

**BEFORE THE PUBLIC SERVICE
COMMISSION OF MARYLAND**

IN THE MATTER OF THE APPLICATION OF *
CITIZENS UB SOLAR, LLC FOR A *
CERTIFICATE OF PUBLIC CONVENIENCE * Case No. 9483
AND NECESSITY TO CONSTRUCT A 9.9 MW *
SOLAR PHOTOVOLTAIC GENERATING *
FACILITY IN THE TOWN OF UNION BRIDGE *
AND CARROLL COUNTY, MARYLAND *

* * * * *

**JOINT MOTION FOR PREHEARING RULING ON SCOPE OF
COMMISSION’S AUTHORITY**

Citizens UB Solar, LLC (the “Applicant”) and the Town of Union Bridge (the “Town”) (collectively the “Settling Parties”) hereby respond to Technical Staff’s Reply and respectfully request that the Public Service Commission of Maryland (the “Commission”) issue a prehearing ruling that it has jurisdiction to review and approve the Joint Motion of Approval of Agreement of Stipulating and Settlement (the “Settlement”) filed with the Commission on October 31, 2019¹ and/or make the Settlement a condition in its CPCN order.

I. Introduction

Following months of negotiations and a unanimous vote by the Town Council, the Settling Parties submitted a comprehensive agreement to the Commission that would resolve all contested issues in this case. Among other provisions, the Settlement: (1) provides the Town enhanced control over aspects of the Project by annexing the Project site into the Town’s footprint; (2) allows siting of a portion of the Project in the Town’s existing “Industrial-Restricted” zoning district; (3) requires the Settling Parties to enter into a Payment In Lieu of Taxes (“PILOT”) Agreement to provide extraordinary personal property tax revenues above

¹ ML#: 227330.

existing tax rates for the life of the Project; and (4) provides an option to purchase land for a new (and much needed) water treatment plant and stormwater management facility. The terms of the Settlement are clearly germane to this proceeding and well within the Commission's jurisdiction to consider and approve under Public Utilities Article ("PUA") § 7-207. In fact, these provisions are more clearly within the scope of the Commission's jurisdiction than other settlement terms the Commission has approved and adopted in prior proceedings.

In response, Technical Staff ("Staff") asks the Commission to decline to act on the Settlement.² In summary, Staff argues that the provisions of the Settlement are outside of the Commission's authority. This position is incorrect and would harm the Project. First, the Settlement makes material changes to the layout and regulatory structure of the Project that must be incorporated into CPCN and reflected in PPRP's licensing conditions.³ Second, the Settling Parties contemplated the Commission would follow past precedent and incorporate the Settlement into its order granting a CPCN, which would provide continuing Commission oversight. Third, as is standard in settlements before the Commission, Section 12 of the Settlement allows either party to void the Settlement if not approved by the Commission without material modification. In other words Staff's position jeopardizes the Settlement.

Staff has not identified any aspect of the Settlement to which it objects. Instead, after itemizing the major terms of the Settlement, Staff expressly states in its response that it does not oppose the Settlement.

Staff's argument necessitates a preliminary ruling on the scope of the Commission's jurisdiction over the Settlement to determine whether the Settlement is enforceable. For the

² Reply of Commission Staff to the Settlement by Citizens UB Solar, LLC and the Town of Union Bridge, ML# 227426 (November 8, 2019).

³ To that end, PPRP filed revised conditions on November 15, 2019 to reflect the revised layout of the Project and annexation by the Town.

reasons stated below, the Settling Parties request that the Commission issue a prehearing ruling that it has jurisdiction to consider and approve the Settlement and incorporate the Settlement into its CPCN order. If the Commission determines that it does not have such jurisdiction, the Settling Parties request the opportunity to reconsider the Settlement prior to the Commission's consideration and issuance of a proposed order.

II. Legal Standard

When reviewing a CPCN application, the Commission must give “due consideration” to the recommendation of the local county and “the effect of the generating station ... 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 of means for the required timely disposal of wastes produced by any generating station. PUA § 7-207(e)(1) & (2).

Additionally, as of October 1, 2017, the Commission must also consider:

- (i) the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where any portion of the generating station is proposed to be located; and
- (ii) the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located. PUA § 7-207(e)(3).

“Due consideration” does not require the Commission to employ a strict balancing test or any particular method. Rather, the Commission must simply “consider all relevant facts and exercise reasonable judgment.”⁴ The Commission has historically adopted licensing conditions

⁴ *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Public Service Commission*, 227 Md. App. 265, at 288 (2016), *aff'd*, 451 Md. 1 (2016); *see also* Order No. 88260, Case No. 9413, 8 (June 16, 2017) (affirming proposed order of PULJ and rejecting the application of a formulaic approach in favor of the flexible standard adopted by the Court of Appeals).

when issuing CPCNs to generating stations that impose requirements prior to, during, and after construction.⁵

The Commission's authority is broad. In addition to "powers specifically conferred by law", "[t]he Commission has the implied and incidental powers needed or proper to carry out its functions under" the Public Utilities Article. PUA § 2-112(b). Further, "[t]he powers of the Commission shall be construed liberally." PUA § 2-112(c).

The Commission frequently considers and approves, but is not bound to accept, settlements that resolve contested issues in quasi-judicial proceedings.⁶

III. Argument

1. The Settlement is relevant to multiple CPCN review factors.

Staff argues that the Settlement is outside the Commission's jurisdiction to consider in this proceeding. Staff offers no support for this position, and a review of the Settlement demonstrates that it resolves issues relevant to several of the Commission's review factors under PUA § 7-207(e) and frequently addressed in solar CPCN proceedings.

Under PUA § 7-207(e)(1), the Commission must consider, and gives significant weight to,⁷ "the recommendation of the governing body of each ... municipal corporation in which any portion of the construction of the generating station ... is proposed to be located." Here, the Town has unanimously approved the Settlement and now supports the Project, subject to the terms of the Settlement. Staff has effectively requested the Commission ignore this

⁵ See e.g., Order No. 89096, Case No. 9477, Appendix A and B (April 16, 2019) (granting CPCN to solar project subject to conditions)

⁶ See e.g., Order No. 84698, Case No. 9271 (February 17, 2012) (approving Exelon-Constellation merger settlement with modifications).

⁷ See e.g., Order No. 88453, Case No. 9402, 44 (September 29, 2019) (noting the Commission must give "significant weight" to local jurisdiction's recommendation.)

recommendation. The Settlement is germane to the Commission's consideration of the relevant local jurisdiction's recommendation under this review factor.

The Settlement also addresses “the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where any portion of the generating station is proposed to be located” under PUA § 7-207(e)(3)(i) by requiring the Project to be annexed into the Town⁸ and expanded so that it is sited within a portion of the Town currently zoned Industrial-Restricted.⁹ This revision to the Project layout is specifically referenced as an amendment to the pending CPCN application¹⁰ and is consistent with the recommendation of the Reviewing State Agencies to “continue discussions with the Town of Union Bridge regarding the annexation of project lands into the town as contemplated by the Comprehensive Plan.”¹¹ This represents a fundamental change to the Project and the zoning factors the Commission must consider under § 7-207(e)(3)(i). Further, this change has required the Power Plant Research Program to file revisions to several of its standard conditions that reflect the future location of the Project entirely within the Town.¹² In fact, the Revised Final Conditions filed on November 15, 2019 in paragraph 1 treat the Settlement as an amendment to the Application and incorporate

⁸ Settlement at Section II.1. The Commission has previously found commitments to annex as relevant to the Commission's CPCN review authority. In Case No. 9477, the Town of Greensboro initially opposed a solar project proposed to be located near its municipal boundary, but later withdrew that opposition based on the applicant's agreement to annexation a portion of the project into the town. This action was considered relevant by the Commission in its analysis under PUA § 7-207. As explained by Judge Grace: “The Town of Greensboro filed a letter, withdrawing its earlier opposition of the Project, and instead, noting its support for the application, subject to the Applicant following through with its agreement and consent to annex 414 acres in the Town's growth area into its municipal boundaries. Consequently, I find that the CPCN, subject to Final License Conditions of Staff and PPRP, complies with the recommendations of the County and of the Town of Greensboro.” Order No. 89096, Case No. 9477 7 (March 15, 2019).

⁹ *Id.* at Section II.2 and Appendix B.

¹⁰ *Id.*

¹¹ Secretarial Letter to Chairman Stanek, ML#: 226071, 1 (July 15, 2019).

¹² See PPRP Response to Settlement, ML# 227388 (November 6, 2019).

it as part of the Application by definition. The Settlement is now integral to the Commission's consideration of the pending CPCN application and cannot be ignored as requested by Staff.

With respect to PUA § 7-207(e)(1)(ii) ("economics"), the Settlement would require the Applicant to enter into a PILOT Agreement with the Town offering extraordinary personal property tax revenue to the Town.¹³ Further, the annexation of the Project into the Town will provide additional real property tax revenue to the Town. The Commission frequently considers tax benefits in orders granting CPCNs to solar facilities.¹⁴ Additionally, the Settlement requires the Project to provide an option to purchase land on the project parcel for a waste water treatment plant and stormwater management facility.¹⁵ This commitment would provide a tangible economic benefit to the Town. Accordingly, the Settlement is relevant under PUA § 7-207(e)(1)(ii).

With respect to PUA § 7-207(e)(1)(iii) ("esthetics"), the Settlement incorporates important landscape screening requirements (including an unprecedented commitment to plant trees that will mature to 30 feet in height) to mitigate views of the Project, subject to approval by the Town.¹⁶ Vegetative screening is a frequent issue considered by the Commission to resolve concerns of esthetic impacts related to proposed solar facilities. This Settlement term provides important mitigation to the esthetic impacts of the Project on the Town and relevant under PUA § 7-207(e)(1)(iii).

¹³ Settlement at II.3.

¹⁴ See e.g., Order No. 89069, Case No. 9457, at 61 (February 15, 2019) (finding, in the Commission's review of "economic" factors under PUA § 7-207(e)(1)(ii), that a solar project "will provide positive economic benefits to the County and State" in part because it will "generate tax revenue for both the County and State").

¹⁵ Settlement at Section II.4.

¹⁶ Settlement at Section II.5.

Finally, the Settlement is relevant to PUA § 7-207(e)(3)(ii) (“the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located”). The Settlement evidences that the Applicant worked with the Town to resolve all issues presented by the Town.

The Settlement is doubtlessly within the Commission’s review jurisdiction for this CPCN proceeding.

2. The Commission has authority to review the Settlement, and the Settlement is consistent with settlements previously approved by the Commission.

In addition to having authority to review the Settlement under PUA § 7-207(e), the Commission also has authority to approve and adopt the Settlement as a condition of a CPCN order issued in this proceeding. Because the Settlement is an integral component of the Project and the Commission’s review, its terms must be adopted by the Commission to ensure the Project operates consistent with the public convenience and necessity.

Staff correctly notes the Commission’s authority is limited to “powers specifically conferred by law”, however, this ignores that “[t]he Commission has the implied and incidental powers needed or proper to carry out its functions under” the PUA, with those powers “construed liberally.” PUA § 2-112(b) and (c). The Commission’s historic use of these broad powers in both the CPCN licensing context and the approval of settlement agreements demonstrates the Commission has authority to approve and incorporate the Settlement into its CPCN.

In CPCN proceedings, PPRP sponsors and the Commission adopts comprehensive licensing conditions that address both state-level and local permitting requirements. In fact, numerous conditions proposed by PPRP require receipt of local approvals or otherwise touch upon issues of local concern. These standard conditions include, among others:

- Conditions requiring site plan approval.¹⁷
- Conditions requiring receipt of grading permits.¹⁸
- Conditions requiring implementation of vegetation management and pollinator habitat (*i.e.*, flower) plans.¹⁹
- Conditions requiring compliance with local forest conservation ordinances.²⁰
- Conditions requiring receipt of all permits for the use, crossing, and occupancy of local roads.²¹

Although the Commission does not have the expertise or authority to review site plans, issuing grading permits, approve forest conservation plans, and so forth, these conditions are nevertheless incorporated as integral components of CPCNs and ensure an approved facility's construction and operation is consistent with the public convenience and necessity.²² Importantly, they allow the Commission to serve an important oversight function. For instance, if a project does not obtain a local approval required by a CPCN conditions but commences construction, the Commission then has authority to take enforcement action, including revoking the CPCN. As with PPRP's conditions, several of the Settlement terms contain commitments that are outside of the Commission's expertise, but are integral to construction and operation of the Project consistent with the public convenience and necessity. Accordingly, it is essential for the

¹⁷ See *e.g.*, Order No. 88562, Case No. 9454, Appendix A (January 5, 2018) (Condition 17).

¹⁸ *Id.* (Condition 15).

¹⁹ *Id.* (Conditions 12 and 13)).

²⁰ *Id.* (Condition 10).

²¹ *Id.* (Conditions 18 and 19).

²² Similarly, Staff typically proposes a condition for solar CPCNs that requires the receipt of interconnection approvals from PJM. While the Commission does not have jurisdiction over transmission-level interconnections (which are reserved to FERC), Staff nonetheless includes these conditions to provide the Commission with oversight authority via the CPCN process.

Commission to consider and adopt the Settlement, allowing it to serve an oversight function as it does with many of PPRP's conditions.

A review of other settlements previously approved by the Commission also demonstrates that this Settlement is well within the bounds of the Commission's broad authority. In fact, in comparison, the Settlement is much more directly related to the Commission's applicable review factors that what have been approved in the past. For example:

- In Case No. 9297, the Commission approved a settlement between the Keys Energy Center (an applicant for a CPCN to construct a large natural gas plant) and the United States Air Force.²³ In doing so, the Commission included as Attachment C to its final order licensing conditions agreed to between the Keys Energy Center and the United States Air Force concerning the safety of operations at various federal military installations outside of state jurisdiction.²⁴
- In Case No. 9318, in granting a CPCN to the Dominion Cove Point Natural Gas Plant the Commission required the facility to (1) make annual contributions of \$400,000 to the Maryland Energy Assistance Program or other local income energy assistance programs for the first 20 years of operations and (2) make five annual instalments of \$8 million (totaling \$40 million) in to the Maryland Strategic Energy Investment Fund for renewable energy and energy efficiency investments carried out by the Maryland Energy Administration.²⁵
- In Case No. 9361, in the context of the PHI-Exelon merger, the Commission approved far reaching settlement terms only tangentially related to the proposed merger, including the creation of recreational dirt trails under transmission lines, system hardening to support a water treatment plant, and a \$3.5 million sediment study of the Conowingo dam.²⁶

Settlements represent a give and take between parties with adverse interests. To reach an agreement, parties often agree to terms that are outside the bounds of what the Commission would have been expected to order if the case had been litigated. The Commission is not being

²³ The settlement agreement is available via ML# 157307.

²⁴ Case No. 9297, Order No. 86692 (October 21, 2014).

²⁵ Case No. 9318, Order No. 86372, Appendix A-63-64, Conditions J-3 and J-4 (June 2, 2014).

²⁶ Case No. 9361, Order No. 86990, Appendix A, Conditions 42, 43, and 44 (May 15, 2015).

asked to become a party to the agreement. However, the Commission still reviews such settlements to determine whether, read with the record as a whole, the requested approval is in the public interest. If so, then the public interest is served by linking the terms of the Settlement with Commission approval to ensure compliance with these central terms, rather than leaving the Commission powerless in the event of a breach. If approved, the failure of a settlement term would be subject to enforcement action at the Commission. Staff's position would undermine this oversight and limit the ability of adverse parties to resolve issues. The Settlement addresses crucial issues to this case concerning zoning, economics, and esthetics and is well within the broad bounds of what settlements the Commission has previously approved. It is uniquely important to a small municipality like Union Bridge, whose authority is largely preempted in this setting, to rely on the Commission to stand behind the Settlement to assure that the Town's concerns will remain a recognized and integral part of the regulatory process going forward. Accordingly, it is appropriate and necessary for the Commission to approve and adopt the Settlement in any order issued in this proceeding.

III. Conclusion

For the reasons stated above, the Settling Parties request that the Commission issue a prehearing ruling that it has jurisdiction to consider and approve the Settlement and incorporate the Settlement into its CPCN order. Further, if the Commission determines that it does not have jurisdiction, the Settling Parties request leave to reconsider the Settlement before further Commission review.

[Signatures on following page...]

Respectfully submitted,

CITIZENS UB SOLAR, LLC

By: 

David W. Beugelmans

Counsel for Citizens UB Solar, LLC

THE TOWN OF UNION BRIDGE,
MARYLAND

By: 

John T. Maguire

Counsel for The Town of Union Bridge,
Maryland