

**BEFORE THE PUBLIC SERVICE
COMMISSION OF MARYLAND**

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

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

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**JOINT REPLY MEMORANDUM ON APPEAL OF
ONEENERGY BLUE STAR SOLAR, LLC AND ONEENERGY IBIS SOLAR, LLC**

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Table of Contents

	Page
I. Statement of Case	1
II. Summary of Position	3
III. Argument	3
A. The Commission should immediately finalize the conditions in Case Nos. 9387 and 9392 because OneEnergy will comply with the FCA and the conditions will not materially change as a result of Staff's appeal.....	3
B. The Commission should reverse the PULJ's interpretation of the FCA and findings on preemption and reaffirm the "due consideration" standard consistent with Commission precedent.....	5
1. The Commission should overturn the interpretation of the FCA in the Proposed Orders because it renders the statute surplusage, is inconsistent with the statutory scheme, and violates public policy.	6
2. The Commission should overturn the PULJ's finding that the Commission cannot preempt local forest conservation ordinances because it is inconsistent with precedent and harms Commission authority.	9
3. "Due consideration" under NR § 5-1603(f) must be based on a complete review of the administrative record for each project.....	11
IV. Conclusion	13

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OneEnergy Blue Star Solar, LLC and OneEnergy Ibis Star, LLC (“OneEnergy”), by their undersigned counsel, hereby file their joint reply memorandum of appeal.

I. Statement of Case

The two solar projects involved in this appeal have wended through a kaleidoscopic Forest Conservation Act (“FCA”) process. OneEnergy originally filed its CPCN applications understanding utility scale solar projects to be exempt from the FCA based on unbroken prior Commission precedent. Then, late in the CPCN review, OneEnergy learned that the Power Plant Research Program (“PPRP”) had decided to argue for full FCA compliance. To try to resolve the issue, OneEnergy participated in the two first litigated solar CPCN cases. After all parties briefed the issue, the salient question appeared to be how much, if any, FCA compliance was appropriate based upon the Commission’s “due consideration.” Indeed, all briefs ultimately agreed that State law requires the Commission to provide “due consideration” review of the record to determine

how much, if any, FCA compliance is appropriate. But then, instead of analyzing the issue as argued by the parties, the Proposed Orders rendered nugatory the State FCA and imposed full compliance with local forest conservation ordinances based on a strained reading of Maryland law. In short, chaos abounded.

To be clear, regardless of the outcome of this appeal, both the Blue Star and Ibis projects (the “Projects”) will fully satisfy all FCA requirements in order to move forward with final local reviews. This reply brief is not intended to influence that outcome. Rather, OneEnergy is filing this reply to make two distinct points. First, Blue Star and Ibis need to be allowed to move forward quickly. These applications were filed nearly a year ago. There is no material dispute or question regarding the proposed conditions because OneEnergy has voluntarily agreed to engage in full FCA compliance for both project. There is simply no reason why the Commission cannot finalize the proposed conditions now, subject to a subsequent order on the underlying legal authority surrounding those conditions.

Second, it is crucial that the Commission clearly and concisely articulate the CPCN FCA standard. Predictability is crucial to any business climate, and OneEnergy and other solar developers working in Maryland desperately need a return to clarity on how the FCA will be handled going forward. OneEnergy requests that the Commission provide this certainty by reversing the deeply flawed legal reasoning of the Proposed Orders and reaffirming the flexible “due consideration” standard of review. It is OneEnergy’s hope that this clarity will allow developers, PPRP, and counties to work together for future projects to develop creative forestry conditions that make sense for utility-scale solar projects and provide Marylanders with significant benefits not possible under a rigid application of the FCA.

II. Summary of Position

OneEnergy respectfully requests that the Commission:

1. Immediately finalize the conditions in Case Nos. 9387 and 9392 with PPRP's Proposed Condition 2(e), with Staff's requested clarification; and
2. Overturn the PULJ's interpretation of the FCA and findings on preemption and reaffirm the "due consideration" standard consistent with Commission precedent.

III. Argument

A. The Commission should immediately finalize the conditions in Case Nos. 9387 and 9392 because OneEnergy will comply with the FCA and the conditions will not materially change as a result of Staff's appeal.

The dispute over the applicability of the FCA has delayed the Projects for several months, and development activities have been at a near standstill pending finalization of the CPCN conditions. Until conditions are final, OneEnergy faces uncertainty with local approvals and it cannot effectively market, finance, or sell the Projects. This poses a substantial hardship on OneEnergy and delays Maryland's realization of the Projects' economic and environmental benefits.

On appeal, Staff has asked the Commission to overturn the legal reasoning contained in the Proposed Orders, but has not requested that the Commission change the substantive conditions requiring full mitigation consistent with local FCA obligations in either case.¹ *See* Memorandum of Appeal of the Staff of the Maryland Public Service Commission, 4 (ML#: 190697). Staff's only requested change is that the Commission delete the phrase "[c]onsistent with [Kent or Somerset] County ordinances implementing the FCA" from PPRP's Proposed

¹ OneEnergy originally requested that the Commission immediately finalize the conditions for the Projects soon after the PULJ issued his decisions in these proceedings. OneEnergy Request for Immediate Issuance of Final Orders (ML#: 188919). Staff opposed this request in order to preserve its right to appeal. Staff Opposition to Request (ML#: 189029). With the appeal now pending, this is likely a more opportune time for the Commission to simultaneously recognize and preserve Staff's right to appeal while also allowing the Projects to move forward. This can be done through a two-part order, first finalizing the conditions and the second articulating the Commission's policy regarding the FCA in CPCN proceedings.

Condition 2(e) in both cases, which would make the condition language consistent with Staff's preferred legal interpretation of the FCA.²

Importantly, this requested change retains the original obligation for the Projects to comply with the precise amount of FCA mitigation required under each county ordinance.³ Because substantive compliance for Blue Star and Ibis will not change as result of this appeal, there is no reason for the Commission to deny OneEnergy the ability to immediately proceed with local reviews. Should the Commission side with the parties on the correct legal interpretation of the FCA, it can delete the superfluous "[c]onsistent with [Kent or Somerset] County ordinances implementing the FCA" from PPRP's Proposed Condition 2(e), as requested by Staff.⁴ The inclusion or omission of this language has no material effect on OneEnergy's compliance obligations in these cases.

The Commission can fairly balance Staff's right to appeal and OneEnergy need to proceed toward construction by immediately finalizing the proposed conditions in both cases. While Staff argued vigorously against OneEnergy's initial request to finalize the proposed conditions in these cases, with Staff's appeal now on the record it is clear the Commission can accommodate both Staff and OneEnergy's interests. Accordingly, OneEnergy renews its prior request for the Commission to immediately finalize the proposed conditions in these cases, subject to the change discussed above requested by Staff.

² "Staff notes that it has no objection to the substantive conditions the Proposed Order would impose on the Applicant as part of a CPCN, with the exception of the wording of proposed Condition 2(e) regarding the Maryland FCA." *Id.*

³ For Blue Star, this is 5.3 acres of mitigation. PULJ Proposed Order, Appendix A, 1 (ML#: 188160). For Ibis, this is 6.75 acres of mitigation. PULJ Proposed Order, 94 (ML#: 188161).

⁴ The Commission has broad authority to fashion solutions as equitable. Md. Public Utilities Article § 3-112(b) (The Commission "has the implied and incidental powers needed or proper to carry out its functions," which "shall be construed liberally").

B. The Commission should reverse the PULJ’s interpretation of the FCA and findings on preemption and reaffirm the “due consideration” standard consistent with Commission precedent.

OneEnergy did not seek an appeal of the Proposed Orders in Case Nos. 9387 and 9392 because of its need to move forward with the Projects and the concomitant decision to fully comply with FCA requirements in both counties. However, OneEnergy firmly believes that the legal reasoning underlying the Proposed Orders is deeply flawed and restricts the ability of parties to CPCN proceeding to work collaboratively to achieve the best overall outcome. No party to either proceeding advanced the reasoning ultimately adopted in the Proposed Orders, and PPRP, Staff, and OneEnergy agreed by the reply brief stage that the Commission decides all forestry issues under the “due consideration” standard prescribed by NR § 5-1603(f). *See* PPRP Consolidated Reply Brief, 2-3 (ML#: 185450) (noting that a “review of the briefs filed shows a remarkable, though perhaps unintended, consensus on the applicability of the Maryland FCA”).

OneEnergy agrees with Staff’s position on appeal that the interpretation of NR § 1602(b)(5) and 5-1603(f) in the Proposed Orders is erroneous. Even more troubling is the PULJ’s conclusion that Commission orders do not preempt county forest conservation ordinances. This is a significant departure from precedent with profound negative consequences to Commission authority. OneEnergy respectfully requests that the Commission rule with Staff on both legal issues, clarifying that forestry issues are decided by the Commission under the well-established and flexible “due consideration” standard. This will provide developers with certainty and all interests with maximum flexibility, allowing collaboration among stakeholders to fashion conditions that make sense for utility-scale solar projects and provide wide-ranging benefits to Maryland not possible under a rigid, formulaic application of the FCA. It would also align the Commission’s decision in these cases with the PULJ’s proposed order in Case No. 9395, which determined forestry issues are decided by the Commission under the “due

consideration” standard. Proposed Order of PULJ (May 13, 2016) (ML#: 190666). This appeal offers a unique opportunity for the Commission to immediately rectify what is effectively a “circuit split” in Commission jurisprudence.

1. The Commission should overturn the interpretation of the FCA in the Proposed Orders because it renders the statute surplusage, is inconsistent with the statutory scheme, and violates public policy.

The interpretation of the FCA in the Proposed Orders hinges on the wording of NR § 5-1602(a), which provides that “[e]xcept as provided in subsection (b) of this section, *this subtitle* shall apply to any public or private subdivision plan or application for a grading or sediment control permit by any person ... on areas of 40,000 square feet or greater.” (emphasis added). Under the PULJ’s reading of the statute, the entirety of the FCA subtitle only applies when an applicant has applied for a subdivision plan or grading or sediment control permit, and at no other time. Thus, under the Proposed Orders, NR § 5-1603(f) (which contains the requirement for the Commission to give due consideration to forestry issues) only applies when an applicant has applied for a subdivision plan or grading or sediment control permit.⁵

The Commission’s interpretation of NR § 5-1602(b)(5) and 5-1603(f) must comply with basic rules of statutory interpretation. Two of these rules are instructive here. First, a “statute must be given a reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense.” *State v. Johnson*, 415 Md. 413, 421-22 (2010). Second, the interpretation must recognize that the General Assembly cannot have intended the statute to operate in such a way that makes it impossible for a CPCN applicant to ever receive an exception. Otherwise, the exception would be meaningless and violate a most basic tenant of statutory interpretation: a provision of a statute may not be rendered surplusage. *Gardner v. State*, 420 Md. 1, 8 2011; *see*

⁵ *See e.g.*, PULJ Proposed Order, 54-58 (ML#: 188160).

also Moore v. State, 388 Md. 446, 453 (2005) (holding that a statute must be construed “as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory”). The interpretation of the FCA expressed in the Proposed Orders violates these rules for at least two reasons, and there are also compelling public policy reasoning to protect Commission authority over forestry issues.

First, the PULJ’s reasoning is circular and renders the statute surplusage. The Proposed Orders require a project subject to a CPCN to have applied for a subdivision plan or grading or sediment control permit in order to be exempt from the FCA. However, FCA compliance obligations attach once a project applies for one of these local approvals. This means that it is impossible for a project to ever be excepted from the FCA because it would have needed to comply with the FCA for the exception to apply. This interpretation renders the statutory language surplusage, contrary to the rules of statutory interpretation. *See Moore v. State*, 388 Md. 446, 453 (2005). This reading also ignores the fact that NR § 5-1602(a) begins with “[e]xcept as provided in subsection (b) of this section.” NR § 5-1602(b) contains 14 broad exemptions to the FCA. The General Assembly would not have found it necessary to qualify the jurisdictional hook of the FCA with a direct citation to the exemptions to the FCA – including for projects subject to a CPCN – if those exemptions were to never apply.

Second, the PULJ’s interpretation of the statute is “absurd, illogical, [and] incompatible with common sense” when read in light of the entire statutory scheme. *State v. Johnson*, 415 Md. 413, 421-22 (2010). The FCA subtitle is full of provisions that – like NR § 5-1603(f) – are clearly intended to exist and impose substantive duties even if a subdivision plan or grading or sediment control permit has not been applied for. For instance, NR § 5-1610 creates a Forest Conservation Fund managed by DNR. Under the PULJ’s interpretation of the statute, this fund

only exists when an applicant has applied for a subdivision plan or grading or sediment control permit, and apparently does not exist at any other time. Additionally, NR § 5-1603(a)(1) requires local governments to develop local forest conservation programs. Under the PULJ's reading of the statute, this obligation only exists when an applicant has applied for a subdivision plan or grading or sediment control permit, and at no other time. These outcomes (and numerous others not covered here) are plainly absurd, but they are the exact result reached under the Proposed Orders. The only reasonable interpretation of the statute is that the General Assembly intended NR § 5-1602(b)(5) and 5-1603(f) to apply at all times, not just when a subdivision plan or grading or sediment control permit has been applied for.

There is also a strong policy rationale for rejecting the interpretation contained in the Proposed Orders. A primary benefit of the CPCN process to developers is that it creates a central clearinghouse for all permitting issues related to the development of a generating station, offering certainty and uniformity for developers.⁶ As explained during the hearing by Ms. Clark, “[f]rom a developer’s perspective, this is useful because it streamlines power plant siting.”⁷ This goal of the Power Plant Siting Act has been affirmed by the Maryland’s appellate courts through a series of decisions finding the General Assembly intended for the CPCN process to preempt local land use reviews and delegate all reviews to the Commission – “a state agency with statewide powers, perspective, and expertise” acting as a “centralized authority.” *Howard County v. Potomac Elec. Power Co.*, 319 Md. 511, 527 (1990). The Commission has “exclusive jurisdiction” in CPCN cases. *Potomac Elec. Power Co. v. Montgomery County*, 80 Md. App. 107, 115 (1989). Affirming the proposed orders would eliminate this benefit and harm solar and

⁶ Applicant Ex. 8 4:3-5; Ibis Ex. 7 4:23-24 (Clark Rebuttal).

⁷ Applicant Ex. 84:4-5; Ibis Ex. 7 4:24-25 (Clark Rebuttal).

other power plant developers in Maryland by subjecting them to the FCA requirements of each of Maryland's 24 jurisdictions.⁸ The Ibis and Blue Star projects serve as case studies for the confusion and uncertainty created by the PULJ's interpretation. Case Nos. 9387 and 9392 demonstrate why it is absolutely essential for the Commission to retain what the General Assembly intended to be central authority over all power plant siting issues, including forestry concerns.

In reality, the General Assembly created specific language, co-located with 13 other broad exceptions from the FCA, offering an exception to projects subject to a CPCN. It defies common sense to conclude that, in creating this language, the General Assembly actually intended for projects to be subject to full FCA compliance except under the most peculiar of circumstances. If the General Assembly had intended to subject projects to full FCA compliance, it could have remained silent or explicitly imposed full compliance. Instead, it has done the exact opposite and included such projects on the list of exceptions to the FCA.

OneEnergy respectfully requests that the Commission reject the legal interpretation of the FCA in the Proposed Orders and reaffirm the "due consideration" standard of review for forestry issues in CPCN proceedings under what is the most logical, plain reading of the law.

2. The Commission should overturn the PULJ's finding that the Commission cannot preempt local forest conservation ordinances because it is inconsistent with precedent and harms Commission authority.

The PULJ's finding on preemption in Case No. 9392 eviscerates PPRP and the Commission's important role in CPCN proceedings and should be overruled. It is well settled that the CPCN process preempts local reviews because the General Assembly intended for the CPCN process to be all encompassing in order to ensure a safe and reliable electric supply. *See*

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

e.g., Howard County v. Potomac Elec. Power Co., 319 Md. 511 (1990); *Potomac Elec. Power Co. v. Montgomery County*, 80 Md. App. 107 (1989). The Proposed Orders directly contradict this precedent. Affording the Somerset County Forest Conservation Ordinance supremacy over the Commission's order in Case No. 9392 "would sanction an authority superior to that of the PSC" in the CPCN process – which the Court of Appeals has expressly rejected. *Id.* at 529. Along similar lines, the Commission recently affirmed its authority to preempt local ordinances in another solar CPCN case. Case No. 9411, April 26, 2016, Transcript 25-27.

It is worth noting that the General Assembly did not intend to revoke county input on FCA issues. The Commission must give "due consideration" to "the recommendation of the governing body" of counties when taking a final action in this proceeding, including on the FCA. PUA § 7-207(e). This can include full FCA compliance if the Commission determines it is appropriate to do so based on the facts in the record. In contrast, the Proposed Orders require rigid adherence with local forest conservation ordinances irrespective of Commission decisions to the contrary. The logical extension of this is that the Commission has no authority to preempt local jurisdictions for any reason. The Proposed Orders thus would undermine the ability of PPRP to conduct its review and the ability of the Commission to take the actions necessary to ensure a safe and adequate electric supply consistent with the State's policy goals. It would also prevent developers from working with PPRP and counties to develop creative forestry compliance options that would not be possible under a rigid application of the FCA.

Accordingly, OneEnergy respectfully requests that the Commission reject the PULJ's ruling on preemption and find that its orders preempt local forest conservation ordinances. To do otherwise would seriously jeopardize Commission authority.

3. “Due consideration” under NR § 5-1603(f) must be based on a complete review of the administrative record for each project.

OneEnergy diverges from Staff on one aspect of its appeal, which is not germane to the resolution of Blue Star and Ibis, but is worth noting in the interest of establishing a comprehensive FCA policy. Staff has argued convincingly in favor of “due consideration” review by the Commission. It makes a logical leap, however, in assuming that it is automatically appropriate in these cases to impose full FCA compliance without adequate support in the record. *See* PUA § 3-113(a)(1) (providing that the Commission must render a decision based on evidence in the record).

Again, the issue is moot for Blue Star and Ibis because OneEnergy has agreed to fully comply with local FCA requirements for these two projects. But were that not the case, after adopting the “due consideration” standard the Commission (or PULJ on remand), would need to fully analyze the record to determine what outcomes are supported by record evidence under the “due consideration” standard, and if more than one is supported to determine which is appropriate. The law requires “due consideration” of “the need to minimize the loss of forest and the provisions for afforestation and reforestation” under NR § 5-1602(b)(5). As established by a long history of Commission precedent, the “due consideration” standard is flexible and allows the Commission to impose a range of compliance obligations on projects subject to a CPCN, from full to no FCA compliance, or something else altogether.⁹ As with all Commission decisions, however, any compliance obligation must be supported by evidence in the record.

⁹ The applicable standard does not establish a balancing test or require the applicant to prove that benefits outweigh costs. Rather, the Commission must consider the relevant statutory factors based on evidence in the record and, again based on evidence in the record, condition the Projects as it deems necessary to serve the public interest. As explained by Staff in its initial briefs, “[c]onsideration is sufficient if the record supports the conclusion that each factor required by statute has been considered.” Staff Initial Blue Star Brief, 8. This is consistent with several appellate cases affirming this standard for CPCN proceedings. *See, e.g., Potomac Elec. Power Co. v. Montgomery County*, 80 Md.App. 107, 114 (1989); *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Public Service Com’n*, 2016 WL 617328, *11 (2016).

PUA § 3-113(a)(1).¹⁰ At the same time, as the sponsor of Proposed Condition 2(e), PPRP had the burden of demonstrating that its condition requiring full FCA compliance is reasonable in both cases. *See Re Potomac Edison Co.*, 83 Md. P.S.C. 272 (Oct. 6, 1992) (finding that when “DNR is the party sponsoring [a] proposed condition, it has the burden of proof to show that the condition is reasonable”).¹¹ As discussed at length during initial briefing, PPRP failed to meet this burden and the Commission is left with no evidence to support full FCA compliance. OneEnergy Joint Reply Brief, 5-10 (ML# 185451).¹²

Ordinarily, lack of record evidence to support a condition would dictate that the Commission reject the condition. Under these unusual circumstances, however, OneEnergy has agreed to voluntarily comply with local FCA obligations for the Projects in order to proceed with local reviews. On this basis alone, the Commission should approve PPRP’s Proposed Condition 2(e).¹³ This is similar to a settlement, where the Commission routinely adopts conditions without extensive analysis. *See e.g.*, Order No. 87556, Case No. 9405 (May 17, 2016) (acquiescing to full FCA compliance obligation in a settled solar CPCN case without analysis).

Accordingly, OneEnergy respectfully requests that the Commission explicitly acknowledge OneEnergy’s agreement to comply with the FCA in these two cases without reaching the issue of what “due consideration” would mean for the Blue Star and Ibis. The Commission should not lock future projects into full FCA compliance under the “due consideration” standard, and should instead find that its decision – while reaffirming that the

¹⁰ The Commission must “impose CPCN conditions that reflect the evidence and information *in the record* and enable the project to serve the public interest.” Staff Initial Blue Star Brief, 8.

¹¹ *See also* PULJ Proposed Order, 63-68 (ML#: 188161).

¹² In short, PPRP’s witnesses did not conduct any independent analysis of the Projects to explain why PPRP’s condition imposing full FCA compliance is reasonable. *Id.*

¹³ All parties also agree that it is within the Commission’s authority to impose full FCA compliance on a project subject to a CPCN.

“due consideration” standard controls – does not serve as precedent binding developers and PPRP to full FCA compliance moving forward. This will make clear that the Commission will consider each future project individually based on the facts in the record under the “due consideration” standard. This outcome will allow the Blue Star and Ibis projects to move forward under full FCA compliance, while establishing precedent that will guide developers, PPRP, and counties in the future as they work together to develop creative forestry conditions that offer benefits not possible under a rigid application of the FCA.

IV. Conclusion

Notably, the vast majority of solar CPCN are not contested. While these cases follow a litigated model, developers have an incentive to work collaboratively with PPRP, the counties, and local community members early on in the process to ensure there is no need to contest the conditions ultimately introduced into the record. Thus, behind the scenes, CPCN cases are much more collaborative than they are adversarial. Reaffirming the “due consideration” standard for forestry issues is not aimed at limiting state and local oversight. From a practical standpoint, providing this flexibility will create an incentive for parties and other stakeholders to work collaboratively on forestry issues – just as they do for all other aspects of development – because failure to do so increases the likelihood of a contested proceeding. Ultimately, a collaborative approach will lead to much more desirable outcomes than a strict application of full FCA requirements for all future projects. OneEnergy is seeking to reinforce this important and effective process for the benefit of stakeholders and developers in Maryland.

For all these reasons, OneEnergy respectfully requests that the Commission:

1. Immediately finalize the conditions in Case Nos. 9387 and 9392 with PPRP's Proposed Condition 2(e) and delete the reference to local provisions as requested by Staff; and
2. Overturn the PULJ's interpretation of the FCA and findings on preemption and reaffirm the "due consideration" standard consistent with Commission precedent.

Respectfully submitted,

A handwritten signature in black ink, reading "Todd R. Chason / DWB". The signature is written in a cursive, flowing style.

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