

**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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**STATE OF MARYLAND, DEPARTMENT OF NATURAL RESOURCES,  
POWER PLANT RESEARCH PROGRAM'S CONSOLIDATED REPLY  
MEMORANDUM TO PUBLIC UTILITY STAFF'S MEMORANDUM OF APPEAL AND  
APPLICANT'S REPLY BRIEF**

Staff ("Staff") for the Maryland Public Service Commission ("PSC") filed a Memorandum of Appeal on May 16, 2016 in Docket No. 9387 ("Blue Star Appeal") and in Docket No. 9392 ("Ibis Appeal") challenging the legal analysis addressing the Maryland Forest Conservation Act, Md. Code Ann., Nat. Res. (NR), §§5-1601 through 5-1613 ("FCA") in the Proposed Orders issued by the Public Utility Law Judge in Docket No. 9387, ("Blue Star Solar Proposed Order") and Docket No. 9392, ("Ibis Solar Proposed Order") both issued on April 6, 2016. On June 3, 2016, Applicants, OneEnergy Blue Star Solar LLC and OneEnergy Ibis Solar

LLC, filed a joint reply memorandum also challenging the legal analysis in the Proposed Orders. This memorandum responds to points raised in both briefs.

The Power Plant Research Program (PPRP) agrees with and adopts the “Statement of the Case” set forth in Staff’s memorandum, subject to the arguments below. (Blue Star Appeal, pp. 1-4; Ibis Appeal, pp. 1-4). PPRP also agrees in general with Staff’s legal analysis and conclusions set forth in its “Argument,” to the extent that it states that the PSC has the ultimate authority, through the process of “due consideration,” to determine the appropriate level of FCA compliance for a generating facility. (*see generally*, Blue Star Appeal at 4-9 ; Ibis Appeal at 4-9). Similarly, PPRP agrees with and adopts Staff’s analysis and conclusion that the FCA is controlling as to projects subject to a CPCN, and is not subordinate to local ordinances implementing the FCA. (*Id.*) PPRP believes that a misreading of the exceptions provided by the FCA set forth in the Proposed Orders will complicate the parties ability to determine the PSC’s statutory authority to give due consideration to FCA compliance. Accordingly, the Proposed Orders should be modified to find that the PSC’s “ authority to give due consideration to forest conservation issues controls over any requirements of local forest conservation ordinances.” (Blue Star Appeal, pp. 4, 10; Ibis Appeal, pp. 2, 10).

That said, PPRP takes issue with certain assertions and conclusions found in Staff’s Memoranda of Appeal and Applicants’ Joint Memorandum, as set forth in the following exceptions and clarifications.<sup>1</sup>

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<sup>1</sup> Applicants did not file an appeal of either Proposed Order in PSC Cases 9387 and 9392 (*see*, Applicants’ Joint Memorandum at 5), and thus, are limited to responding to issues raised in Staff’s brief. To the extent that Applicants challenge matters not raised by Staff’s appeal, those arguments should be disregarded. *See e.g.*, pp. 11-12 of Joint Memorandum (Applicants’ assertion that there is inadequate support in the record to require full FCA compliance)

1. The Commission's "Due Consideration" of the FCA May Result in Requiring Full Compliance with the County's Implementation of the FCA.

Staff asserts that the clause "consistent with Kent/Somerset County ordinances implementing the FCA" contained in Licensing Condition 2(e) must be removed in order to avoid a misinterpretation of FCA's application to a CPCN proceeding in a manner that eliminates the Commission's obligation to give due consideration to the FCA. (Blue Star Appeal at 4, 10; Ibis Appeal at 4,10). Staff's reasoning appears to rest on a belief that "due consideration" by the Commission cannot, in any circumstance, require full compliance with the FCA. To the extent that Staff is suggesting that a PSC determination, after "due consideration" is given to the FCA, that full compliance with the FCA through the county's implementing ordinance could *not* be in the public convenience and necessity, PPRP disagrees. When the Commission determines that the facts in a case provide no basis to deviate from the normal application (*i.e.*, full compliance) with the FCA, then the Commission's determination that full compliance with the manner in which the State's FCA is implemented (generally through a county ordinance) is appropriate. In *Blue Star* and *Ibis*, respectively, PPRP and county witnesses provided significant testimony as to why full compliance was required in these cases. As shown in the Proposed Orders, the Applicant in each of these cases did not provide sufficient evidence to demonstrate that a deviation from full compliance should be allowed. (*Blue Star* Proposed Order at 68 -70; *Ibis* Proposed Order at 79-81) In exercising its discretion in this case, the Public Utility Law Judge ("PULJ") adopted PPRP Recommended Condition 2(e) as an appropriate reflection of the evidence provided in each case, as supported by the record. Staff sets forth no basis to disregard the PULJ's well-reasoned findings on this matter. Instead, Staff states that "a sufficient record has been made by the PULJ in this case by receiving testimony on the FCA, as well as the particulars of the proposed power project." (Blue Star Appeal at 9; Ibis

Appeal at 8). PPRP believes that there is no need to remove the clause from Condition 2(e) requiring full compliance with the county ordinance (i.e., standard implementation of the FCA) simply to assure that the Commission maintains its ultimate authority to determine the State law's application to a CPCN applicant. Thus, there is no basis to grant Staff's request that this portion of Condition 2 (e) in Appendix A of the Proposed Orders be removed.

## 2. Applicants for a CPCN are Generally Required to Comply with Local/ County Ordinances Specified Within the Final Conditions

Staff asserts that “[a]s a matter of longstanding precedent, generating stations that are subject to the requirement that a CPCN be obtained from the Commission prior to construction are not subject to local planning and zoning processes and related ordinances.” (Blue Star Appeal at 4; *see also* Ibis Appeal at 4). PPRP notes that it is longstanding precedent in CPCN cases to require in the Recommended Initial Conditions and, ultimately, the Final Conditions, conditions requiring that an applicant comply with various local ordinances. These conditions in a CPCN require compliance with county ordinances addressing such areas as vegetative buffering, setbacks, lighting and county roads, and also require compliance with permit requirements for certain delegated authorities to a county, including erosion and sediment control, stormwater management, grading and building permits, site plan and the County Emergency Management System.<sup>2</sup> In this manner, the PSC has determined in the vast majority of CPCN dockets that it is in the public convenience and necessity for a generating station that has obtained a CPCN to fully comply with many local/ county ordinances.

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<sup>2</sup> See e.g., PSC Case No. 9387, Proposed Order, Appendix A, Conditions 2d, 6, 7, 9, 10 and 16; PSC Case No. 9392, Proposed Order, Appendix A, Conditions 2d, 6, 7, 8, 10, 11, 16 and 17; PSC Case No. 9370, Final Order, Appendix A, Conditions 2d, 6, 11, 12, 15 and 18..

### 3. Section 7-207(e) of the Public Utility Article Does Not Include the “Applicant’s Needs” As a Factor for the Commission’s Consideration in Determining the Public Convenience and Necessity

Staff states that, “[t]he opinions and recommendations of PPRP and local jurisdictions are normally given considerable deference and weight in this process, but *an Applicant’s needs must also be considered*” (emphasis added). (Blue Star Appeal at 10; *see also* Ibis Appeal at 10). This assertion contradicts a plain reading of §7-207(e) of the Public Utilities Article. It erroneously adds “the Applicant’s needs” to the statutory factors specified in §7-207(e)(i), (ii) for which the Commission must give “due consideration” in determining what serves the public convenience and necessity. PUA §7-207(e) requires the PSC to consider a broad range of socioeconomic, environmental, health, safety, and system reliability impacts associated with proposed power plants as well as the host county or municipal governing authority’s recommendations. Pursuant to §3-306 of the Natural Resources Articles, and on behalf of State Agencies, PPRP provides a comprehensive independent environmental and socioeconomic review of such projects and coordinates the development of recommended licensing conditions that are submitted to the PSC in weighing the PUA §7-207(e) factors. As Staff points out, the Commission has the obligation and authority to give “due consideration” to §7-207(e)’s enumerated factors<sup>3</sup> in determining whether a project seeking a CPCN is in the public convenience and necessity and under what conditions. These statutory factors are clearly delineated and do not include “the applicant’s needs.”

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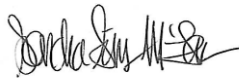
<sup>3</sup> PPRP agrees with Staff’s analysis that statutory language strongly suggests that the General Assembly desires the Commission to treat FCA issues in the same manner as it treats other Public Utilities Article §7-207(e) factors. (Blue Star Appeal at 9)

4. All Parties Need A Clear and Controlling Interpretation for the Application of the FCA to CPCN Proceedings.

PPRP agrees with the Applicants that “it is crucial that the Commission clearly and concisely articulate the CPCN FCA standard.” Applicants’ Brief at 2. At present, there are differing FCA analyses from the two Public Utility Law Judges who have issued proposed orders addressing the FCA. Although both PULJs found the FCA to be applicable, their legal analysis is at odds. Moreover, another contested FCA case will soon be under submission to a third PULJ, with the potential for further disparate results. All parties would benefit by the Commission's binding statement on the law applying the FCA to CPCN proceedings. Accordingly, PPRP respectfully requests that the Commission review the Proposed Orders issued in Blue Star (PSC 9387) and Ibis (PSC 9392), as well as the pending though not yet appealed Proposed Order in Pinesburg (PSC 9395 – notice of appeal due June 13, 2016), and provide binding guidance to the parties on the scope and legal application of the FCA. Doing so will save time and resources and avoid unnecessary contested evidentiary hearings.

June 6, 2016.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that electronic copies of the foregoing brief were served on all parties of record on the service list this 6<sup>th</sup> day of June, 2016.

A handwritten signature in black ink, appearing to read "Sondra Simpson McLemore". The signature is fluid and cursive, with the last name "McLemore" being more prominent.

Sondra Simpson McLemore