 truckloads would be required.⁴³ Additionally, there will also be daily traffic consisting of cars, pickup trucks and excavation equipment.⁴⁴ However, once the Project becomes operational, traffic will be limited and will consist of maintenance crews for mowing and vegetation maintenance.⁴⁵

The Applicant filed an interconnection application for the Project in September 2014, and PJM and DPL completed a Feasibility Study in February 2015.⁴⁶ PJM subsequently conducted a Combined Feasibility and System Impact Study to determine what upgrades were necessary, while maintaining the grid's reliability and safety.⁴⁷ PJM and DPL ultimately determined that the Crisfield substation has sufficient capacity to accommodate the Project with minimal upgrades.⁴⁸ Thus, OneEnergy concluded that the Project would have no adverse impact on the stability and reliability of the electric system.⁴⁹

The Applicant noted that according to DNR, "no federal or state rare, threatened, or endangered species are within the boundaries of the Site" or any critical habitats on the Project site.⁵⁰ Additionally, according to the Maryland Historic Trust

⁴³ *Id.* at 25.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 31.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 34.

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("MHT"), the Project will not negatively impact any architectural or archaeological resources.⁵¹

OneEnergy indicated that there is the potential presence of the threatened Northern long-eared bat; however, since bats roost in trees and the site's wooded area will not be disturbed, the Project will have no impact on them.⁵²

Ms. Clark's Supplemental Direct Testimony addressed the Commission requirement to consider the need to minimize the loss of forest and the provisions of afforestation and reforestation required by the FCA. Specifically, she testified that since the Project would not require any cutting or clearing of forest, the Commission did not need to address minimizing forest loss or reforestation; therefore, she only addressed afforestation.⁵³ Ms. Clark stated that absent an exemption for a CPCN, the FCA contains afforestation requirements even if no trees are disturbed.⁵⁴ In this case, absent a specific exemption, the Applicant would be required to afforest up to 20% of its "net tract area" through on-site planting.⁵⁵ If that option is not available, the Applicant would need to place existing on-site forest land into a conservation easement, plant on-site and place that area into a

⁵¹ *Id.* at 34, 36.

⁵² *Id.* at 36.

⁵³ *Ibis Ex. 6* at 1.

⁵⁴ *Id.* at 1-2.

⁵⁵ *Id.* at 2.

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conservation easement, or pay a fee into the Forest Conservation Fund.⁵⁶

Ms. Clark testified that compliance with the first two options was nearly impossible.⁵⁷ First, the Applicant has only leased the portion of the land required for the Project. Any afforestation requirement would require additional land, remove additional income producing land from the owner, and require OneEnergy to pay for additional acres without increasing the Project's efficiency.⁵⁸ Furthermore, once the Project is decommissioned, the landowner could farm the land; however, if the afforested land were placed into a conservation easement, that land could no longer be farmed and would cease to be productive.⁵⁹

Ms. Clark explained that the only remaining option, if an exemption did not exist, would be to pay a "tree tax" of up to \$121,560 assessed over the entire project area.⁶⁰ By imposing this fee on the Project, she asserted that it would make Maryland less attractive for developers even though the RPS requires solar projects to be built.⁶¹

Finally, she asserted three additional justifications to not apply the FCA's requirements to the Project. First, Ms. Clark argued that to impose afforestation requirements on OneEnergy would

⁵⁶ *Id.* at 2-3.

⁵⁷ *Id.* at 3.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ *Id.*

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be contrary to public policy as the use of the land would be temporary.⁶² Next, she stated that PPRP typically includes conditions to minimize environmental impacts on the project site, as well as a decommissioning condition that requires the land to be restored to its original state.⁶³ Finally, Ms. Clark noted that the State-wide environmental benefits of the Project weigh against imposition of the FCA.⁶⁴

In her Rebuttal Testimony, Ms. Clark responded to PPRP's testimony as to why full compliance with the FCA is not appropriate and the damage to Maryland's solar industry that would occur if PPRP's position is accepted by the Commission. She indicated that PPRP proposed an afforestation mitigation requirement of 6.75 acres pursuant to the County's Forest Conservation Ordinance ("FCO").⁶⁵

Ms. Clark testified that four options exist to meet PPRP's full FCA compliance recommendation:

- (1) placing existing forest on the parcel into a forest conservation easement in perpetuity;
- (2) engaging in on-site planting, which would require additional cleared land if available, and placing the planted land into a forest conservation easement in perpetuity;
- (3) a payment in lieu into the Somerset County Forest Conservation Fund; or
- (4) working with a local Forest Conservation Bank to secure land to be reserved.⁶⁶

⁶² *Id.*

⁶³ *Id.* at 4-5.

⁶⁴ *Id.* at 5.

⁶⁵ *Ibis Ex. 7* at 1.

⁶⁶ *Id.* at 2.

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She stated that the first two options were not feasible as discussions with the landowner to place additional property into an easement have not been finalized, and she has investigated purchasing an easement off-site in the County, but the process is unclear and potential costs are unknown.⁶⁷

Ms. Clark noted that the only option currently available is the payment-in-lieu of approximately \$88,209 and that the late introduction of the FCA compliance requirement has made the process difficult.⁶⁸ The payment-in-lieu-of amount materially impacts the Project as FCA compliance was not contemplated in OneEnergy's evaluations, and represented a significant revenue reduction.⁶⁹

Ms. Clark expressed concern about the impact of PPRP's position on Maryland's solar industry, as it would increase both uncertainty and costs. Ms. Clark testified that since the FCA is administered on a County level, solar developers could be subject to different FCA requirements in 24 separate jurisdictions.⁷⁰ She indicated that PPRP's position regarding forest mitigation created uncertainty for this Project, as well as other utility-scale solar projects.⁷¹

Ms. Clark explained that the Applicant relied upon previous Commission decisions not requiring afforestation/

⁶⁷ *Id.*

⁶⁸ *Id.* The previous payment-in-lieu amount cited by Ms. Clark, \$121,560, was mistakenly based on an afforestation requirement of 20% rather than 15% and a slightly higher per square foot figure. *Id.* at 3.

⁶⁹ *Id.* at 3-4.

⁷⁰ *Id.* at 4.

⁷¹ *Id.* at 4-5.

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mitigation for solar projects that avoided onsite trees.⁷² Once she learned of PPRP's position in Case No. 9387 requiring forestry-related conditions, Ms. Clark began exploring options for this Project. During the time she was developing an alternative approach in Case No. 9387, Ms. Clark indicated that OneEnergy learned PPRP planned to require full FCA compliance, which was very late in the process and provided no time to discuss potential options.⁷³ She stated imposing full FCA compliance jeopardizes other similar projects and creates uncertainty with added litigation costs.⁷⁴

Ms. Clark described OneEnergy's commitment to the environment and reiterated its support of the State's policies to protect forests.⁷⁵ She indicated that while the forest mitigation requirements should not be ignored by the Commission, a more flexible approach should be adopted that balances both the environmental objectives and the benefits of solar projects.⁷⁶ As an alternative, Ms. Clark described the proposal made to Kent County in Case No. 9387 to calculate the afforestation mitigation by the amount of impervious surface added to the property as a result of the Project, using a 1:1 ratio.⁷⁷ However, she noted

⁷² *Id.* at 5.

⁷³ *Id.* at 5-6.

⁷⁴ *Id.* at 6.

⁷⁵ *Id.*

⁷⁶ *Id.* at 7.

⁷⁷ *Id.*

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that the PPRP was unwilling to consider that proposal.⁷⁸ Ms. Clark concluded with a discussion of the benefits of solar, and how solar projects are different than other types of development projects that are subject to the FCA.

During cross-examination, Ms. Clark explained that OneEnergy learned of the forest conservation requirement in October 2015 after receiving comments on the site plan from the Planning Commission.⁷⁹ She testified that OneEnergy had been proceeding with the understanding its various solar projects were exempt from the FCA, and learning of the forestry-related requirement in October was late in the Project's development.⁸⁰ Ms. Clark indicated that if the Applicant was aware of the FCA requirement earlier in the process, it would have provided additional time to negotiate with the landowner about the possibility of placing existing forest into an easement.⁸¹

Ms. Clark also stated that the Applicant also had been seeking clarity with PPRP about the FCA condition and began seeking other compliance options in January 2016.⁸² Ms. Clark acknowledged that she was aware of other solar projects in the County that were required to do forest conservation.⁸³

⁷⁸ *Id.*

⁷⁹ Tr. 23 (9392).

⁸⁰ Tr. 24-25 (9392).

⁸¹ Tr. 26-27 (9392).

⁸² Tr. 28-29 (9392).

⁸³ Tr. 31 (9392).

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In response to questions from PPRP, Ms. Clark testified that the lease, signed in 2013, consisted of an initial five-year period for the Applicant to do its due diligence, followed by a twenty-year period for the Project, with a five-year option period.⁸⁴ She explained that the Project's approximate fifty temporary construction jobs, the staging area and the trailer required for the Project would all be required for approximately three to five months.⁸⁵

Ms. Clark stated that in January 2016, OneEnergy contacted someone with the County regarding purchasing an off-site easement/mitigation bank, but she had not contacted the Soil Conservation District.⁸⁶ Ms. Clark also recalled that PPRP, specifically Mr. Sadzinski, provided an updated site plan with comments and they had discussed the FCA issue, but it was not a formal discussion on how the FCA would apply to this Project.⁸⁷

On re-direct, Ms. Clark explained that OneEnergy did not understand PPRP's change regarding the application of the FCA and that full compliance could prevent solar projects from moving forward.⁸⁸ She stated that solar projects should be given special consideration and noted that similar projects did not have FCA requirements.⁸⁹ Ms. Clark indicated that she had a better under-

⁸⁴ Tr. 32-33 (9392).

⁸⁵ Tr. 33-34 (9392).

⁸⁶ Tr. 35, 37 (9392).

⁸⁷ Tr. 38-39 (9392).

⁸⁸ Tr. 40 (9392).

⁸⁹ Tr. 41 (9392).

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standing of the County's requirements, but how the Applicant moved forward would depend whether full FCA compliance was required.⁹⁰

She also discussed the issues raised during the public hearing. First, in terms of decommissioning the Project, Ms. Clark explained that what is considered a hazardous material varies by County, "[b]ut the panels themselves are of -- composed of pretty high - highly recyclable materials,"⁹¹ She also confirmed that there are no components or chemicals that are considered hazardous and that the proper disposal of any hazardous materials was required pursuant to PPRP's licensing conditions.⁹²

In regards to buffering, Ms. Clark explained that OneEnergy adjusted its site plan to accommodate a fifty foot setback and proposed a twenty-five foot vegetation screen along the property lines that front homes based upon the conditions implemented in the Great Bay solar project.⁹³ However, Ms. Clark stated that OneEnergy is attempting to readjust and reconfigure this Project to meet the same setback imposed in Case No. 9380, which required a seventy-five foot setback where possible.⁹⁴

In terms of the actual buffer, Ms. Clark testified that it had not yet been determined. She indicated that OneEnergy will likely follow the same process as it is using in Queen Anne's County, where a landscape architect is working with that County to

⁹⁰ Tr. 42-43 (9392).

⁹¹ Tr. 50 (9392).

⁹² Tr. 50-51 (9392); see PPRP Ibis Ex. 2, para. 15 at 4-5.

⁹³ Tr. 52 (9392); see PPRP Ibis Ex. 2, para. 16 at 5.

⁹⁴ Tr. 53 (9392).

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determine the materials for that project's buffer.⁹⁵ Ms. Clark stated that the height of the trees to be planted will be considered, and noted that in a similar case, the respective County approved the site plan, a bond was posted for the trees that were planted, and the County had enforcement avenues regarding the landscaping.⁹⁶ She also confirmed that residents have an opportunity to provide feedback to the Applicant as part of the site plan process.⁹⁷

In terms of the Applicant's impervious surface compliance option, Ms. Clark estimated that the amount of mitigation required would be approximately less than two acres.⁹⁸

B. PPRP

Dr. Sherwell, the Administrator for Atmospheric Sciences for PPRP and the Project Manager for several solar facilities, testified regarding PPRP's approach to the FCA requirements as part of its review process. He noted that since 2011, PPRP has reviewed ten solar facilities throughout Maryland. Dr. Sherwell stated that those facilities all required compliance with the FCA and the following condition was included as a licensing condition:

Construction and operation ... shall comply with all applicable local, State, and federal laws and regulations, including ...

⁹⁵ Tr. 54 (9392).

⁹⁶ Tr. 54-56 (9392).

⁹⁷ Tr. 56-57 (9392).

⁹⁸ Tr. 60 (9392).

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Maryland's Forest Conservation Act, Md. Code,
Sections 5-1602(b)(5) and 5-1603 of the
Natural Resources Article.⁹⁹

He also specifically stated that PPRP had not previously exempted a project from complying with the FCA.¹⁰⁰

However, Dr. Sherwell explained that PPRP had erroneously recommended that no mitigation was required for projects that did not involve the clearing of trees. Specifically, he testified, "This error was originally made in 2011 in the Church Hill Solar case, PSC Case No. 9314, and was subsequently not corrected until Case No. 9380, Great Bay Solar."¹⁰¹ In Case No. 9380, Dr. Sherwell indicated that PPRP learned that the FCA mitigation calculations applied to both the forested and cleared agricultural portions of the project site.¹⁰² In Case No. 9383, Dr. Sherwell noted that PPRP expanded its FCA condition "to further require the Applicant to document its coordination with the County ... and to provide PPRP and the PSC with copies of the FCA-related submittals to the County and documentation of all required mitigation activities."¹⁰³

During cross-examination, he indicated that FCA requirements had not been imposed on several other solar projects,¹⁰⁴ and he was not aware of any changes to the FCA statute or

⁹⁹ PPRP Ibis Ex. 4 at 2. In an effort to contrast this case with Case No. 9387, PPRP's exhibits were labeled "PPRP Ibis" rather than "PPRP" which was used in Case No. 9387.

¹⁰⁰ PPRP Ibis Ex. 4 at 2.

¹⁰¹ *Id.* at 2.

¹⁰² *Id.* at 3.

¹⁰³ *Id.*

¹⁰⁴ Tr. 59 (9387).

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regulations.¹⁰⁵ Dr. Sherwell testified that PPRP makes recommendations and does not have any enforcement or regulatory authority, which is given to the counties pursuant to the FCA.¹⁰⁶ He stated that for future projects, PPRP will rely upon each county's recommendation regarding the FCA.¹⁰⁷

Dr. Sherwell explained that previous PPRP recommendations that no mitigation was required were not a finding that a project was exempt or that the FCA applied.¹⁰⁸ It was not until the Great Bay Solar case, Case No. 9380, that PPRP determined it had been misapplying the FCA when Somerset County brought the issue to PPRP's attention.¹⁰⁹ PPRP then consulted with DNR's Forestry Service. Dr. Sherwell clarified that an applicant would need to have a CPCN first, and then make the case that the project was exempt from the FCA.¹¹⁰

Mr. Sadzinski, a Program Manager with PPRP, testified regarding PPRP's findings and the preliminary recommendations of its evaluation of the Project, and also responded to Ms. Clark's Supplemental Direct Testimony. Mr. Sadzinski testified that PPRP conducted an independent environmental and socioeconomic evaluation of the Project based upon OneEnergy's Application and supporting testimony, as well as obtaining information to verify the

¹⁰⁵ Tr. 61 (9387).

¹⁰⁶ Tr. 62 (9387).

¹⁰⁷ Tr. 66 (9387).

¹⁰⁸ Tr. 78 (9387).

¹⁰⁹ Tr. 80-81 (9387).

¹¹⁰ Tr. 88 (9387).

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Applicant's evaluations.¹¹¹ Additionally, he noted that on July 29, 2015, PPRP participated in a field review of the Project.¹¹²

He testified that PPRP's initial recommended conditions, which have been approved by seven different State agencies, may be amended, added to or deleted in PPRP's final recommended conditions in order to address issues that may arise during hearings.¹¹³ In the event no issues arise from hearings that require the initial conditions to be modified, they will serve as the State's final recommended conditions.¹¹⁴

As part of its review, PPRP examined the Project's potential impacts on the environment and the economy, as well as visual, noise and electromagnetic impacts. Mr. Sadzinski testified that the State's RPS requires 20 percent renewable energy by 2022, including 2 percent from solar energy sources.¹¹⁵ He explained that the Project would utilize solar photovoltaic technology, would consist of 21,000 PV panels on approximately forty-five acres of land and generate 6.0 MW of electricity.¹¹⁶

Mr. Sadzinski indicated that the Project would not have a significant impact to vegetation resources. He stated that the Project site consisted of actively cultivated land with a mixed deciduous forest (partially wetlands) existing along the southern

¹¹¹ PPRP Ibis Ex. 1 at 5.

¹¹² *Id.* at 6.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 7.

¹¹⁶ *Id.* at 7-8.

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boundary of the parcel; however, neither the forest nor the wetlands would be impacted by the Project.¹¹⁷ Mr. Sadzinski explained that the parcel contained an active, albeit sparse and weak, soybean crop along with weedy herbaceous plants found on cultivated fields in the region.¹¹⁸ He indicated that the FCA applied to the Project. Specifically, PPRP recommended a condition that OneEnergy be required to mitigate 6.75 acres as determined by the County.¹¹⁹

In terms of impacts on wildlife, PPRP determined that there would be none as the site offers little natural wildlife habitat. Mr. Sadzinski testified that the Project could benefit wildlife by establishing and maintaining warm season grasses within the Project site.¹²⁰ Therefore, PPRP recommended the Applicant follow the guidance provided by the County's Soil Conservation District to establish and maintain vegetation, and to restrict mowing during ground-nesting bird season.¹²¹

Mr. Sadzinski also discussed potential impacts to the wetlands or streams. He explained that the United States Army Corps of Engineers ("USACE") found that a roadside ditch adjacent to Plantain Road would be subject to both USACE and the Maryland Department of the Environment's jurisdiction; therefore, it is

¹¹⁷ *Id.* at 8-9.

¹¹⁸ *Id.* at 9.

¹¹⁹ *Id.* In PPRP's Licensing Condition, it recommends 6.8 acres of mitigation was likely rounded up from the 6.75 acres of mitigation recommended by the County.

¹²⁰ *Id.* at 10.

¹²¹ *Id.* at 11.

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likely that either a Nontidal Wetlands Permit or a Letter of Exemption will be required.¹²² Furthermore, Mr. Sadzinski noted that the Project should implement the procedures and requirements of the County's Stormwater Management, Grading, Soil Erosion, and Sediment Control Ordinance.¹²³

He also discussed potential issues related to potential flooding and storm surges, as well as sea-level rises. Mr. Sadzinski stated that the top of piles would need to be installed four to five feet above grade so that the panels are out of the floodplain.¹²⁴ Additionally, Mr. Sadzinski noted that the County indicated that certain electrical equipment, such as combiner boxes, inverters and transformers, may need to be elevated five to seven feet above grade, and the final height of such equipment would be subject to the County's review and approval.¹²⁵

Mr. Sadzinski also addressed the impacts in terms of economic, demographics and fiscal issues raised by the Project. He stated that up to fifty jobs would be created by the Project, with many construction jobs likely being filled by local contractors, and that the Project will have a positive impact on the local economy from payrolls and expenditures.¹²⁶ Mr. Sadzinski found that fiscal benefits from the Project would be in the form of income tax

¹²² *Id.* at 12.

¹²³ *Id.*

¹²⁴ *Id.* at 13.

¹²⁵ *Id.* at 13-14.

¹²⁶ *Id.* at 14.

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revenues to the State and on lease payments, as well as business personal property tax revenues.¹²⁷

In terms of land use impacts, PPRP concluded that the Project satisfies the conditions necessary to obtain a special exception from the County's Board of Zoning Appeals ("BZA").¹²⁸ Mr. Sadzinski noted that the Project site was not within the Critical Area and is nearby several homes, a church and the Crisfield Airport. PPRP recommended that OneEnergy certify to both the Commission and PPRP that the Project has been designed in substantial conformity to the County's site plan review requirements and that OneEnergy obtain approval from the Planning Commission prior to commencing construction.¹²⁹

Mr. Sadzinski testified that the impacts from transportation associated with the Project would be limited to the construction period, and should be confined mainly to Plantation Road.¹³⁰ He stated that approximately forty automobiles or light trucks will be added to local traffic on a daily basis over the construction period, and that the anticipated truck deliveries will not impact existing traffic near the Project site.¹³¹ PPRP recommended that the Applicant comply with the applicable State and local permitting requirements and obtain any necessary approvals

¹²⁷ *Id.* at 15.

¹²⁸ *Id.*

¹²⁹ *Id.* at 16.

¹³⁰ *Id.*

¹³¹ *Id.* at 16-17.

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for the use of the State and County roads.¹³² Finally, PPRP indicated that it conducted an independent glare analysis due to the Project's proximity to Crisfield Municipal Airport, and determined that the FAA's "no objection" standard was satisfied.¹³³

Mr. Sadzinski also addressed the Project's visual impacts. He indicated that the Project site is relatively flat and OneEnergy indicated it would add a twenty-five foot screen of trees and shrubs that would be developed pursuant to the County's Planning Commission and Staff's requirements.¹³⁴ However, PPRP asserted that the County's bufferyard requirements were inadequate; therefore, PPRP recommended the Applicant set back its facilities at least fifty feet from any adjacent property line or public road, or seventy-five feet where possible, within which the referenced landscaping should be planted.¹³⁵

Mr. Sadzinski testified that the Project would have minimal lighting requirements and concluded that the County's site plan review process would address any impacts.¹³⁶ Finally, he stated that PPRP conducted an independent glare assessment and found that views from outside the Project site would not be affected by glare; however, PPRP recommended OneEnergy develop a

¹³² *Id.* at 17.

¹³³ *Id.* at 18.

¹³⁴ *Id.*

¹³⁵ *Id.* at 18-19.

¹³⁶ *Id.* at 19.

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process to address solar-reflection complaints and take appropriate steps to mitigate impacts for valid complaints.¹³⁷

Mr. Sadzinski explained that there were properties within one-half mile of the Project site on the National Registry of Historic Properties (two properties) and additional properties were on the Maryland Inventory of Historic Properties.¹³⁸ However, the MHT found that the Project would have no impact on the historic properties.¹³⁹ PPRP did recommend that if relics or unforeseen archeological sites were found during construction, the Applicant, in conjunction with MHT, should develop a plan for avoidance and protection, data collection or destruction without recovery of such items.¹⁴⁰ Finally, Mr. Sadzinski stated that the Project would not be visible to motorists on Crisfield Highway, a scenic road, and that cyclists utilizing that road would not be impacted by the traffic associated with the Project's construction or operation.¹⁴¹

In relation to public services and safety, he explained that no additional services would be required to serve the Project under normal circumstances.¹⁴² Mr. Sadzinski testified that solar panels and the associated electrical equipment are largely free of flammable materials, and that the risk of fire from the Project is low, provided potential fuels from under and around the arrays are

¹³⁷ *Id.*

¹³⁸ *Id.* at 19-20.

¹³⁹ *Id.* at 20.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 20-21.

¹⁴² *Id.* 21.

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addressed.¹⁴³ PPRP recommended that the Applicant design, install and maintain the Project to meet the minimum standards set forth in the National Fire Protection Association's NFPA 1 Fire Code Handbook and NFPA 70 National Electrical Code.¹⁴⁴ Mr. Sadzinski also recommended that OneEnergy be required to contact the local fire departments and the County's Department of Emergency Services to establish protocols for response options, emergency access to the site, identification of system components and Standard Operating Procedures and Guidelines for on-site emergencies.¹⁴⁵

Mr. Sadzinski also addressed the potential impact on property values from the Project. He testified that the Project will be largely out of sight from neighboring properties due to landscaping buffers, and there will be no significant traffic, noise or pollution, and there will be no hazardous waste generated at the site.¹⁴⁶ Furthermore, the site will be returned to its original state when the Project is ultimately decommissioned; therefore, PPRP concluded property values will not be affected by the Project.¹⁴⁷

Regarding noise, Mr. Sadzinski described the allowed noise levels specified in COMAR and the sound that will be generated by the Project. He noted that the closest residence will be more than 200 feet from the closest inverter pad, at which

¹⁴³ *Id.* at 21-22.

¹⁴⁴ *Id.* at 22.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* 22-23.

¹⁴⁷ *Id.* at 23.

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distance the noise levels will be well below ambient background noise levels; thus, there will be no significant impacts at residential receptors.¹⁴⁸ Additionally, Mr. Sadzinski testified that PRPP conducted an independent evaluation of potential noise impacts from both the construction and operation of the Project and found OneEnergy will comply with the applicable noise limits.¹⁴⁹

He also discussed the Electromagnetic Field ("EMF") Impact Assessment. Mr. Sadzinski stated that there was sufficient buffer from adjacent properties so that EMF levels should not pose a potential health risk to nearby residents.¹⁵⁰

Finally, Mr. Sadzinski rebutted Ms. Clark's supplemental direct testimony. First, he disagreed with Ms. Clark that the use of the property was a temporary use. Mr. Sadzinski cited a report that indicated the typical lifetime of a solar photovoltaic facility was approximately twenty-five to thirty years.¹⁵¹ In his experience, a "temporary" project, in terms of utility-scale solar facilities, was between less than one year to a maximum of three years.¹⁵² Additionally, even though a decommissioning plan is required, the lease for the property could be extended. He also indicated that other mitigation options are available to the Applicant, not just the payment-in-lieu option.¹⁵³

¹⁴⁸ *Id.* at 24.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 25.

¹⁵² *Id.*

¹⁵³ *Id.*

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Mr. Sadzinski testified that PPRP was aware of the Applicant's contention that the Project was exempt early in the review process¹⁵⁴ and became aware of the County's FCA position in the fall.¹⁵⁵ He explained that PPRP's initial recommended condition did not include the number of acres necessary for mitigation because it did not have the specific number at that time.¹⁵⁶

Mr. Sadzinski confirmed that he testified in two previous solar CPCN cases and PPRP's recommendations in those cases included the boilerplate FCA condition.¹⁵⁷ Mr. Sadzinski stated that in Case No. 9370, his position was that mitigation was not required, but he erroneously failed to coordinate with the county.¹⁵⁸ He also explained that he considered the Project to be temporary based upon his previous experience, which did not include solar projects.¹⁵⁹

Ms. Honeczy is the Supervisor of the Urban & Community Forestry Program within DNR's Forest Service. Her testimony addressed the FCA, its historic basis, goals and benefits. Ms. Honeczy stated that she provides assistance to local governments to implement the FCA.¹⁶⁰

¹⁵⁴ Tr. 98 (9387).

¹⁵⁵ Tr. 104 (9387).

¹⁵⁶ Tr. 104-105 (9387).

¹⁵⁷ Tr. 107 (9387).

¹⁵⁸ Tr. 107-108 (9387).

¹⁵⁹ Tr. 109-110 (9387).

¹⁶⁰ PPRP Ibis Ex. 5 at 1.

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She explained that the FCA was enacted in 1991 "to protect the forests of Maryland by making the identification and protection of forests and other sensitive areas an integral part of the site planning process."¹⁶¹ Ms. Honeczy stated, "The primary objective of the FCA is to conserve forest cover on development sites by minimizing the loss of existing forests and/or replenishing forest that has been lost to development activities in the past."¹⁶² She noted that it is important to conserve forest resources because of the vital role trees play in protecting the environmental and human health.¹⁶³

Ms. Honeczy testified that the FCA sets forth the minimum standards that developers must follow for new projects. She stated that each County has the responsibility to ensure the FCA standards are met and that a developer includes mitigation as part of the site plan process.¹⁶⁴ In this case, the County has implementation authority.

She described generally what developers are required to do to meet the FCA requirements as part of the site plan process. Ms. Honeczy indicated that even if a project does not involve the removal of any trees, a project is not exempt from the FCA's mitigation requirements.¹⁶⁵ She testified that the FCA mitigation requirements "recognize[] every project developer's obligation to

¹⁶¹ *Id.* at 2.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 3.

¹⁶⁵ *Id.* at 4-5.

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contribute toward improving Maryland's natural resources as envisioned by the Act."¹⁶⁶ Ms. Honeczy explained, "This obligation should be imposed on every development with greater than 40,000 square feet of soil disturbance, regardless of the project's environmental characteristics or economic benefits."¹⁶⁷ Ms. Honeczy stated that mitigation is still required because the regeneration potential of forests will be temporarily or permanently lost once structures are installed upon land used for agriculture.¹⁶⁸

On cross-examination, she noted that local jurisdictions do not have the ability to determine that the FCA does not apply, but they do have the authority to issue a variance.¹⁶⁹ Ms. Honeczy testified, "Any project that has an existing CPCN at the time of the application to the County for their site plan, grading plan, subdivision plan or Sediment Control Plan would be exempted from the FCA. But it's at the time of the application for those plans."¹⁷⁰ However, Ms. Honeczy testified that if an existing project already had a CPCN, Natural Resources Article ("NR"), *Md. Code. Ann.*, § 5-1603 would apply and would require the Commission to give consideration to minimize the impact to forests, afforestation and reforestation.¹⁷¹ Ms. Honeczy confirmed that unless a project was grandfathered, a solar project would have to

¹⁶⁶ *Id.* at 5.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Tr. 124 (9387).

¹⁷⁰ Tr. 128 (9387).

¹⁷¹ Tr. 129 (9387).

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comply with the FCA regardless of whether the County review or the Commission review occurred first.¹⁷²

Ms. Honecny also explained why mitigation would be required even though no trees were being cut or cleared. She stated that the General Assembly determined that if a project needed the referenced plans and permits, the FCA would apply, but as OneEnergy is not cutting down any trees, its afforestation requirements are not as great.¹⁷³ She also confirmed that this Project would never qualify for the exception.¹⁷⁴

C. Somerset County

Kimberly Kudla, a Planner with the County's Department of Technical and Community Services, testified on behalf of the County Commissioners and her department regarding the FCA mitigation requirements for the Project. She stated that the County Commissioners' position is to treat all solar projects equally and that local regulations must be complied with, including the County's FCO.¹⁷⁵ Ms. Kudla explained that compliance with the FCO was necessary to protect the County's existing natural resources.

She noted that County's position in this case is consistent with two other similar solar projects. First, Ms. Kudla testified that the Somerset Renewable Energy Project required the

¹⁷² Tr. 130 (9387).

¹⁷³ Tr. 145-146 (9387).

¹⁷⁴ Tr. 146 (9387).

¹⁷⁵ Somerset Ex. 1 at 1.

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clearing of 16.77 acres of forest and of the remaining 79.1 forest acres onsite, 59.83 acres were placed into a long-term protection agreement to comply with the FCO.¹⁷⁶ Next, she described the Great Bay Solar Project which was recently approved by the Commission and included a condition to comply with the FCO.¹⁷⁷

In terms of this project, Ms. Kudla listed the numerous options available to OneEnergy to comply with the FCO. She stated that based upon the forty-five acre limit of disturbance, OneEnergy is required to provide 6.75 acres of afforestation mitigation.¹⁷⁸ The options are as follows: on-site planting; placing 6.75 acres of trees on the existing parcel into a long-term protection agreement; using a mitigation bank or purchasing a parcel and either placing existing trees or planting trees, and placing them into a long-term protection agreement; make a payment fee-in-lieu of \$0.30 a square foot into the Somerset County Forest Conservation Fund; or obtaining a variance from the County's BZA.¹⁷⁹ Ms. Kudla testified that based on a conversation with a local realtor regarding the purchase price of land, the Applicant could potentially purchase the required 6.75 acres for \$10,000 to \$17,000 based upon a \$1,500 to \$2,500 per acre price estimate.¹⁸⁰

She explained that OneEnergy was notified that it would need to comply with the FCO on two separate occasions, but she had

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 3.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

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not been contacted by the Applicant.¹⁸¹ Ms. Kudla also noted that the Applicant's fee-in-lieu-of figure was overstated.

On cross-examination, Ms. Kudla stated that the Applicant in the Great Bay project agreed to comply with the County's FCO.¹⁸² She testified that the County's FCO did not contain an exemption for CPCNs.¹⁸³ Ms. Kudla indicated that this Project had gone through the Technical Advisory Committee and the County received the Applicant's site plans, but the County was waiting to see what happens with forest conservation, which is the only contested issue.¹⁸⁴

D. Staff

Mr. Wilson described the Project and the required inter-connection process, which includes several studies, the Feasibility Study, the Impact Study, and the Facilities Study, all performed by PJM, as well as the Interconnection Service and Construction Service Agreements, and Capacity Injection Rights ("CIRs").¹⁸⁵ He

¹⁸¹ *Id.* at 3-4; see Attachment to Somerset Ex. 1 - Letter from the Somerset County Department of Technical and Community Services to Kevin J. Shearon, DMS and Associates, LLC regarding the Review of Site Plan for Two Rebas, LLC, dated November 16, 2015, at 1. The referenced letter noted that the Planning Commission's Site Plan review would be delayed for two reasons. First, the Commission had not yet ruled on what conditions should be applicable to the Project through the CPCN process, and another solar project was being reviewed by the Commission and considering whether local zoning laws would be superseded by the Commission; therefore, the Planning Commission determined that review of the site plans would be delayed until the referenced issues are resolved. Somerset Ex. 1, Attch. 1 at 2.

¹⁸² Tr. 66-67 (9392).

¹⁸³ Tr. 68 (9392).

¹⁸⁴ Tr. 69 (9392).

¹⁸⁵ Staff Ex. 1 at 6-9.

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also explained the Wholesale Market Participant Agreement ("WMPA") which is an option "available to those generation projects that are seeking to interconnect with the PJM transmission system through a state regulated local electric distribution system prior to commercial operation."¹⁸⁶ Mr. Wilson stated that the Project "can apply to take part in wholesale transactions of energy and/or capacity into the PJM markets and to receive CIRs by executing a WMPA", which defines the terms for a generating facility, connected to the local distribution facility or sub-transmission facility, to participate in the PJM markets.¹⁸⁷

Mr. Wilson testified that the Project has a generator interconnection queue number of AA1-059, and the Applicant anticipates a commercial in-service date of no later than the fourth quarter of 2016.¹⁸⁸ He noted that the Facilities Study was received from PJM on December 23, 2015, and must be completed prior to executing the WMPA.¹⁸⁹ Mr. Wilson indicated that OneEnergy intends to move forward with the Interconnection Agreement no later than June 30, 2016.¹⁹⁰

Mr. Wilson explained that the Project will interconnect with DPL's distribution facilities via the Crisfield substation, which may require an Interconnection Agreement with DPL.¹⁹¹ He

¹⁸⁶ *Id.* at 10.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 11.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 11-12.

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testified, "To insure safety and reliability of the electric system DPL will be constructing protection equipment, including a recloser, and communications equipment that will allow DPL to isolate the solar project in order to address operational events adversely impacting the electric system."¹⁹² OneEnergy will be required to install telemetering and telemetry equipment, and design and install relaying and metering equipment to comply with DPL's transmission standards, as well as pay costs associated with the design and construction of facilities necessary to interconnect with DPL's system, which was estimated at \$739,860.¹⁹³

Furthermore, Mr. Wilson reiterated that impacts of the Project on the reliability and stability of DPL's system were considered. Prior to operation, he testified that the Project must comply with both DPL and PJM's interconnection requirements, complete any necessary facility upgrades and milestones specified in the Interconnection Service Agreement and WMPA, all of which will ensure that there will be no adverse impact on the reliability and stability of the transmission system.¹⁹⁴ Mr. Wilson noted the Project's generation capability will benefit both Maryland and the PJM system. He specifically included the WMPA as a condition for this Project because it "is a crucial document for maintaining the

¹⁹² *Id.* at 12.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 13.

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safety, reliability, and stability of the electric transmission system."¹⁹⁵

Mr. Wilson also discussed his recommendation to require OneEnergy to obtain Commission approval to conduct business as an electric retail supplier. Even though OneEnergy intends on selling the Project's capacity and energy into the PJM wholesale market, he opined that Maryland's retail market could present an attractive alternative to the wholesale market depending on market conditions.¹⁹⁶

Mr. Wilson concluded that renewable energy projects, such as solar and wind farms, have been promoted and mandated by the State, and that the Project would contribute towards Maryland meeting its RPS goals.¹⁹⁷ Therefore, he recommended that a CPCN be issued for the Project, consistent with the licensing conditions proposed by both Staff and the other State agencies.¹⁹⁸

E. Public and Written Comments

At the evening public hearing, County Commissioner Randy Laird, on behalf of the Board of Commissioners, stated that the Commissioners would be satisfied if the conditions mirrored those imposed by Public Utility Law Judge McGowan in a recent case in the County.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 14.

¹⁹⁷ *Id.* at 14-15.

¹⁹⁸ *Id.* at 15-16 and Attachment A.

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Several citizens also appeared and commented on the Project. There was concern expressed about the County's zoning laws being violated, adversely impacting residents' property, property values and quality of life. A comparison was made to a large solar project in the Mohave Desert that was described as an environmental and economic disaster, as well as other solar projects around the State. In similar projects, it was noted that the respective County's zoning laws either permitted the project or required a BZA hearing; however, no such hearing was being conducted in Somerset County.

The County's Planning Director responded that the County's position was that if a CPCN was issued, it would supersede local zoning laws and would not require a BZA hearing. Concern was expressed with the County's position because it removed the citizens' due process rights, and that the evening hearing was not well publicized. In relation to decommissioning, concerns were articulated about the sufficiency of the bonding requirements and how the disposal of the panels, which are considered hazardous materials, will be handled.

Another citizen, who resides in a home purchased in 1977, and which is on a road parallel to Plantation Road where the Project will be located, described the investments made to her home over the years and expressed concern that her view will be of a solar farm rather than farmland. She was also distressed over the possibility of not seeing the numerous birds and animals as a result of the Project, as well as the impact on property values.

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The Project's proposed location next to nearby residences was questioned, given the abundance of empty land throughout the County. An individual, who farms the land where the Project will be, also questioned the location given the close proximity to a residential area.

Citizens also questioned the buffering that would be planted and whether it would block the view of the solar panels. It was suggested that setbacks of 75 to 100 feet from nearby homes be imposed as a condition. Finally, a citizen raised the issue of planting trees and that exceptions should not be made for businesses.

Approximately 600 written comments were also filed with the Commission.¹⁹⁹ All of the comments were in opposition to the Project and requested various conditions. The February filings consisted of two slightly different form letters endorsed by numerous individuals which were drafted by a couple that lives in close proximity to the Project site, and a third form letter submitted by members of Safe for Somerset ("SFS"). The letters all opposed the Project and stated that the Project does not comply with County zoning laws and strips protections that had been guaranteed, that the zoning laws have not been followed, and noted that many nearby residents were unaware that the Project was even

¹⁹⁹ See MLs 183906 and 183907 (both filed February 23, 2016); ML 183931 (filed February 24, 2016); ML 186239 (filed March 17, 2016); MLs 186279 and 186280 (both filed March 21, 2016); and ML 186640 (filed March 24, 2016). Please note that ML 183906 included a listing of Safe for Somerset members (299) in support of this particular letter, which I included in the estimated number of written comments.

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being considered. The letters referenced that all speakers at the public hearing opposed the Project and the lack of maps depicting the Project violated their due process rights.

There was doubt expressed about the PSC's claim that property values would not decrease as a result of the Project, and the letters sought a guarantee from the Applicant in the event of a decrease. Additionally, the signatories requested evidence that property values around similar solar projects have not decreased, as well as whether those Counties' zoning law permitted the development or required a BZA hearing. A similar project on Costen Road was referenced as an "eyesore" and that a 100 foot setback should be required with buffering for all residential views. In summary, the comments sought (1) a BZA hearing; (2) a property value guarantee; (3) a 100 foot setback; and (4) multi-layer mature buffering for all residential views.²⁰⁰

The SFS letter similarly expressed concerns about the failure to adequately identify the site, contrary to County zoning laws, which deprived residents of an opportunity to express their views and resulted in neighboring property owners being unaware of the proposed Project.²⁰¹ The SFS members sought another hearing to provide those affected by the Project due process.

Similar to the other form letters, SFS members questioned the evidence that property values would not decline as a result of the Project and sought a property value guarantee for

²⁰⁰ MLs 183906, 183907 and 183931.

²⁰¹ ML 183906.

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those residing within one-half mile of the Project. Finally, the SFS letter also sought a 100 foot buffer with double row planting to mask all views of the Project.

On March 17, 2016, a letter was filed which expressed opposition to the project and described a County Planning Commission meeting regarding the Project. Specifically, the letter referenced concerns about the vegetation buffer proposed by OneEnergy, and requested that the buffer consist of multi-layered mature plantings, that the Applicant be required to maintain the vegetation for the duration of the Project and that the Applicant provide a property value guarantee.²⁰²

On March 18, 2016, SFS filed a second letter asserting that the Commission's notification was incomplete and confusing, that citizens were not notified about the precise location of the Project, and that the public hearing was held too late in the process.²⁰³ Next, SFS criticized the PSC for not addressing concerns or providing a site map for the Project.²⁰⁴ Concerns were also expressed about the proposed buffer and questioned when nearby residents' feedback will be solicited by OneEnergy.²⁰⁵ Finally, SFS requested a property value guarantee for nearby residential properties.²⁰⁶

²⁰² ML 186239.

²⁰³ ML 186280, dated March 17, 2016.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

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On March 21, 2016, another nine copies of a previously filed form letter in opposition to the Project were filed with the Commission.²⁰⁷ Finally, on March 24, 2016, approximately ninety-one copies of a form letter were filed which reiterated residents opposition to the Project, and requested multi-layered mature planting for the buffering, that OneEnergy be responsible for maintaining the buffer, and that residents receive a property value guarantee.²⁰⁸

III. Arguments on Brief

A. One Energy²⁰⁹

OneEnergy requested (1) a finding that as a matter of law CPCN projects are excepted from compliance with the FCA, as implemented by PPRP and the County if certain conditions are met, and that oversight of forestry issues shifts to the Commission for a review based upon each individual project; and (2) that pursuant to a "due consideration" review of forestry issues, the Commission strike PPRP's proposed licensing condition 2(e) as it is not applicable to this Project; or (3) alternatively, if the Commission determines forestry-related conditions should be imposed on solar projects that do not impact trees, OneEnergy's compromise based upon calculations on added impervious surface be adopted.²¹⁰

²⁰⁷ ML 186279, dated March 14, 2016; see ML 183906.

²⁰⁸ ML 186640., dated March 14, 2016.

²⁰⁹ OneEnergy filed a Joint Brief for this case and Case No. 9387.

²¹⁰ Applicants' Jt. Brief at 7-8.

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First, the Applicant contended that the Project was excepted from both the State and County forestry reviews and must be reviewed under the Commission's "due consideration" standard. OneEnergy asserted that the General Assembly did not intend for CPCNs to strictly comply with the FCA based upon the exception set forth in NR § 5-1602(b)(5), but rather that the Commission utilize the relaxed "due consideration" standard in NR § 5-1603(f).²¹¹ The Applicant noted that the due consideration standard provides the Commission significant discretion. OneEnergy argued that if PPRP's position requiring full compliance with local forest conservation ordinances were adopted, it would eliminate the benefit of having one clearinghouse, the Commission, for all permitting issues and would effectively subject applicants to FCA requirements in each of Maryland's 24 jurisdictions.²¹²

Based upon the premise that CPCNs are exempt from the FCA, but are subject to the Commission's due consideration review, the Applicant next addressed what it viewed as the two conditions precedent for the exception in NR § 5-1602(b)(5)(i-ii) to apply. First, OneEnergy noted that the minimization of the loss of forest is not at issue because no trees are being impacted.²¹³ The second step requires the Commission to determine, pursuant to NR § 5-1603(f) "whether, after 'due consideration' of the minimization of forest loss, afforestation and reforestation,

²¹¹ *Id.* at 9.

²¹² *Id.* at 10-11.

²¹³ *Id.* at 14.

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forestry-related requirements are appropriate based on the specific facts of these projects."²¹⁴ The Applicant noted that only afforestation should be considered.

OneEnergy emphasized that the Commission should consider the Project's limited impact on the environment and its uncontested State-wide environmental benefits. Additionally, the Applicant argued that PPRP has not recommended, and the Commission has not imposed, forestry obligations on previous solar projects, and that PPRP did not provide any distinguishing factors that would require the imposition of such conditions on this Project.²¹⁵ OneEnergy stated that PPRP failed to provide a basis to support its departure from previous cases, noted that PPRP simply adopted the County's position without an independent review and gave no consideration to the facts of the particular Project.²¹⁶

The Applicant noted the lack of uniformity of county forest conservation ordinances across the State and pointed out that the only viable compliance option is the payment in-lieu-of option which would have a material impact on the Project. OneEnergy also highlighted PPRP's failure to timely inform the Applicant that it intended to recommend full FCA compliance despite being on notice that OneEnergy believed the Project was exempt.²¹⁷

²¹⁴ *Id.*

²¹⁵ *Id.* at 15.

²¹⁶ *Id.* at 16-17.

²¹⁷ *Id.* at 20.

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OneEnergy highlighted the Project's limited impacts and environmental benefits favored not imposing any forestry-related conditions. Specifically, the Applicant noted that the temporary nature of the Project, the planned restoration of the property to its original state, the State's "solar carve out," and the Greenhouse Gas Emissions Act in 2009 all weigh in favor of not imposing afforestation requirements on this Project.²¹⁸ However, if afforestation conditions are imposed, OneEnergy opined that the added cost "could easily tip the scale again [sic] developing otherwise viable projects".²¹⁹ Finally, OneEnergy argued that if any forestry-related conditions are imposed, the Commission should rely upon the alternative proposed by OneEnergy.²²⁰

OneEnergy also asserted a preemption argument to the County's FCO. The Applicant took issue with PPRP's contention that since the County's FCO did not contain an exception for CPCNs, full compliance was required even with the exception set forth in NR § 5-1602(b)(5).²²¹ The Applicant argued that the issuance of a CPCN would preempt a County forest conservation program and ordinances.²²² OneEnergy stated PPRP's position would effectively give the County superior authority over the Commission in the CPCN process "eviscerating the Commission's singular responsibility for

²¹⁸ *Id.* at 21-23

²¹⁹ *Id.* at 23.

²²⁰ *Id.* at 24.

²²¹ *Id.* at 11.

²²² *Id.* at 12.

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power plant permitting."²²³ OneEnergy contended that inclusion of the "due consideration" language in NR § 5-1603(f) by the General Assembly is evidence that it intended that the CPCN process would preempt local forest conservation ordinances.

In its Joint Reply Brief, the Applicant indicated that only two options, no FCA obligations or modified compliance, are possible and that PPRP failed to meet its burden to demonstrate the reasonableness of its proposed FCA condition. First, OneEnergy argued that PPRP placed the burden on the Applicant to demonstrate that the Project's benefits outweigh FCA compliance.²²⁴ Next, OneEnergy argued that the Commission has not applied the balancing test set forth in Case No. 9318, Order No. 86372, to a solar CPCN case. Rather, OneEnergy agrees with Staff that the FCA obligation should be treated with due consideration and in the same manner as any issues raised in CPCN cases.²²⁵ OneEnergy also argued that the standard relied upon by PPRP, which presumes full afforestation is required, is without support. The Applicant indicated that the siting of a project is not relevant to whether afforestation requirements should be imposed on a solar project that does not impact any trees.²²⁶

OneEnergy also argued that there is no evidence supporting PPRP's full compliance recommendation. The Applicant stated

²²³ *Id.*

²²⁴ Applicants' Jt. Reply Brief at 2-3.

²²⁵ *Id.* at 3.

²²⁶ *Id.* at 4.

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that PPRP and the County's witnesses, who relied upon "circular logic that presumes the only possible recommendation to the Commission is full compliance with the exact terms of the FCA as implemented locally,"²²⁷ failed to state why full compliance was reasonable and could not articulate the "due consideration" standard.²²⁸ According to OneEnergy, this demonstrated that PPRP failed to carry its burden related to the recommended FCA condition.

The Applicant reiterated that the record supports no FCA obligations being imposed, citing the temporary nature of the Project, the resulting environmental benefits and the material financial impact of the payment-in-lieu-of compliance obligations. The Applicant stated that the Project site will be "managed and provide benefits in ways that they would have not otherwise absent the project[]," and there is no evidence the Project will exist past the initial lease term.²²⁹ Next, OneEnergy touted Maryland's solar RPS and stated that full FCA compliance runs counter to legislative intent as it will increase electricity costs, produced by RPS-eligible sources, to consumers.²³⁰ Additionally, the Applicant stated that the Project will offer similar carbon mitigation effects, such as planting trees or placing existing

²²⁷ *Id.* at 5, citing Staff's Initial Brief (Case No. 9387) at 6.

²²⁸ Applicants' Jt. Reply Brief at 6-9.

²²⁹ *Id.* at 10-11.

²³⁰ *Id.* at 11.

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trees into an easement, as well as addressing nutrient and sediment issues through permitting prior to construction.²³¹

OneEnergy also contested PPRP's argument that other mitigation, either on-site or off-site, could have been identified had the Applicant coordinated earlier with the Counties. The Applicant argued that PPRP ignored the coordination with the Counties prior to filing the CPCN applications, as well as OneEnergy's and the Counties' reliance upon previous Commission decisions that did not impose FCA-related conditions.²³² OneEnergy stated it explored other compliance options only after PPRP determined full FCA compliance was required.²³³ The Applicant also indicated that payment-in-lieu-of is the only viable option and will have a material impact on the Project.

Finally, OneEnergy averred that its alternate compliance proposal was reasonable and agreed that it has the burden to prove its reasonableness. The Applicant argued that as the parties agree the Commission has final say over the FCA, the alternative compliance option would provide guidance for future cases, while still requiring coordination with the respective county to find a compliance option other than payment in-lieu-of.²³⁴ OneEnergy noted that acceptance of PPRP's position would suggest that the Commission would always require full FCA compliance, and that these

²³¹ *Id.*

²³² *Id.* at 13.

²³³ *Id.*

²³⁴ *Id.* at 15.

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cases, Case Nos. 9387 and 9392, represent an opportunity to streamline solar projects, rather than subject projects to FCA requirements for 24 jurisdictions.²³⁵

The Applicant acknowledged that its impervious surface calculation is not set forth in the FCA, but that the Commission could still consider it under the "due consideration" standard. According to OneEnergy, the impervious surface alternative would incentivize "developers to maintain as much pervious surface as possible, maintaining and even enhancing soil quality and wildlife habitat."²³⁶ It concluded that the same factors that support no compliance also support the alternative compliance option.

B. PPRP

First, PPRP argued that OneEnergy "has the burden to demonstrate that the benefits of its proposed project ... outweigh the societal and environmental costs of siting it where it is proposed."²³⁷ According to PPRP, the Applicant must demonstrate the benefits of siting the Project in Somerset County outweigh the FCA afforestation requirements, and if not, the Commission must determine the appropriate licensing conditions to ensure conformance with the public convenience and necessity.²³⁸

²³⁵ *Id.* at 15-16.

²³⁶ *Id.* at 16.

²³⁷ PPRP's Initial Brief at 3, citing *In Re Dominion Cove Point LNG, LP*, 105 Md. P.S.C. 228, 256 (2014).

²³⁸ PPRP's Initial Brief at 3.

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PPRP claimed that OneEnergy asserted the same position in this case as it did in Case No. 9387, but failed to provide facts specific to this Project for an exception to the FCA requirements.²³⁹ While PPRP acknowledged the societal, environmental and economic benefits of the project, it asserted that those "limited benefits do not obviate the statutory requirement to consider a project's benefits as weighed against the relevant statutory factors to be considered in any CPCN case, which in this case includes the FCA, local government recommendations, and the environmental and ecological benefits derived from FCA compliance."²⁴⁰

PPRP also asserted that the Commission should disregard OneEnergy's argument that the Project is "too temporary or too pervious to merit FCA compliance."²⁴¹ Instead, PPRP called for a consistent State-wide approach for FCA mitigation.²⁴² It claimed the proposed FCA mitigation condition was both reasonable and appropriate, as well as being consistent with the County's position.

PPRP dismissed OneEnergy's alternative afforestation compliance proposal, that payment in-lieu-of afforestation would be tied to a 1:1 ratio based upon the Project's pervious surface for the same reasoning set forth in its Case No. 9387 Initial Brief.

²³⁹ *Id.* at 3-4. (citations omitted)

²⁴⁰ *Id.* at 4.

²⁴¹ *Id.* (citations omitted)

²⁴² *Id.* at 5.

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PPRP averred the alternative proposal was unsupported by the record and premature as it was provided "prior to any significant amount of coordination with Somerset County or investigation of mitigation options for its Ibis project."²⁴³

Furthermore, PPRP claimed the alternative proposal ignored the County's preference for either on-site or off-site mitigation, and would effectively substitute the Commission's judgment for the County's in terms of what mitigation options should be implemented. In support of that claim, PPRP noted that the record demonstrated that options exist for OneEnergy to comply with the afforestation requirements through placing on-site trees into a long-term protection agreement, off-site mitigation banks, purchasing land to either plant trees or place existing trees into a long-term protection agreement.²⁴⁴ Additionally, PPRP argued that the Applicant's proposed calculation was not relevant to FCA compliance and ignored the manner in which FCA compliance is determined by the FCA and local land use ordinances.²⁴⁵

In its Joint Reply Brief, PPRP stated that if the FCA is applicable to solar generating stations, the primary issue is what due consideration to the FCA should be given by the Commission. PPRP noted some agreement between the parties regarding the applicability of the FCA, in that the Commission has discretion on

²⁴³ *Id.* 6. (citations omitted)

²⁴⁴ *Id.* at 7-8, citing Somerset Ex. 1 at 3.

²⁴⁵ PPRP's Initial Brief at 8-9.

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the application of the FCA.²⁴⁶ PPRP argued that NR § 5-1603(f) "applies to all CPCN applicants seeking to build an electric generating station, ..." and that there were no balancing tests or references to a specific type of generating station, *i.e.*, solar, in the FCA.²⁴⁷

PPRP asserted that the Commission's due consideration must be based upon substantial evidence. Specifically, in order to deviate from PPRP's recommended licensing condition, the record of the case must support such a decision; otherwise, it would be arbitrary and capricious.²⁴⁸ PPRP continued to recommend the Commission accept the recommended FCA condition, and asserted that OneEnergy's alternative proposal does not warrant serious consideration.

PPRP acknowledged its previous errors in the application of the FCA, but questioned OneEnergy's assertion that the FCA recommendation was last minute. PPRP referred to the Applicant's acceptance of the draft licensing conditions in Case No. 9387 that required consultation with the County to determine afforestation and reforestation requirements.²⁴⁹

PPRP also dismissed Staff's Solomonic recommendation as baseless and lacking support in the record.²⁵⁰ Similarly, PPRP stated that OneEnergy's alternative proposal should be rejected as

²⁴⁶ PPRP's Jt. Reply Brief at 2-3.

²⁴⁷ *Id.* at 3.

²⁴⁸ *Id.* at 4.

²⁴⁹ *Id.* at 5-6.

²⁵⁰ *Id.* at 7.

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unsupportive of the concept of afforestation. It argued that OneEnergy's assertion that the Project site, with all of the solar panels and supporting facilities, will support the growth of trees was not credible.²⁵¹ PPRP argued that OneEnergy's alternative proposal was arbitrary and lacked support in both the FCA and the applicable County ordinances.²⁵²

C. Staff

In its Initial Brief, Staff argued that while the Project is not exempt from the FCA, it is entitled to an exception. It noted that the Commission was required to give "due consideration" to forest conservation requirements prior to issuing CPCNs and that the PULJ and Commission have the discretion to determine what actions are required, if any, to comply with the FCA.²⁵³

Staff focused on the broad discretion provided the Commission in the statute based upon the "due consideration" and previous decisions. Staff argued that the County's FCO was "virtually impossible to interpret, and did not mention generating stations."²⁵⁴ Staff presumed the FCO's intent was to require generating stations to be subject to the FCO, and if the presumption was correct, it was beyond the County's powers to enact and enforce such an ordinance because it conflicted with both the

²⁵¹ *Id.* at 7-8.

²⁵² *Id.* at 8.

²⁵³ Staff's Initial Brief at 3.

²⁵⁴ *Id.* at 5.

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Commission's authority over CPCNs and the exception within the FCA.²⁵⁵ Despite its concerns with the FCO, Staff indicated that the County has the opportunity to support its proposal, either with PPRP or on its own; however, neither the FCA nor FCO mandates the Commission adopt a full compliance approach.²⁵⁶

Staff criticized PPRP's interpretation of the statute that the Project could not meet the requirements to be excepted/exempted, that the FCA exception only applied to projects with CPCNs prior to 1991, and even if a CPCN could be obtained prior site approval, full FCA compliance would still be required pursuant to the Commission's "due consideration."²⁵⁷ According to Staff, PPRP's position, in conjunction with the County's FCO, which lacks a generation station exemption, renders the FCA exception meaningless.²⁵⁸

Staff maintained that pursuant to NR § 5-1603(f), the Commission must "give due consideration 'to the need to minimize the loss of forest and the provisions of afforestation and reforestation' when considering all applications for a CPCN pursuant to its statutes."²⁵⁹ According to Staff, "due consideration" does not mean full compliance or complete exemption. It relies upon the "due consideration" the Commission must give to

²⁵⁵ *Id.* at 6.

²⁵⁶ *Id.* at 7.

²⁵⁷ *Id.* at 8.

²⁵⁸ *Id.* at 9.

²⁵⁹ *Id.* at 10.

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all issues in PUA § 7-207, and suggests the Legislature intended the Commission to treat the FCA in the same manner.²⁶⁰

Based upon the record, Staff proposed a compromise between OneEnergy and PPRP's positions. Staff noted the State's policies to promote the development of solar energy, and forest conservation and afforestation, and the unreasonableness of choosing one over the other based on the record.²⁶¹ Therefore, Staff recommended a payment in-lieu-of in the amount of \$44,105, the mid-point between OneEnergy and PPRP.

In its Joint Reply Brief, Staff stated that all three parties agreed that the Commission has the final authority to determine what, if any, forestry-related conditions can be imposed pursuant to NR § 5-1603(f).²⁶² Staff argued that the record is sufficient for the Commission to give "due consideration" to the need to minimize the loss of forest, and the afforestation and reforestation requirements.²⁶³ Staff continued to recommend the mid-point between the Applicant and PPRP with a condition that OneEnergy be required to pay a fee in-lieu-of \$44,105.

IV. Applicable Law

This application was filed pursuant PUA §§ 7-207 and 7-208. Pursuant to PUA § 7-207(e), the Commission shall take

²⁶⁰ *Id.* at 10-11.

²⁶¹ *Id.* at 13.

²⁶² Staff's Jt. Reply Brief at 2-3.

²⁶³ *Id.* at 3.

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action on an application for a CPCN only after due consideration of the followings factors:

(1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station, overhead transmission line, or qualified lead line is proposed to be located; and

(2) the effect of the generating station, overhead transmission line, or qualified lead line on:

(i) the stability and reliability of the electric system;

(ii) economics;

(iii) esthetics;

(iv) historic sites;

(v) aviation safety as determined by the Maryland Aviation Administration and the administrator of the Federal Aviation Administration;

(vi) when applicable, air and water pollution; and

(vii) the availability and means for the required timely disposal of wastes produced by any generating station.

Pursuant to PUA § 7-208(g)(1), the Commission shall include in the certificate it issues the requirements of the federal and State environmental laws and standards that are identified by the Department of the Environment, and the methods

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and conditions that the Commission determines are appropriate to comply with those environmental laws and standards.²⁶⁴

Natural Resources Article ("NR"), *Annotated Code of Maryland*, §§ 5-1601-1613 make up Maryland's FCA. NR § 5-1602(a) states, "Except as provided in subsection (b) of this section, this subtitle shall apply to any public or private subdivisions plan or application for a grading or sediment control permit by any person, including a unit of State or local government on areas 40,000 square feet or greater."

NR § 5-1602(b) states, in pertinent part:

The provisions of this subtitle do not apply to: ... (5) The cutting or clearing of public utility rights-of-way or land for electric generating stations licensed pursuant to § 7-204, § 7-205, § 7-207, or § 7-208 of the Public Utilities Article, provided that:

(i) Any required certificates of public convenience and necessity have been issued in accordance with § 5-1603(f) of this subtitle; and

(ii) The cutting or clearing of the forest is conducted so as to minimize the loss of forest;

NR § 5-1603(a)(1) states, "A unit of local government having planning and zoning authority shall develop a local forest conservation program, with the intent, requirements, and standards of this subtitle."

²⁶⁴ In addition, the Commission may not adopt any method or condition under these provisions that the Department of the Environment determines is inconsistent with federal and State environmental laws and standards. PUA § 7-208(g)(2).

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NR § 5-1603 (a)(2) states, "By April 30, 1992 all units of government with planning and zoning authority shall submit a proposed forest conservation program, which meets or is more stringent than the requirements and standards of this subtitle, to the Department for its review and approval."

NR § 5-1603(f) states:

After December 31, 1992, the Public Service Commission shall give due consideration to the need to minimize the loss of forest and the provisions of afforestation and reforestation set forth in this subtitle together with all applicable electrical safety codes, when reviewing applications for a certificate of public convenience and necessity issued pursuant to § 7-204, § 7-205, § 7-207, or § 7-208 of the Public Utilities Article.

NR 5-1601(b) defines "afforestation" as "the establishment of a tree cover on an area from which it has always or very long been absent, or the planting of open areas which are not presently in forest cover."

The County's FCO § 3.1 states:

Except as provided in Section 3.2 of this article, this ordinance applies to:

- A. Site plan review, subdivision, project plan, grading, or sediment control approval on an area of land 40,000 square feet or greater after the effective date of this ordinance.
- B. A public utility not exempt under Section 3.2(D), (E), and (G) of this article;

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- C. Any unit of Somerset County government making an application for a site plan review, project plan, grading, or sediment control approval on an area of land 40,000 square feet or greater.²⁶⁵

FCO § 3.2 states, in pertinent part:

This ordinance does not apply to: ...

- D. Linear projects not regulated under Article 78, §§ 54A and 54B or § 54I, Annotated Code of Maryland, if the activity:

- (1) Does not result in the cumulative clearing of more than 20,000 square feet of forest; and,
- (2) Does not cut or clear forests subject to a Forest Conservation Plan as enumerated herein; and,
- (3) Is the subject of a declaration of intent as provided for in Section 3.3 of this ordinance.

- E. Routine maintenance or emergency repairs of public utility rights-of-way ...

- G. The construction and maintenance of water and sewage treatment facilities and County landfills²⁶⁶

V. Analysis

A. Evolution of PPRP's FCA Condition

In the past, projects similar to OneEnergy's have not been controversial, with applicants typically agreeing to the

²⁶⁵ Somerset Ex. 2 at 8-9.

²⁶⁶ *Id.* at 9-10.

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conditions recommended by PPRP and Staff and many, if not all, cases resulting in a settlement. In this case, the parties are in agreement with all of PPRP and Staff's proposed licensing conditions, with the exception of the recommended forest mitigation requirements. The PPRP condition at issue states:

2. Construction and operation of the solar facility shall be undertaken in accordance with this certificate and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following: ...

(e) Forest Conservation - Maryland's Forest Conservation Act (FCA), Md. Code, Sections 5-1602(b)(5) and 5-1603 of the Natural Resources Article. Consistent with Somerset County ordinances implementing the FCA, OneEnergy Blue Star shall provide for 6.8 acres of mitigation.²⁶⁷

This particular condition, requiring a specified amount of mitigation, is new and has been evolving over recent solar cases.

A brief discussion of the evolution of PPRP's position is warranted. In previous solar CPCN cases, such as Case No. 9370, PPRP recommended the following licensing condition:

2. Construction and operation of the Project shall be undertaken in accordance with this CPCN and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following: ...

e. Forest Conservation - Maryland's Forest Conservation Act, Md. Code,

²⁶⁷ PPRP Ibis Ex. 2.

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Sections 5-1602(b)(5) and 5-1603 of the
Natural Resources Article.²⁶⁸

In that case, PPRP's ERD indicated, "the Project, as proposed would not require clearing of any trees, and thus will have no need for mitigation under Maryland Forest Conservation Act."²⁶⁹ The applicant did not contest it and the Commission imposed the general condition.²⁷⁰ PPRP's general condition, imposed most recently in December 2015,²⁷¹ is extremely broad, fails to actually address what an applicant is required to do, if anything, to comply with the FCA.

In Case No. 9383, PPRP recommended, and the Commission included, the following FCA licensing condition:

2. Construction and operation of the Project shall be undertaken in accordance with this CPCN and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following: ...

²⁶⁸ See *In the Matter of the Application of OneEnergy Dorchester, LLC for a Certificate of Public Convenience and Necessity to Construct a 15.5 MW Solar Photovoltaic Generating Facility in Dorchester County, Maryland*, Case No. 9370, Order No. 87012, slip op. at Appx. A, p. 1-2 (dated May 8, 2015).

²⁶⁹ Order No. 87012, slip op. at 6.

²⁷⁰ *Id.* at Appx. A at 2.

²⁷¹ *In the Matter of the Application of Great Bay Solar I, LLC for a Certificate of Public Convenience and Necessity to Construct a 150.0 MW Solar Photovoltaic Generating Facility in Somerset County, Maryland*, Case No. 9380, Order No. 87321, slip op. at Attch. 1 at 2 (dated December 15, 2015). In Case No. 9380, PPRP determined that some tree removal might be necessary, requiring mitigation pursuant to the FCA. Order No. 87321 at 14-15. Although PPRP noted that it discovered that it had misinterpreted the FCA in Case No. 9380, it still imposed its general condition and did not change it until Case No. 9383. Tr. 80-82 (9387).

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(e) Forest Conservation - Maryland's Forest Conservation Act, Md. Code Sections 5-1602(b)(5) and 5-1603 of the Natural Resources Article, by seeking information from Queen Anne's County as to any afforestation, reforestation or mitigation requirements that may apply to the Project. OneEnergy Sunfish shall provide the PSC and PPRP a copy of the information provided by the County.²⁷²

Like its predecessor, this requirement provides no guidance as to whether, and to what extent, the FCA applies to the respective project.

The condition's next iteration occurred in Case No. 9387 as part of PPRP's initial recommended licensing conditions filed on December 1, 2015. Specifically, PPRP recommended the following condition:

2. Construction and operation of the Project shall be undertaken in accordance with this CPCN and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following: ...

(e) Forest Conservation - Maryland's Forest Conservation Act, Md. Code, Sections 5-1602(b)(5) and 5-1603 of the Natural Resources Article. OneEnergy Blue Star shall consult with Kent County to determine the County's requirements for any afforestation, reforestation or mitigation that may apply to the Project. OneEnergy Blue Star shall provide the PSC and PPRP with a copy of the information provided by the County.

²⁷² In the Matter of OneEnergy Sunfish Solar, LLC, for a Certificate of Public Convenience and Necessity to Construct a 6.0 MW Solar Photovoltaic Generating Facility in Queen Anne's County, Maryland, Case No. 9383, Order No. 87380, slip op. at Appx. A at 1 (dated December 22, 2015).

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Prior to construction, OneEnergy Blue Star shall also file in this docket a document specifying each requirement identified by Kent County and how OneEnergy Blue Star plans to address each county requirement identified.²⁷³

While this condition was more detailed, it still lacked any real precision. It was not until January 21, 2016 that PPRP specified the extent that the FCA would apply in Case No. 9387 by explicitly requiring 5.3 acres of mitigation.²⁷⁴

In this case, OneEnergy's reliance upon previous Commission decisions, based upon PPRP's recommended forestry conditions, is understandable. PPRP witness Sherwell testified that PPRP had never exempted a project from the FCA, but erroneously did not require mitigation on some projects.²⁷⁵ This is a distinction without a difference. When PPRP did not require any mitigation, it effectively removed compliance with the FCA as a licensing condition. Whether PPRP explicitly exempted a project or did not require mitigation is inconsequential, as the impact was the same. For OneEnergy, or any other CPCN applicant, to rely upon previous PPRP FCA positions should have been expected by PPRP as it is evident that similar projects had not been required to meet any FCA afforestation requirements, if no tree removal was intended.

²⁷³ *In the Matter of the Application of OneEnergy Blue Star Solar, LLC for a Certificate of Public Convenience and Necessity to Construct a 6.0 MW Solar Photovoltaic Generating Facility in Kent County, Maryland, Case No. 9387, Docket Entry 26, ML 178924 - Initial Recommended Licensing Conditions.*

²⁷⁴ Case No. 9387, Docket Entry 41, ML 182764 - Revised Recommended Licensing Conditions.

²⁷⁵ PPRP Ibis Ex. 4 at 2.

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PPRP's claim that OneEnergy should not have been surprised by the forest mitigation recommendation is also unfounded.²⁷⁶ PPRP relied upon OneEnergy's acceptance of the initial recommended conditions in Case No. 9387 which only required the Applicant to consult with the County "to determine the County's requirements for any afforestation, reforestation or mitigation."²⁷⁷ As previously noted, that condition was vague and did not indicate whether any reforestation or afforestation would actually be required, nor did it specify that PPRP was supporting Kent County's position. Therefore, it was not unreasonable that OneEnergy agreed to the initial condition in Case No. 9387, or that it anticipated a similar condition would be proposed by PPRP in this proceeding.²⁷⁸

B. Applicability of the FCA and/or FCO

First, it must be decided whether the FCA and/or the FCO apply to this Project, not whether the NR § 5-1602(b)(5) exception applies to the Project.²⁷⁹ When determining the meaning and intent of a statute, the Maryland Court of Appeals stated, "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature."²⁸⁰ In interpreting a statute, one must begin with "the plain language of the statute, and ordinary,

²⁷⁶ See PPRP's Jt. Reply Brief at 5.

²⁷⁷ Case No. 9387, Docket Entry 26, ML 178924 - Initial Recommended Licensing Conditions.

²⁷⁸ See ML 179144, Docket Entry 29, and ML 179311, Docket Entry 30.

²⁷⁹ As Staff noted, there is no exemption in the FCO for generating stations.

²⁸⁰ *Kushell v. Dep't of Natural Resources*, 385 Md. 563, 576, 870 A.2d 186, 193 (2005). (citations omitted)

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popular understanding of the English language dictates interpretation of its terminology."²⁸¹ Furthermore, "[a] court may neither add nor delete language so as to reflect an intent not evidenced in the plain and unambiguous language of the statute; nor may it construe the statute with forced or subtle interpretations that limit or extend its application."²⁸²

If the language of the statute is unambiguous as construed, "according to its ordinary and everyday meaning, then we give effect to the statute as it is written."²⁸³ In that case:

[i]f there is no ambiguity in that language, either inherently or by reference to other relevant laws or circumstances, the inquiry as to legislative intent ends; we do not need to resort to the various, and sometimes inconsistent, external rules of construction, for "the Legislature is presumed to have meant what it said and said what it meant."²⁸⁴

The Maryland Court of Appeals has also stated, "the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim, or policy of the Legislature in enacting the statute."²⁸⁵

²⁸¹ *Id.* (citations omitted)

²⁸² *Id.* at 576-577, 870 A.2d at 193, quoting *Price v. State*, 378 Md. 378, 387, 835 A.2d 1221, 1226 (2003); *County Council v. Dutcher*, 365 Md. 399, 416-417, 780 A.2d 1137, 1147 (2001).

²⁸³ *Kushell* at 577, 870 A.2d at 193, citing *Collins v. State*, 383 Md. 684, 688-89, 861 A.2d 727, 730 (2004).

²⁸⁴ *Kushell* at 577, 870 A.2d at 193-194, citing *Arundel Corp. v. Marie*, 383 Md. 489, 502, 860 A.2d 886, 894 (2004), quoting *Witte v. Azarian*, 369 Md. 518, 525, 801 A.2d 160, 165 (2002).

²⁸⁵ *Williams v. Peninsula Reg'l Med. Ctr.*, 440 Md. 573, 580-81, 103 A.3d 658, 663 (2014), quoting *Lockshin v. Semsker*, 412 Md. 257, 275-76, 987 A.2d 18, 28-29 (2010).

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However, the analysis is different if the statute is ambiguous. In that situation, "courts consider not only the literal or usual meaning of the statutory language, but also their meaning and effect in light of the setting, the objectives and purpose of the enactment."²⁸⁶

Interestingly, none of the parties directly addressed whether the statute or ordinance applies to this issue in briefs, but PPRP witness Honeczy specifically referenced the applicability of the FCA in her oral testimony.²⁸⁷ As previously noted, NR § 5-1602(a) states, "Except as provided in subsection (b) of this section, *this subtitle shall apply to any public or private subdivisions plan or application for a grading or sediment control permit* by any person, including a unit of State or local government on areas 40,000 square feet or greater." (emphasis added) Under the plain reading of the statute, the FCA applies to subdivision plans, and there is no indication in the record that the property is being subdivided for this Project.²⁸⁸ Therefore, the FCA can only apply to this Project if grading or sediment control permit applications have been filed.

OneEnergy indicated that it has yet to file either its grading or sediment control permit applications, which are not

²⁸⁶ *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 75, 517 A.2d 730, 732 (1986). (citations omitted)

²⁸⁷ See Tr. 117-118 (9387).

²⁸⁸ NR § 5-1601(mm) defines "Subdivision" as "any division of a parcel of land into 2 or more lots or parcels for the purpose, whether immediate or future, of transfer of ownership, sale, lease, or development."

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typically submitted until the site plan has been approved.²⁸⁹ Since OneEnergy has not filed either a subdivision plan or an application for a grading or sediment control permit, under the plain reading of NR § 5-1602(a), the FCA would not apply to this Project at this point in time.²⁹⁰

The FCO's application provision is broader than the FCA and specifically includes "site plan review."²⁹¹ OneEnergy confirmed that on October 15, 2015, it filed its site plan for initial review, and on February 19, 2016, a revised site plan was filed with the County.²⁹² Therefore, the FCO applies to the Project even though the FCA does not.

Given this finding and the fact that the FCO has no CPCN-related exemption, it is unnecessary to address whether NR § 5-1602(b)(5) is applicable to this project or if the Commission may exercise "due consideration" in accordance with NR § 5-1603(f). NR § 5-1602, entitled "Application of Subtitle," subsection (a) states, in pertinent part, "Except as provided in subsection (b) of this section, this *subtitle shall apply*" Since the Project falls outside of the FCA because OneEnergy has yet to file a grading or sediment control permit application, the *entire subtitle*, NR §§ 5-1601-1613, would not be applicable, thereby removing the "due consideration" of NR § 5-1603(f).

²⁸⁹ Commission Ex. 1.

²⁹⁰ The FCA would apply as soon as OneEnergy filed an application for a grading or sediment control permit with the County, which it intends to do after the Project receives site plan approval. Ibis Ex. 2 at 16-17.

²⁹¹ Somerset Ex. 2 at 9.

²⁹² Commission Ex. 1.

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C. Is the County's FCO Preempted by the Commission's CPCN Authority?

In light of the finding that the FCO applies to the Project, as well as OneEnergy and Staff's claims that the FCO is preempted by the Commission's CPCN authority, it must be determined whether the Commission's CPCN authority preempts the FCO. The Applicant argued that this Order will preempt the FCO, while Staff asserted that the FCO conflicts with the Commission's CPCN authority because the FCO subjects generating stations to forest conservation requirements by not having a specific exemption for CPCNs similar to NR § 5-1602(b)(5).

Maryland courts have held that preemption by a State law of a local ordinance can occur in one of three ways: preemption by conflict; express preemption; or implied preemption.²⁹³ Conflict preemption occurs when a local ordinance "prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law."²⁹⁴ In this case, neither of those scenarios exist. The FCO is simply more restrictive than the State's FCA, which is specifically permitted by NR § 5-1603(a)(2). The FCO does not prohibit anything permitted by either the FCA or PUA, nor does it permit something either the FCA or PUA prohibit. While the FCO does not contain an exemption for CPCNs, that does not equate to a prohibition. Thus, no conflict preemption exists.

²⁹³ *Talbot County v. Skipper*, 329 Md. 481, 487-88, 620 A.2d 880, 883 (1993). (citations omitted)

²⁹⁴ *Id.* at 487, n. 4, 620 A.2d at 882, n. 4. (citations omitted)

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Next, "[e]xpress preemption occurs when the General Assembly by statutory language prohibits local legislation in a field."²⁹⁵ The exact opposite is true in this case. Even though the Commission has broad authority over CPCNs, the General Assembly mandated counties to create their own forest conservation ordinances and permitted those ordinances to be more stringent than the FCA. The Legislature also did not place specific limitations on those ordinances, such as mandating the inclusion of all of the FCA's exceptions.²⁹⁶ If the General Assembly intended to provide total authority over CPCNs, it could have elected to do so.

Finally, in relation to implied preemption, the Maryland Court of Appeals stated, "Generally, state law preempts by implication local law where the local law 'deal[s] with an area in which the [State] Legislature has acted with such force that an intent by the State to occupy the entire field must be implied.'"²⁹⁷ In a CPCN-related case, the Court of Appeals stated, "[t]he primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field."²⁹⁸ The Court determined that "the General Assembly intended to grant broad powers to the PSC to execute its principle duty of assuring adequate electrical service state-

²⁹⁵ *East Star, LLC v. County Comm'rs of Queen Anne's County*, 203 Md. App. 477, 485, 38 A.3d 524, 528 (2012). (citations omitted)

²⁹⁶ See NR § 5-1603(a)(1-2).

²⁹⁷ *Talbot County* at 488, 620 A.2d at 883, quoting *County Council v. Montgomery Ass'n*, 274 Md. 52, 59, 333 A.2d 596, 600 (1975).

²⁹⁸ *Howard County v. Potomac Elec. Power Co.*, 319 Md. 511, 523, 573 A.2d 821, 828 (1990), quoting *Board v. Harker*, 316 Md. 683, 696-697, 561 A.2d 219, 226 (1989).

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wide ..." and that "§54A states with particularity that the PSC shall have final authority over the granting of construction permits for overhead transmission lines in excess of 69,000 volts."²⁹⁹

In *Re Potomac Edison Co.*, the Commission stated, "We hold that the Commission's overarching authority to *site transmission lines* includes the location, specifications and conditions of substations that are integral to a proposed transmission line project that requires a CPCN."³⁰⁰ The Commission specified that there could be limits to its local siting authority, stating, "We expressly do not hold that our CPCN authority supersedes local siting authority for all electric substations, but only as to substations or other elements integral to proposed transmission line projects that are subject to our CPCN authority."³⁰¹

I disagree with OneEnergy's assertion that the FCO would be preempted by a Commission Order in this case. OneEnergy stated that giving the FCO "supremacy over the Commission's order in Case 9392 'would sanction an authority superior to that of the PSC'"³⁰² and "would eliminate a primary benefit of the CPCN process by eviscerating the Commission's singular responsibility for power plant permitting."³⁰³

²⁹⁹ *Howard County* at 524, 573 A.2d at 828 (footnote omitted).

³⁰⁰ *Re Potomac Edison Co. on behalf of PATH Allegheny Transmission Co.*, 100 Md. P.S.C. 276, 282 (2009). (emphasis added)

³⁰¹ *Id.* at 284. (emphasis added)

³⁰² Applicant's Jt. Initial Brief at 12, quoting *Howard County*, 319 Md. at 529, 573 A.2d at 830.

³⁰³ Applicant's Jt. Initial Brief at 12.

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The case cited by OneEnergy involved the siting of a transmission line and the potential impacts of local zoning laws. The Court of Appeals found that Howard County and Montgomery County were attempting to regulate the same subjects as the Commission, which is not occurring this case.³⁰⁴ For example, the Court noted that the ordinances:

require a showing of a 'public necessity' or 'need' for the construction, ...; require that the local authorities consider potential impacts on esthetic qualities, either architectural or historic, ...; require minimization of impacts on the environment or character of the surrounding areas ...; Montgomery County requires a consideration of aviation hazards; ... [b]oth counties require assessment of other more specific considerations toward granting a special exception.³⁰⁵

The Court noted that all of these factors were within the Commission's jurisdiction and were considered in CPCN cases.³⁰⁶ The Court also stated:

a local governing body that has the power to altogether exclude from its jurisdiction a transmission line which provides electrical service statewide is essentially regulating the public utility in a manner that may be antithetical to the interests of the rest of

³⁰⁴ Howard County, 319 Md. at 527, 573 A.2d at 830.

³⁰⁵ Id.

³⁰⁶ Id. at 527, 573 A.2d at 829.

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the state. The legislature could not possibly have intended this result.³⁰⁷

Unlike the referenced transmission line cases, there is no indication that the Legislature intended to have the Commission regulate *all* aspects of CPCNs, a point noted by the Commission in *Re Potomac Edison Co.*³⁰⁸ In relation to the siting of a substation for a transmission line, the Commission stated, "Our CPCN authority wins out only with regard to the components of a proposed project that are integral to the transmission line itself."³⁰⁹

While the Commission has broad authority over projects like OneEnergy, it is by no means absolute. The Commission is not the "one stop CPCN shop" OneEnergy and Staff claim it to be. There are many reviews and approvals outside of the Commission's authority which are necessary and required to obtain the authority to construct a project such as a generating station. In addition to addressing all of the factors in PUA § 7-207(e)(2), applicants must also seek and obtain numerous permits, such as grading and sediment control permits, building permits, and a NPDES general permit. Additionally, projects are required to have site plans approved on a local level. There are also agreements and approvals from various agencies, such as the County's Planning and Zoning Commission, the Maryland Department of the Environment, the USACE

³⁰⁷ *Id.* at 527-528, 573 A.2d at 830.

³⁰⁸ 100 Md. P.S.C. at 284.

³⁰⁹ *Id.*

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and PJM that are required prior to construction.³¹⁰ While the Commission can issue a CPCN and require that certain things occur prior to construction, it has no authority over an applicant receiving site plan approvals, permits or interconnection agreements. These types of approvals are obtained at the local, State, federal and/or Regional Transmission Operator levels; not the Commission.

As has been noted numerous times, the Legislature explicitly required local jurisdictions to have their own ordinances, which indicates intent to give those jurisdictions authority over forest conservation-related issues. Staff cited no limitations on the restrictiveness of the FCO other than citing the Commission's overall CPCN authority. An obvious way for a county to make its forest conservation ordinance more stringent is to reduce the number of exceptions/exemptions. This is consistent with Ms. Honeczy's testimony, who discussed the origins of the FCA and its various components and was the most versed witness on the FCA in this case. She testified, "[S]ome of the counties do not have all of the exemptions listed because either they do not apply to that County, such as [the] coal mining exemption. Or others have removed others such as my understanding is if you do not have the PSC CPCN exemption listed in their ordinance."³¹¹

Another way to make a forest conservation ordinance more stringent is to cast a wider net over projects to which it will

³¹⁰ See for example Ibis Ex. 2 at 18.

³¹¹ Tr. 119 (9387).

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apply by expanding the application language, *i.e.*, including site plans. This is exactly what the County did and is why the FCO applies to the Project, and the FCA does not. The determination as to whether to impose forestry-related conditions is not a siting issue similar to a transmission line. Moreover, the proposed forest conservation licensing condition does not impact the Project's siting. In fact, some type of forestry-related mitigation, reforestation or afforestation, would be required regardless of where the Project was sited. The FCO would apply wherever the Project would be located within the County regardless of whether or not the Applicant cleared or cut trees. The only issue would be whether the condition would need to be reforestation or afforestation.

The application of the County's FCO to a solar generator is clearly not the same as the attempted application of zoning regulations to a transmission line. The application of the FCO is not obstructing the CPCN process in any way, but is one of many county-level requirements applicants must consider. Additionally, there is nothing within PUA § 7-207 that specifically requires the Commission to consider forestry-related issues. Therefore, I find that the FCO is not preempted by the PUA.

D. Burden of Proof

The burden of proof must be addressed prior to considering the options proposed by the parties as there was obvious disagreement between the Applicant and PPRP. In terms of

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the specific burden of proof, and which party bears the burden, the Commission has previously stated, "The burden is on the Applicant to demonstrate that a CPCN ... meets the public convenience and necessity [standard]."³¹² However, the burden of proof is not the sole responsibility of the applicant, as parties that seek to impose conditions on a project must also demonstrate the proposed conditions are reasonable. For example, in denying a condition recommended by DNR, the Commission found that DNR failed to meet its burden of proof related to a condition for the proposed retention of dead trees within a transmission line's right-of-way.³¹³ In other words, the party recommending a particular condition must provide adequate support, or the condition will be rejected. Therefore, the burden is on both PPRP and OneEnergy to demonstrate that their proposed FCA conditions are both reasonable and supported by the record.

OneEnergy took exception to what it considered an attempt by PPRP to impose a new burden of proof for solar CPCN applicants based upon the *Dominion Cove Point* ("DCP") CPCN case.³¹⁴ PPRP asserted that the initial burden is on OneEnergy to demonstrate that the benefits of the Project's siting outweigh compliance with the FCA and, if not, what conditions are

³¹² *Re Potomac Edison Co. dba Allegheny Power*, 97 Md. P.S.C. 239, 243 (2006) (upholding a Hearing Examiner's decision denying Allegheny Power's CPCN application for a transmission line finding that the applicant failed to meet its burden regarding statutory requirements in relation to the transmission line's route, and that there was not an immediate need for the project).

³¹³ *Re Potomac Edison Co.*, 83 Md. P.S.C. 272, 280-281 (1992).

³¹⁴ *Dominion Cove Point*, 105 Md. P.S.C. at 228.

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appropriate pursuant to PUA § 7-208(f)(1)(ii).³¹⁵ PPRP relied upon the Commission's finding in DCP related to the evaluation of the PUA § 7-207 factors, which stated, "To justify issuance of a CPCN, DCP has the burden to demonstrate that the benefits of the generating facility, including economic benefits, outweigh the environmental, safety and societal costs of siting the generating facility within the liquefaction Project in Lusby, Maryland."³¹⁶

In DCP, the applicant sought to construct a 130 MW generating station at its existing liquefied natural gas terminal site in Calvert County, Maryland.³¹⁷ DCP was significantly different than the present case as it involved "overlapping consideration by us[, the Commission,] of the Generating Station and by the FERC of the larger LNG facility."³¹⁸ The Commission specifically stated, "We have recognized the *unique circumstances of this case* as we have applied the considerations our statute requires to the facts presented by the parties and the public in their comments."³¹⁹ The Commission further stated, "Given the *unique factual and jurisdictional situation*, we conclude that the

³¹⁵ See PPRP's Initial Brief, Case No. 9387 at 8. While this burden argument was not specifically included in PPRP's Initial Brief in this case, PPRP incorporated by reference its entire Initial Brief in Case No. 9387 in the interest of judicial economy. PPRP's Initial Brief in Case No. 9392 at 2.

³¹⁶ *Dominion Cove Point*, 105 Md. P.S.C. at 256.

³¹⁷ *Id.* at 233.

³¹⁸ *Id.*

³¹⁹ *Id.* (emphasis added)

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environmental impacts of the generating facility should be evaluated as part of the entire project"³²⁰

PPRP similarly recognized DCP's uniqueness as its witnesses stated, "This Project is unlike other CPCN reviews in my experience ..." and noted the proposed generating station's location within and its importance to the larger DCP liquefaction project, which was being reviewed by the FERC.³²¹ Additionally, in terms of siting the DCP project, the potential impact on public safety of locating a 130 MW generator to be integrated with the LNG facility was a factor "[s]eparate from the delineated statutory elements in PUA § 7-207,"³²²

Any attempt to equate DCP and the standards used to evaluate that project to OneEnergy's proposed solar facility is misplaced and equates to an "apples to oranges" comparison. This solar project is extremely similar to several previously approved CPCNs, and the "DCP siting standard" was never applied. This Project does not require FERC approval and there have been no safety-related issues raised in this case. DCP also had several vigorously contested issues, such as siting, benefits of the project, pollution, and safety, whereas this case involves whether PPRP's afforestation licensing condition should be imposed.³²³

³²⁰ *Id.* at 255. (emphasis added)

³²¹ *Id.* at 235, quoting PPRP witness Susan Gray.

³²² *Id.* at 260.

³²³ *Dominion Cove Point* was appealed to the Circuit Court of Baltimore City and then to the Maryland Court of Special Appeals, with both courts affirming the Commission's decision granting the CPCN. See *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Svc. Comm'n*, 2016 WL 617328 (Md. Ct. Sp. App., February 16, 2016).

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Despite the noted differences between the cases, *DCP* was still reviewed under the PUA § 7-207 factors, as the Commission stated:

In determining if *DCP* has met its burden, the Commission must consider the factors delineated in PUA § 7-207 ... including but not limited to (1) the recommendation of the local government; (2) the effect of the generating station on the stability and reliability of the electric system; (3) economics; (4) esthetics, historic sites, and aviation safety ..., (5) air and water pollution; and (6) the availability of means for the required timely disposal of wastes produced by the generating station.³²⁴

These factors are the same factors that have been considered in previous solar cases and should continue to be used in this case. I fail to see the purpose of imposing the added burden suggested by PPRP. There is nothing in the applicable statutes that require a CPCN applicant to prove a particular site's benefits outweigh a proposed condition, such as afforestation provisions.

E. Compliance Proposals

Four options have been proposed in this case related to compliance with the FCA/FCO: full compliance (PPRP); paying one-half of the payment in-lieu-of amount recommended by PPRP (Staff); no mitigation because the Project is excepted/exempted (OneEnergy); and the alternative compliance proposal that would require FCA

³²⁴ *Dominion Cove Point*, 105 Md. P.S.C. at 256.

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compliance in relation to the Project's total amount of impervious surface (OneEnergy).

First, I agree with PPRP and cannot accept Staff's Solomonic rate case-like approach of "splitting the baby". Not only is this recommendation not supported by the record, I do not believe that simply picking the mid-point between PPRP and the Applicant's positions to be an appropriate resolution of the issue. This case, as one of first impression that will impact several other pending solar CPCN applications, requires a decision on the application of the FCA/FCO which will provide all parties with at least some form of guidance.³²⁵ While the Commission has significant discretion and authority, given my finding that the "due consideration" standard is not applicable, Staff's proposal cannot be considered.

Next, I find OneEnergy's alternative compliance option to be a novel approach and an attempt to compromise with PPRP's belated full compliance recommendation. While I understand the intent behind the Applicant's proposal, the plan has no legal justification in either the FCA or FCO. I also appreciate OneEnergy's desire to streamline the FCA compliance process for future projects; however, the General Assembly required each jurisdiction (excluding Garrett and Allegheny Counties) to have its own

³²⁵ PPRP cited 12 other cases involving solar CPCN applications and that FCA compliance is at issue in 11 of them. See PPRP's Initial Brief at 2, fn. 1. Given that my decision focused on the County's FCO, this decision may have limited value to other projects as Counties have different forest conservation ordinances, and the facts and circumstances of each case will also vary.

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forest conservation ordinance and allowed for more stringent ordinances than the FCA itself.³²⁶ The Commission may not simply ignore County ordinances to streamline this process. Applicants must familiarize themselves with the respective County ordinances, i.e., sediment control, grading, etc., which likely vary by jurisdiction, and I believe that an applicant's due diligence should naturally extend to the respective County's forest conservation ordinance. Thus, I find that OneEnergy failed to meet its burden of demonstrating the reasonableness of its condition. Short of obtaining a variance from the County, the alternative compliance plan is not a viable option for this Project.

Thus, I am left with either adopting PPRP's full compliance condition or OneEnergy's position that compliance is not required. Based upon my consideration of the facts and circumstances presented in this case, I find that PPRP's proposed licensing condition related to forest conservation is reasonable and supported by the record, and is hereby adopted.³²⁷ However, I am reducing the amount of mitigation to 6.75 acres, which is consistent with both the County's and PPRP's testimonies.³²⁸

Most importantly, full compliance is consistent with the law. Despite OneEnergy's efforts to read exemptions and factors into the FCA that the Commission should consider, I cannot do so.

³²⁶ See NR § 5-1603(a)(1) and (c)(1).

³²⁷ There was no apparent challenge to the calculation that resulted in the recommended 6.75 acres of mitigation.

³²⁸ See Somerset Ex. 1 at 3, PPRP Ibis Ex. 1 at 9, and PPRP Ibis Ex. 4 at 4-5; see also Tr. 64-66 (9387).

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Also, as previously noted, I do not agree that the FCO is preempted by the Commission's CPCN authority. This Project requires mitigation in the form of afforestation based upon the plain reading of the FCO.

Adopting PPRP's recommended condition is also consistent with Commission precedent in terms of weighing a local jurisdiction's input on land use issues related to CPCNs. The Commission has explicitly stated:

[W]e recognize that land use decisions fall within the core expertise and competency of local authorities ... not this Commission. As such, we will give appropriate - which is to say, significant - weight to the views and recommendations of local authorities in deciding whether, where and on what terms to site the various components of a transmission line falling within our authority.³²⁹

While that case involved an application for a transmission line, the premise is the same for this case, and substantial weight must be given to the County's FCO. This is true especially in light of my finding the FCO is applicable to this case.

I do not view this decision as a departure from Commission precedent. OneEnergy argued that it relied on previous Commission decisions that did not impose forestry-related conditions with specific afforestation requirements on similar projects, and this Project was not any different than those projects.³³⁰

³²⁹ *Re Potomac Edison Co.*, 100 Md. P.S.C. at 284.

³³⁰ Applicants' Jt. Initial Brief at 15.

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While the Applicant is correct, I agree with PPRP that those cases, and the lack of forestry-related conditions, resulted from an erroneous interpretation/application of the FCA by PPRP, upon which the Commission relied.

This case, along with Case No. 9387, are the first cases involving a solar CPCN in which a specific amount of forest mitigation was recommended and the parties failed to reach a settlement on the licensing conditions, so the Commission has not previously rendered a decision on this issue. Given that this is a case of first impression, I question how a decision in favor of PPRP is contrary to Commission precedent. If OneEnergy's precedential argument were accepted, it could in theory prevent PPRP from taking a position on the FCA, or any other condition, other than what it recommended in previous solar CPCN cases. Moreover, the difficulty presented by OneEnergy's position is that it is contrary to the FCO and the FCA, even though the latter is technically not applicable yet, and would require the creation of an exception/exemption where one neither exists nor was intended.

There were several factors that I considered but ultimately deemed to be irrelevant to my findings. First, the County's position that all solar projects should be treated equally and be required to comply with the FCO and all other local requirements is understandable. Even though I am requiring OneEnergy to comply with the afforestation requested by PPRP and the County, this Proposed Order should not be interpreted as a blanket decision that all future solar projects will need to comply. This decision

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was based upon the facts and circumstances of this case, and it is possible that a future project could be treated differently.

In regards to OneEnergy, I find that the three additional justifications cited by Ms. Clark for not applying the FCA/FCO to this project are unsupported. There is no indication, and none was cited, that compliance with the FCA or FCO can be avoided because the use of the property is temporary, that the land will be restored to its original state upon decommissioning, or for policy reasons. OneEnergy's position overlooks some of the General Assembly's findings related to the State's Forests and Parks, such as:

(2) Enhancing the extent and condition of tree and forest cover in the Chesapeake Bay watershed is critical to the success in restoring the Chesapeake Bay because forests are the most beneficial use of protecting water quality due to their ability to capture, filter, and retain water, as well as absorb pollution from the air;

(3) Forests and trees are key indicators of climate change and can mitigate greenhouse gas emissions by carbon sequestration; ...

(9) Forests are a renewable resource that help the State meet its renewable energy goals that are consistent with the State's: ... (ii) Renewable Energy Portfolio Standard; (iii) Healthy Air Act; and (iv) Maryland Clean Energy Initiative Act of 2006³³¹

Instead of contradicting Maryland's policies, based upon the General Assembly's findings, PPRP's recommended afforestation

³³¹ NR § 5-101(a); see also Somerset Ex. 2, § 1.2.

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requirements are consistent with those policies, as well as the purpose of the County's FCO. As Ms. Honeczy testified, afforestation "does not represent compensation for tree loss. Rather, it recognizes every project developer's obligation to contribute toward improving Maryland's natural resources as envisioned by the [Forest Conservation] Act."³³² Similarly, the FCO's stated purpose is "to protect and enhance the existing natural resources in Somerset County, specifically to prohibit certain development disturbances to occur before a forest stand delineation and forest conservation plan have been prepared and approved."³³³

In terms of the temporary versus permanent nature of the Project, the Project, if ultimately constructed, could last from twenty to twenty-five years, at which time it would either be decommissioned or the lease could be extended. Even though the field upon which the Project will be built will eventually be restored, the Project could still last more than two decades. Neither the PUA nor the NR defines temporary or permanent in relation to CPCNs or structures.³³⁴ Webster's defines "temporary" as "lasting, or intended to last, only for a short time,"³³⁵ and

³³² PPRP Ibis Ex. 5 at 5.

³³³ Somerset Ex. 2 at 1, Art. I, § 1.2.

³³⁴ PUA § 4-205(e)(1-2) permits the Commission to authorize temporary rates for a period of up to 12 months. The Commission is also permitted to issue temporary Passenger-For-Hire ("PFH") licenses for up to 30 days pursuant to PUA § 10-107, but PFH licenses may be issued for periods between one and three years in accordance with PUA § 10-106(a).

³³⁵ *The New Lexicon Webster's Dictionary of the English Language*, p. 1018 (1989 Ed.).

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"permanent" is defined as "continuing and enduring without change."³³⁶ Under these definitions, the Project cannot be considered temporary. While the Project may not be as "permanent" as another generator, i.e., a natural gas generator, it is certainly more permanent than temporary based upon the duration of the lease.

Additionally, I find OneEnergy's assertion that additional afforestation costs could impact the future development of other projects in Maryland to be speculative. There is nothing in the record that would indicate future solar projects will be jeopardized by the application of the FCA/FCO in this proceeding. A more likely outcome will be that applicants will have a better idea of all the potential costs when developing projects rather than having an unanticipated expense thrown in at the eleventh hour, as in this case.

Finally, I must deny OneEnergy's request for a ruling that CPCNs are categorically excepted from State and local FCA review and are only subject to the Commission's "due consideration" standard for forestry issues. Based upon the record in this case, I cannot make such a sweeping ruling excepting every CPCN from the FCA. Even if the FCA applied to this Project, the exception in NR § 5-1602(b)(5) would not be applicable because in order to qualify for such an exception, the CPCN must have already been issued. Each case must be examined based on the facts and

³³⁶ *Id.* at 747.

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circumstances of the particular project, as well as the applicable county forest conservation ordinance.

F. Variance

The FCO permits an applicant to request a variance provided it can demonstrate that enforcement would result in unwarranted hardship to the person.³³⁷ There is no indication that the Applicant has sought either a variance or a specific exemption through the County, possibly due to the current status of the Project. Therefore, it may still be possible for OneEnergy to obtain relief, either full or partial, from the County's forest conservation requirements.

G. Concerns and Proposals Raised by the Public

The written comments submitted by the public, as well as the public's comments at the evening hearing, raised several concerns and sought separate conditions to be imposed on this Project.

1. BZA Hearing

Citizens requested a hearing before the BZA so that their opinions could be expressed. The County, however, has deferred to the Commission's authority over CPCNs and concluded that a hearing is not warranted.³³⁸ Whether the County elects to

³³⁷ Somerset Ex. 2 at 29, Art. XVIV [sic] - Variances.

³³⁸ Ibis Ex. 2 at 1, 16; Public Comment Hearing Tr. 11-12 (9392).

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defer to the Commission or to hold a zoning hearing is up to the County. The Commission has no authority to require a County to hold such a hearing.³³⁹

2. Property Value Guarantee

The written comments also sought a "Property Value Guarantee" in the event the Project negatively impacted nearby property values. PPRP's review of the Project specifically addressed property values. Based upon his analysis, Mr. Sadzinski testified, "The proposed facility will have a moderately benign local presence once the facility is operational, which suggests that property values will be unaffected by the Project."³⁴⁰ This conclusion was based, in part, upon the proposed buffering and that the views from residences will be of a landscaped buffer of trees and shrubs, and is the only evidence in the record on this matter.³⁴¹

The record does not support the consideration, let alone granting, of a property value guarantee. Therefore, I cannot include a property value guarantee as a condition for this Project.

3. Increase Set Back / Buffering

Regarding the setbacks for the Project, PPRP recommended the following licensing condition:

³³⁹ See generally PUA § 2-112.

³⁴⁰ PPRP Ibis Ex. 1 at 23.

³⁴¹ Id. at 22-23.

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OneEnergy Ibis shall set back its facilities, defined as facilities within perimeter fencing, a minimum 50 feet and, if feasible, 75 feet from any adjacent non-participating property line or public road within which a 25-foot deep screen of native evergreen trees and shrubs shall be planted. The landscape screening requirements may be waived by the Somerset County Department of Technical and Community Services where OneEnergy Ibis can demonstrate that conditions on adjacent land are present, such as forest, woodland, wetlands, open fields or cropland such that the landscaped buffer serves no purpose. The plan must be submitted to the Somerset County Department of Technical and Community Services for review and approval prior to construction, with copies provided to the PSC and PPRP.³⁴²

The fifty foot to seventy-five foot setback was likely recommended because the same setback was imposed by the Commission in the Great Bay Solar case. In that proceeding, Case No. 9380, the Commission imposed the following condition to address concerns regarding the proposed fifty foot setback to protect residential views:

If feasible, solar installations shall be set back 75 feet rather than 50 feet from all roads and highways, and shall be fully buffered from the view of local residences by planting of appropriate trees and shrubs. Great Bay shall consult with local residents to ensure that buffering of solar installations from residential view will preserve property values and permit owners the full enjoyment of their property.³⁴³

³⁴² PPRP Ibis Ex. 2 at 5, para. 16.

³⁴³ Order No. 87321, *slip op.* at 25.

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In this case, there is no indication that an increased setback to 100 feet is feasible; however, the County specified, "Based on correspondence from the PSC we have determined that a 75 ft. setback is feasible and should be required around the entire site as shown on Sheet C-3. The setback requirements are listed in proposed condition #16 from the Power Plant Research Program (PPRP)." ³⁴⁴ I believe that the County mandated seventy-five foot setback around the entire site to be reasonable and supported by the record.

Next, there was concern expressed about the buffer the applicant intended to plant and whether the buffer would block views of the Project. OneEnergy indicated that the buffer would consist of a "25-foot deep screen of native evergreen trees and shrubs." ³⁴⁵ The obvious intent of a buffer in this case is to block the view of the Project.

The importance of the buffer was highlighted by Mr. Sadzinski's testimony on the potential impact on property values, in which he specifically noted, "With a minimal vertical profile and *proposed buffering* along parts of the perimeter of the Site, the Project will be largely out of sight from nearby

³⁴⁴ Commission Ex. 1 at p. 11 (email from Thomas J. Lawton, Senior County Planner, to Kevin Shearon, dated February 23, 2016). The reference to the PSC is likely a reference to Commission Staff and not the Commission itself. I note that PPRP's licensing condition #16 contained the fifty to seventy-five foot setback language. See PPRP Ibis Ex. 2.

³⁴⁵ Ibis Solar Ex. 2 at 24, para. 5. At the evidentiary hearing, Ms. Clark indicated that a determination as to what trees and shrubs would be planted would occur during the site plan process. Tr. 56 (9392).

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properties."³⁴⁶ PPRP also noted that OneEnergy's plan must be submitted to the Commission, PPRP and the County's Department of Technical and Community Services for review and approval prior to construction, and included this as a specific licensing condition.³⁴⁷ I find that the proposed 25 foot buffer to be sufficient. I will not mandate what the types of vegetation OneEnergy should plant and will defer to the County's landscaping requirements. Additionally, the intent of the buffer, screening residential views, will certainly be addressed by the County, as well as PPRP and the Commission, all of which will have an opportunity to review the landscaping plan prior to the Project's construction.³⁴⁸

More important to this issue, OneEnergy stated, "The Applicant will solicit feedback on the screening proposal from nearby residents in an effort to address concerns related to glare and/or other visual impacts."³⁴⁹ Ms. Clark stated that OneEnergy includes this as part of the site plan process.³⁵⁰ Given the Applicant's willingness to solicit feedback from residents, in addition to the requirement to file its landscaping plan for review, OneEnergy shall also include evidence of its efforts to solicit feedback from nearby residential property owners and any feedback received.

³⁴⁶ PPRP Ibis Ex. 1 at 22-23. (emphasis added)

³⁴⁷ *Id.* at 24, and PPRP Ibis Ex. 2 at 5, para. 16.

³⁴⁸ PPRP Ibis Ex. 3 at 24.

³⁴⁹ Ibis Ex. 2 at 24.

³⁵⁰ Tr. 57. (9392)

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Consequently, I am amending PPRP's Licensing Condition #16 and I will impose the following condition:

OneEnergy Ibis shall set back its facilities, defined as facilities within perimeter fencing, a minimum of **75 feet** from any adjacent non-participating property line or public road within which a 25-foot deep screen of native evergreen trees and shrubs shall be planted. The landscape screening requirements may be waived by the Somerset County Department of Technical and Community Services where OneEnergy Ibis can demonstrate that conditions on adjacent land are present, such as forest, woodland, wetlands, open fields or cropland such that the landscaped buffer serves no purpose. The plan must be submitted to the Somerset County Department of Technical and Community Services for review and approved prior to construction, with copies provided to the PSC and PPRP. **OneEnergy Ibis shall solicit feedback on its screening proposal from adjacent residential property owners, and shall include evidence both of its efforts to solicit feedback from nearby residential property owners and any feedback received from those individuals to the Somerset County Department of Technical and Community Services, the PSC and PPRP.**

4. Decommissioning

In response to the concerns raised at the public hearing, I find that PPRP's proposed licensing condition #15 addressing the decommissioning of the Project to be sufficient. It specifies that OneEnergy's plan "shall include provisions for the safe removal and proper disposal of all components of the Project, including any components with rare/ valuable materials, as well as

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components containing hazardous/toxic materials."³⁵¹ This condition will protect the County against the improper disposal of all materials, not just hazardous materials.

VI. Findings

I find that Somerset County government supports the Project.

I find that the evidence is undisputed that the Project can be built and operated without any negative effects to the stability and reliability of the electric system and grid.

I find that the Project will have some, but limited, benefit to the economy in the form of creating construction jobs. Additionally, once completed, the Project will contribute to Maryland's Renewable Energy Standards Portfolio by adding approximately 6.0 MW to the Portfolio.

Subject to PPRP's recommended licensing conditions, as amended herein, I find that the Project will have no negative effects on esthetics of the Project site or nearby properties.

I find that the Project will have no negative impacts on historical sites.

I find that the Project will have no adverse effect on aviation safety as determined by the Maryland Aviation Administration and the Federal Aviation Administration.

I find that the Project will have no adverse effects on air or water pollution.

³⁵¹ PPRP Ibis Ex. 2 at 5, para. 15.

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I find that the Project will produce minimal quantities of waste which will be timely disposed of at an offsite-licensed landfill. In the event that hazardous waste is generated, I find that such waste will be managed in accordance with applicable federal and State requirements.

Subject to the Final Licensing Conditions, I find that the Project meets all federal and State environmental laws and standards, and find that PPRP's Forest Conservation Act condition, which requires OneEnergy to mitigate 6.75 acres, to be reasonable and supported by the record and is in the public interest.

I therefore find that the CPCN requested as inclusive of the Final Licensing Conditions as proposed by PPRP, as amended herein, attached hereto as Appendix A and made a part hereof, as well as Staff's recommended conditions, attached hereto as Appendix B and made a part hereof, satisfies the public convenience and necessity requirement of PUA § 7-207.

IT IS, THEREFORE, this 6th day of April, in the year Two Thousand Sixteen,

ORDERED: (1) That the Application filed for a Certificate of Public Convenience and Necessity to construct a 6.0 MW solar photovoltaic generating facility in Somerset County, Maryland is hereby granted to OneEnergy Ibis Solar, LLC in accordance with the findings and decision rendered herein.

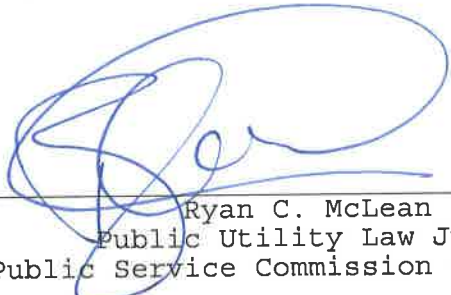
(2) That the conditions in Appendix A, as amended, and Appendix B, attached and incorporated herein are hereby accepted as licensing conditions of the Certificate of

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Public Convenience and Necessity in accordance with the findings of this Proposed Order.

(3) That all motions not granted herein are denied.

(4) That this Proposed Order will become a final order of the Commission on May 7, 2016, unless before that date an appeal is noted with the Commission by any party to this proceeding as provided in Section 3-113(d)(2) of the Public Utilities Article, or the Commission modifies or reverses the Proposed Order or initiates further proceedings in this matter as provided in Section 3-114(c)(2) of the Public Utilities Article.



Ryan C. McLean
Public Utility Law Judge
Public Service Commission of Maryland

Initial Recommended License Conditions
PSC Case No. 9392
OneEnergy Ibis Solar, LLC

1. Except as otherwise provided for in the following provisions, the application ("Application") for the Certificate of Public Convenience and Necessity ("CPCN") is considered to be part of this CPCN for the OneEnergy Ibis Solar, LLC (OneEnergy Ibis) Project ("Project"). The Application consists of the original application filed with the Maryland Public Service Commission ("PSC" or "Commission") on August 21, 2015. Construction and operation of the Project shall be undertaken in accordance with these conditions. The Project shall be constructed within the approximate numerical parameters as to the number of photovoltaic ("PV") panels, dimensions of the panels, and total acreage of the Project site found in the Application and incorporated in the CPCN. Changes to these specifications are not covered by the CPCN and must be reviewed and approved by the PSC and the Power Plant Research Program ("PPRP"). If there are any inconsistencies between the conditions specified below and the Application, the conditions in this CPCN shall take precedence. If CPCN conditions incorporate federal or State laws through paraphrased language, where there is any inconsistency between the paraphrased language and the actual State or federal laws being paraphrased, the applicable federal or State laws shall take precedence.
2. Construction and operation of the solar facility shall be undertaken in accordance with this certificate and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following:
 - a. Nontidal Wetlands – COMAR 26.23.01 applies to activities conducted in nontidal wetlands and wetland buffer.
 - b. Waterway Construction – COMAR 26.17.04 applies to regulations governing construction activities in nontidal waters and floodplains.
 - c. Water Quality and Water Pollution Control – COMAR 26.08.01 through COMAR 26.08.04 apply to discharges to waters of the State and maintenance of surface water quality.
 - d. Erosion, Sediment and Stormwater Control – COMAR 26.17.01 applies to the preparation, submittal, review, approval, and enforcement of erosion, sediment and stormwater control plans, including any dewatering plans and associated water recycling plans.
 - e. Forest Conservation – Maryland's Forest Conservation Act (FCA), Md. Code, Sections 5-1602(b)(5) and 5-1603 of the Natural Resources Article. Consistent with Somerset County ordinances implementing the FCA, OneEnergy Ibis shall provide for 6.8 acres of mitigation.

- f. Particulate Matter from Materials Handling and Construction - COMAR 26.11.06.03D applies to airborne particulate matter such that a person may not cause or permit any material to be handled, transported, or stored, or a building, its appurtenances, or a road to be used, constructed, altered, repaired, or demolished without taking reasonable precautions to prevent particulate matter from becoming airborne.
 - g. Nuisance - COMAR 26.11.06.08 applies to the creation of nuisance or air pollution such that an installation or premises may not be operated or maintained in such a manner that a nuisance or air pollution is created. Nothing in this regulation relating to the control of emissions may in any manner be construed as authorizing or permitting the creation of, or maintenance of, a nuisance or air pollution.
 - h. Odors - COMAR 26.11.06.09 applies to the discharge of air pollution such that a person may not cause or permit the discharge into the atmosphere of gases, vapors, or odors beyond the property line in such a manner that a nuisance or air pollution is created.
 - i. Noise - COMAR 26.02.03 applies to noise emissions whereby OneEnergy Ibis shall construct the proposed Project in such a way that it complies with the Maryland noise regulations and with relevant Somerset County noise ordinances.
3. Construction and operation of the Project must commence within three (3) years of receiving the CPCN and must be completed for operation not later than four (4) years after receipt of the CPCN. If the Project is not completed and operational within four years of issuance of the final order by the PSC granting a CPCN, the CPCN shall expire and no longer constitute authorization to construct and operate the Project.
 4. In accordance with COMAR 20.79.03.01, prior to construction, OneEnergy Ibis shall provide PPRP and the PSC with a copy of the purchase agreement, land lease, or similar agreement with the owners of the property on which the Project site is located. OneEnergy Ibis shall also identify any applicable term of the purchase agreement, land lease, or similar agreement and provide assurances to PPRP and the PSC that such term of the purchase agreement, land lease, or similar agreement meets or exceeds any applicable Power Purchase Agreement ("PPA") term and includes any time necessary for complete closure and removal of the Project facilities.
 5. Prior to the commencement of construction, OneEnergy Ibis shall provide PPRP and the PSC with the final studies, approvals, and permits associated with the interconnection request with PJM and Delmarva Power and Light.
 6. Prior to the commencement of construction, OneEnergy Ibis shall obtain all necessary approvals and permits from the Maryland Department of the

Environment and the U.S. Army Corps of Engineers regarding impacts to wetlands including the ditch adjacent to Plantation Road.

7. OneEnergy Ibis shall provide to PPRP, the PSC, and Somerset County, the as-built details within 30 days of commencement of operation for the following: engineering and construction plans for the Project, including the total acreage of the Project site; the PV panel and module type, dimensions, and locations; and a consistent count of the number of PV modules, a consistent count of the number of support posts for the PV modules, as well as a consistent depth of post/pile burial and height of the PV panels and transformer/inverter pads above grade. Where the as-built details are identical to those submitted with the CPCN application, OneEnergy Ibis shall provide a statement to this effect and not resubmit the information. In addition, OneEnergy Ibis shall provide the PPRP and the PSC with information showing the layout of the power centers, electrical collector lines, and switchyard for the Project. Prior to formally submitting the Construction Drawing Plan Review, Grading Permit, and Building Permit applications to the Somerset County Department of Technical and Community Services for review and permitting, OneEnergy Ibis shall review: the proposed layout of the collector lines in relation to the existing infrastructure (both above ground and below grade) and buildings; and the proposed internal site access roads, underground utilities, and storm water management systems.
8. The grounds of the Project, beneath and between the solar panels, shall be planted and established with native and naturalized grass species as recommended by the Somerset County Soil Conservation District. Further, OneEnergy Ibis Solar shall, prior to commencement of Project construction, submit to Somerset County for approval a grounds management plan, with copies to PPRP and the PSC. The grounds management plan shall include the following:
 - a. Description of the grass species to be maintained at the site;
 - b. Schedule for mowing that minimizes mowing activities during the nesting season of most ground-nesting birds (i.e., May through July, when grass height should be maintained not less than 10 inches if practicable);
 - c. Protocol for managing invasive plant species; and
 - d. Discussion of herbicides and pesticides approved for use at the Project site, and details describing the circumstances of their use.
9. Representatives of the PSC and DNR shall be afforded access to the OneEnergy Ibis site at any reasonable time, with appropriate notification, to conduct inspections and evaluations necessary to assure compliance with the CPCN requirements. OneEnergy Ibis shall provide assistance as reasonably may be necessary to conduct inspections and evaluations effectively and safely, which may include, but need not be limited to, the following:

- a. Inspecting construction authorized under this CPCN;
 - b. Having access to or copying any records that OneEnergy Ibis is required to keep pursuant to this CPCN or applicable regulations;
 - c. Obtaining any photographic documentation and evidence; and
 - d. Determining compliance with the conditions and regulations specified in the CPCN.
10. Prior to the commencement of Project construction, OneEnergy Ibis shall certify to the PSC and to PPRP that it has designed the facility in substantial conformity to Somerset County's Site Plan review requirements as described in §6.14 of the Somerset County Zoning Ordinance, and has received Site Plan approval from the Somerset County Planning Commission.
 11. OneEnergy Ibis shall comply with all permit requirements for use of State and Somerset County roads, and obtain appropriate approvals as necessary.
 12. OneEnergy Ibis shall develop a process to document and address admissible complaints related to potential solar reflections. An admissible complaint shall be one formally submitted in writing to OneEnergy Ibis within two (2) years of the Project's commencement of operation. OneEnergy Ibis shall provide to the PSC and PPRP both a copy of the complaint and its response to the complaint. OneEnergy Ibis's response to any written complaint shall clearly inform the aggrieved party that if not satisfied with OneEnergy Ibis's response, the aggrieved party may seek relief by filing a complaint with the Maryland Public Service Commission. If the PSC determines after notice and an opportunity to be heard that the complaint is justified, it may direct OneEnergy Ibis to prepare and implement a screening plan to mitigate impacts from reflective glare upon the affected property. The screening plan shall be in conformance with all applicable State and local laws and regulations.
 13. In the event that relics of unforeseen archeological sites are revealed and identified during construction, OneEnergy Ibis, in consultation with and as approved by the Maryland Historical Trust (MHT), shall develop and implement a plan for avoidance and protection, data recovery, or destruction without recovery of such relics or sites.
 14. OneEnergy Ibis shall design, install and maintain the Project to meet all applicable minimum standards set forth in the National Fire Protection Agency (NFPA) 70: National Electrical Code and all applicable minimum standards appropriate for ground-mounted solar facilities set forth in NFPA 1: Fire Code.
 15. Prior to commencement of Project construction, OneEnergy Ibis shall provide the PPRP and the PSC with a facility decommissioning plan, outlining the responsible party (ies), timeframes, and estimated costs for decommissioning, dismantling, and proper removal of all Project facilities at the end of the useful life of the Project, or when the Project is otherwise abandoned. Funding

mechanisms to cover the cost of implementing the decommissioning plan shall be secured via a performance bond payable to the State of Maryland to ensure that decommissioning costs are not borne by the County and/or State at the end of the useful life of the Project. The performance and financial assurance guarantees may be comprised of, but not limited to, one or more of the following: a corporate guarantee; a surety bond; a suitable insurance policy; or an irrevocable letter of credit. The financial guarantee shall be in place prior to commercial operation of the Project. Every ten years, over the life of the Project, an updated estimate of decommissioning costs shall be prepared by OneEnergy Ibis to adjust for inflation. Based on this estimate, the amount of the financial assurance guarantee shall be adjusted to cover the revised estimate of decommissioning. The decommissioning plan shall include provisions for the safe removal and proper disposal of all components of the Project, including any components with rare/valuable materials, as well as components containing hazardous/toxic materials. The decommissioning plan shall maximize the extent of component recycling and reuse, where possible, and ensure all components are handled in accordance with applicable federal, State, County, and local requirements.

16. OneEnergy Ibis shall set back its facilities, defined as facilities within perimeter fencing, a minimum of 50 feet and, if feasible, 75 feet from any adjacent non-participating property line or public road within which a 25-foot deep screen of native evergreen trees and shrubs shall be planted. The landscape screening requirements may be waived by the Somerset County Department of Technical and Community Services where OneEnergy Ibis can demonstrate that conditions on adjacent land are present, such as forest, woodland, wetlands, open fields or cropland such that the landscaped buffer serves no purpose. The plan must be submitted to the Somerset County Department of Technical and Community Services for review and approval prior to construction, with copies provided to the PSC and PPRP.
17. Prior to the commencement of construction, OneEnergy Ibis shall contact the Crisfield Fire Department, Marion Fire Department, and the Somerset County Department of Emergency Services to establish points of contact and timely response options, facilitate emergency vehicle access throughout the site, create a consistent marking protocol for the identification of system components that require special attention during an emergency, and develop appropriate Standard Operating Procedures or Standard Operating Guidelines for addressing on-site emergencies.
18. All provisions and requirements of this CPCN shall apply to any and all subsequent owners and/or operators of the solar facility. In the event of any pending change in control or ownership, the current owner/operator shall notify the succeeding owner/operator of the existence of the requirements of this CPCN by letter and shall send a copy of this letter to the PSC and PPRP.

19. Informational copies of the required communications, reports or studies referenced in the recommended license conditions Nos. 1 through 18 shall be sent to the PSC and PPRP by email (and by mail if requested) at:

Director
Power Plant Assessment Division
Department of Natural Resources
Tawes State Office Bldg., B-3
580 Taylor Avenue
Annapolis, Maryland 21401
email: pprp.dnr@maryland.gov

Attachment A

Case No. 9392

OneEnergy Ibis Solar, LLC

Certificate of Public Convenience and Necessity

Proposed Staff Conditions

1. OneEnergy Ibis Solar, LLC or its successors and assigns shall file a request for CPCN amendment with the Commission for any generation capacity in excess of 6.0 MW;
2. The signed Wholesale Market Participant Agreement executed by OneEnergy Ibis Solar, LLC with the regional transmission operator and the local transmission owner shall be filed with the Commission prior to the commencement of construction; and
3. OneEnergy Ibis Solar, LLC shall enter into a distribution Interconnection Agreement with Delmarva Power and Light Company ("DPL"), or obtain a statement from DPL stating that DPL does not require a separate Interconnection Agreement, and this Interconnection Agreement or statement be filed with the Commission prior to construction;
4. OneEnergy Ibis Solar, LLC, or its successors and assigns, shall provide sixty (60) day written notice to the Commission of any non-wholesale electricity sale to a Maryland retail electric customer and comply with all regulations regarding such sale including obtaining any requisite Interconnection Agreement(s) to deliver electricity into the respective distribution systems of Maryland electric companies such as DPL; and
5. OneEnergy Ibis Solar, LLC, or its successors and assigns, shall provide written notice of any change in ownership of all, or any portion of the Project, at least thirty days prior to the closing date of any sale to a third party. The written notice must include, but is not limited to identifying the third party, providing contact information to receive any Commission inquiries, the proposed effective date of any change in ownership and providing documentation that demonstrates the capability of the prospective owner to

operate and maintain the project to perform in accordance with any CPCN issued in this proceeding.