

**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 REPLY MEMORANDUM ON APPEAL

Citizens UB Solar, LLC (the “Applicant”) and the Town of Union Bridge (the “Town”) (collectively, the “Settling Parties”) hereby respond to Technical Staff’s (“Staff”) March 26, 2020 Memorandum on Appeal and respectfully request that the Public Service Commission of Maryland (the “Commission”) affirm, without modification, the Proposed Order of Public Utility Law Judge (the “Proposed Order”) issued by Chief Judge McLean (the “Chief Judge”) in this proceeding on February 13, 2020.¹

I. Statement of the Case

This solar project will be sited in Carroll County within the municipal boundaries of the Town of Union Bridge (the “Town”). It proceeded through the CPCN process as most do, with the Power Plant Research Program (“PPRP”) and Staff proposing licensing conditions that the Applicant then accepted without contested issues.² The Town initially objected to the Project on several grounds. Fortunately, after months of negotiations, the Applicant and the Town resolved all issues, including those related to consistency with the Town’s zoning code and comprehensive plan, and esthetic and economic impacts. After a unanimous vote of approval by

¹ ML#: 228592.

² ML#: 226352.

the Town Council, the Settling Parties submitted a comprehensive agreement (the “Settlement”) to the Commission that resolved all contested issues in this case.³

Key provisions of the Settlement: (1) provide the Town enhanced control over aspects of the Project by annexing the Project site into the Town’s footprint consistent with the Town’s comprehensive plan; (2) amend the CPCN application⁴ and allows siting of a portion of the Project in the Town’s existing “Industrial-Restricted” zoning district; (3) require the Settling Parties to enter into a Payment In Lieu of Taxes (“PILOT”) Agreement to provide extraordinary personal property tax revenues above existing tax rates for the life of the Project; and (4) provide an option to purchase land for a future wastewater treatment plant and stormwater management facility.⁵

Staff does not identify any term of the Settlement to which it objects or finds inappropriate. Instead, Staff objects to incorporating the Settlement into the Proposed Order, arguing that some terms of the Settlement are outside of the Commission’s authority.⁶ Following oral argument, the Chief Judge rejected Staff’s position explaining:

I find that the commitments contained in the Settlement clearly fall within the PUA § 7-207(e) factors the Commission is required to consider when evaluating a CPCN Application ... I specifically find the Settlement results in the Town supporting the Project where it was initial opposed, addresses issues related to esthetics, historic sites, zoning and consistency with the applicable comprehensive plan, and ensures the Project will have a positive economic impact on the Town.⁷

³ Applicant Ex. 13.

⁴ The Settlement made material changes to the layout and regulatory structure of the Project that must be incorporated into CPCN and reflected in PPRP’s licensing conditions. PPRP submitted revised licensing conditions to reflect the Settlement, which are incorporated as Appendix A to the Proposed Order.

⁵ Applicant Ex. 13.

⁶ Reply of Commission Staff to the Settlement by Citizens UB Solar, LLC and the Town of Union Bridge, ML# 227426 (November 8, 2019).

⁷ Proposed Order at 37.

The Chief Judge further noted that 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.⁸

II. Summary of Position

The Commission should expeditiously affirm the Proposed Order without modification and deny Staff’s appeal.

III. Argument

This case should serve as a model for collaboration between CPCN applicants and local jurisdictions as solar deployment ramps up across Maryland this decade.⁹ Instead, the Settling Parties are forced expend time and resources defending the Settlement against speculative, academic challenge.

Staff attacks the Proposed Order in two distinct ways. First, it challenges the Commission’s authority. Staff narrowly defines the Commission’s general oversight authority and specific CPCN powers, then points to particular settlement terms and asks what the Commission could possibly know about each. In so doing Staff ignores plain statutory language and decades of Commission practice. Sections 1 and 2 below explain why the Chief Judge was correct and why Staff is selling short the Commission’s authority.

Second, Staff argues against Commission entanglement in disputes beyond its core competency. In support of this position Staff lists a parade of horrors, imagining that by approving this Settlement the Commission somehow will become a utility regulator, circuit court, and local planning commission all rolled into one. This is unsupportable speculation, and

⁸ Proposed Order at 36, fn. 137. *See also* Section III.2, *infra*.

⁹ By 2028, the Renewable Portfolio Standard will require 14.5% of electricity load delivered in Maryland each year to be covered by solar renewable energy credits from facilities connected to the electric grid serving, necessitating a significant build of in-State solar generation. Md. Public Utilities Article (“PUA”) § 7-703(b).

as Section 4 explains, runs completely counter to smart CPCN policy encouraging settlements between CPCN applicants and local governments.

The Settling Parties respectfully request that the Commission affirm the Proposed Order without modification. However, 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. If the Commission were to adopt the Staff's position, the Settling Parties request the opportunity to reconsider the terms of the Settlement prior to any Final Order by the Commission.

1. The entire Settlement is relevant to the statutory CPCN review factors.

Staff asks the Commission to overturn the Chief Judge's finding that the Commission has authority to consider the Settlement. In support, Staff inconsistently acknowledges that the commitments are within the statutory factors, while nonetheless arguing that the commitments are outside of Commission authority. The Settlement topics with which Staff takes issue fall into two categories: (1) annexation of the Project site into the Town and (2) commitments offering economic benefits to the Town, such as a purchase option allowing the Town to purchase a parcel from the Applicant and financial commitments by the Applicant related to taxes and payment of fees. Contrary to Staff's claims, the Settlement fits directly within the statutory review factors under PUA § 7-207(e).

The Commission must consider, and gives significant weight to,¹⁰ "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."¹¹ Likewise, the Commission must give

¹⁰ See e.g., Order No. 88453, Case No. 9402, 44 (September 29, 2019) (noting the Commission gives "significant weight" to local jurisdiction's recommendation.)

¹¹ PUA § 7-207(e)(1).

due consideration to “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.”¹² Finally, the Commission must give due consideration to “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.”¹³ The Settlement is directly relevant to all of these factors.

The Town, which originally opposed the Project,¹⁴ has unanimously approved the Settlement and now supports the Project, subject to the terms of the Settlement. The Settlement is germane to the Commission’s consideration of the relevant local jurisdiction’s recommendation and the Applicant’s efforts to address issues raised by the Town. Likewise, planning consistency is directly advanced by requiring the Project to be annexed into the Town¹⁵ and expanded so that it is sited within a portion of the Town currently zoned Industrial-Restricted.¹⁶ This revision to the Project layout is specifically referenced as an amendment to the pending CPCN application¹⁷ and is consistent with the recommendation of the Reviewing State Agencies to “continue discussions with the Town of Union Bridge regarding the annexation of

¹² PUA § 7-207(e)(3)(i)

¹³ PUA § 7-207(e)(3)(ii).

¹⁴ Proposed Order at 13-15.

¹⁵ 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 annex a portion of the project into the town. This action was considered relevant by the Commission in its analysis under PUA § 7-207. Order No. 89096, Case No. 9477, 7 (March 15, 2019). (“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.”).

¹⁶ *Id.* at Section II.2 and Appendix B.

¹⁷ *Id.*

project lands into the town as contemplated by the Comprehensive Plan.”¹⁸ This represents a fundamental change to the Project and is directly relevant to zoning and planning factors the Commission must consider.¹⁹

Staff is incorrect in stating “the land annexation does not affect the operations or the environmental or other impacts of the proposed generating station.”²⁰ After the annexation occurs, the Project will be located within the municipal limits of the Town. This fundamentally changes the permitting structure for the Project by providing the Town more control over ministerial permits and other reviews. The annexation required PPRP to file revisions to several of its standard conditions that reflect the future location of the Project entirely within the Town.²¹ In fact, the Revised Final Conditions filed on November 15, 2019 in paragraph 1 treats the Settlement as an amendment to the Application and incorporate it as part of the Application by definition. The annexation portion of the Settlement was integral to the Chief Judge’s consideration of the CPCN application and PPRP’s conditions and cannot be ignored.

Staff is also incorrect that the economic benefits of the Settlement to the Town are irrelevant to this proceeding. The Settlement requires the Applicant to enter into a PILOT Agreement with the Town offering extraordinary personal property tax revenue to the Town.²² 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

¹⁸ Secretarial Letter to Chairman Stanek, ML#: 226071, 1 (July 15, 2019).

¹⁹ PUA § 7-207(c)(3)(i).

²⁰ Staff Memorandum at 5.

²¹ See PPRP Response to Settlement, ML# 227388 (November 6, 2019).

²² Settlement at II.3.

CPCNs to solar facilities.²³ Additionally, the Settlement requires the Project to provide an option to purchase land on the project parcel for a wastewater treatment plant and stormwater management facility.²⁴ Finally, the Settlement requires reimbursement of the Town’s expenses, ensuring the cost of permitting the project does not overwhelm the Town’s finances.²⁵ These commitments provide a tangible economic benefit to the Town. Accordingly, the Settlement is relevant under the PUA § 7-207(e)(1)(ii).

2. The Commission has authority to incorporate the Settlement within its final order, as demonstrated by past Commission practice with respect to settlements and CPCN licensing conditions.

The Commission also has jurisdiction to approve and adopt the Settlement under its broad authority. “The 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). In the CPCN context, the Commission has jurisdiction over the construction and operation of generating stations. *Bd. of County Commissioners of Washington County v. Perennial Solar, LLC*, 464 Md. 610, 644 (2019) (finding that “PU[A] § 7-207 preempts by implication local zoning authority approval for the siting and location of generating stations which require a CPCN”). In every CPCN order, the Commission exercises this jurisdiction by requiring certain actions to occur prior to construction, mostly through PPRP and Staff’s licensing conditions. The Commission’s historic use of its broad powers over generating stations

²³ 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”).

²⁴ Settlement at Section II.4.

²⁵ Settlement at Section II.6 and 7. The Town of Union Bridge has a population of less than 1000 residents. The cost of permitting a complex solar facility would represent an outsized portion of the Town’s budget. Payment of permitting fees is a common occurrence in Maryland, especially in smaller jurisdictions.

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 pre-construction conditions include, among others:

- Conditions requiring site plan approval;²⁶
- Conditions requiring receipt of grading permits;²⁷
- Conditions requiring implementation of vegetation management and pollinator habitat (*i.e.*, flower) plans;²⁸
- Conditions requiring compliance with local forest conservation ordinances;²⁹ and
- Conditions requiring receipt of permits for use and occupancy of roads.³⁰

Although the Commission generally does not have the expertise to review site plans, issue 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. 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 condition but commences construction, the Commission then has authority to take enforcement action, including revoking the CPCN. As

²⁶ See *e.g.*, Order No. 88562, Case No. 9454, Appendix A (January 5, 2018) (Condition 17).

²⁷ *Id.* (Condition 15).

²⁸ *Id.* (Conditions 12 and 13)).

²⁹ *Id.* (Condition 10).

³⁰ *Id.* (Conditions 18 and 19).

with PPRP's conditions, several of the Settlement terms contain commitments that are outside of the Commission's core expertise but are integral to construction and operation of the Project consistent with the public convenience and necessity. Accordingly, it is essential for the Commission to consider and adopt the Settlement, allowing it to serve an oversight function as it does with many of PPRP's conditions.

Accepting Staff's argument would jeopardize the CPCN process by serving as precedent that numerous PPRP licensing conditions adopted by the Commission in solar CPCN cases dating back as far as 2011 are outside of the Commission's jurisdiction. As the Chief Judge stated in the Proposed Order, "I find the items that concern Staff to be no different than many other commitments or conditions that the Commission routinely imposes on applications, for which the Commission relies *entirely* upon PPRP's expertise."³¹

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 than 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.³² 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.³³
- 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

³¹ Proposed Order at 37.

³² The settlement agreement is available at ML# 157307.

³³ Case No. 9297, Order No. 86692 (October 21, 2014).

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.³⁴

- 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 county water treatment plant, and a \$3.5 million sediment study of the Conowingo dam.³⁵

This boils down to appreciating the Commission’s important but nonetheless limited role with this Settlement. The Commission reviews settlements to determine whether, when 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. Otherwise, the Commission is rendered powerless in the event of a breach. The Chief Judge agreed, explaining

“I find the Settlement, in its entirety, can and should be incorporated into CUB Solar’s CPCN. I specifically find the Settlement results in the Town supporting the Project where it was initially opposed, addresses issues related to esthetics, historic sites, zoning and consistency with the applicable comprehensive plan, and ensures the Project will have a positive economic impact on the Town.”³⁶

Acceding to Staff’s position would undercut and limit the Commission’s oversight authority and preclude it from ensuring projects operate consistently with the public convenience and necessity. It is uniquely important to a small municipality like Union Bridge, whose

³⁴ Case No. 9318, Order No. 86372, Appendix A-63-64, Conditions J-3 and J-4 (June 2, 2014). Upheld in *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Public Service Commission*, 227 Md. App. 265, at 288 (2016), *aff’d*, 451 Md. 1 (2016). Staff attempts to distinguish these settlement terms on the basis that these payments were for state-wide programs, while the terms of the Settlement are not. Staff Memorandum at 14-15. The distinction is irrelevant because PUA § 7-207(e) does not require benefits to be state-wide. In fact, in contested cases, the Commission employs a balancing test that considers whether “the benefits of the generating facility, including economic benefits, outweigh the environmental, safety, and societal costs of siting the generating facility.” Order No. 86372, Case No. 9318, 63 (May 30, 2014). This specifically requires consideration of *local* and state-wide impacts. Further, Staff does not attempt to distinguish the settlement terms in Case Nos. 9297 and 9361, which include requirements applying to single entities in specific locations, such as system hardening for a specific county’s wastewater treatment plant.

³⁵ Case No. 9361, Order No. 86990, Appendix A, Conditions 42, 43, and 44 (May 15, 2015).

³⁶ Proposed Order at 37.

authority is largely preempted in this setting, to look to the Commission to assure that its concerns will remain an integral part of the regulatory process going forward.

3. Adopting the Settlements will not embroil the Commission in disputes outside its core competency.

Staff speculates that adopting the Settlement will open the Commission's doors to a host of disputes between the Settling Parties. The mission creep Staff fears cannot occur here, just as it has never materialized following prior Commission-approved settlements or CPCN licensing conditions. The Settlement does not put the Commission directly in charge of annexation, the purchase option, or other requirements. Exactly like PPRP and Staff's licensing conditions, the Settlement simply requires certain actions to occur prior to construction. If these actions do not occur, following notice and hearing, the Commission can delay or prohibit construction. But the Commission's involvement ends there.³⁷

Trying to make its point, Staff quotes language in the form annexation agreement included as an attachment to the Settlement and suggests – without support – that the Commission will be put in charge of deciding disputes under the agreement or under Md. Local Government Article § 4-404, which governs annexations.³⁸ This is not the case. Condition 1 to the Settlement simply requires the Applicant to “initiate” the annexation of the Project site prior to construction pursuant to Md. Local Government Article § 4-404, using an annexation agreement in the form substantially set forth in the attached annexation agreement.³⁹ This

³⁷ Staff attempts to draw an analogy to federal case law interpreting FERC's “affecting” jurisdiction under the Federal Power Act. Staff Memorandum at 10-11. These cases concern whether FERC has jurisdiction to regulate certain retail market participants, such as residential demand response providers, that engage in activities that affect wholesale electric markets. This analogy is misplaced because the Settlement concerns regulation of an entity clearly within the Commission's jurisdiction – a generating station – by prohibiting its construction unless certain actions delineated in the Settlement occur.

³⁸ Staff Memorandum at 7-8.

³⁹ Settlement at 3.

process will occur as it ordinarily would under Maryland law, with no involvement from the Commission. Under the plain language of the Settlement, the only scenario that would require Commission involvement is if the Applicant proceeds to construction *without* annexation occurring. If this hypothetical scenario occurred, the Commission could take action to prohibit further construction activities until the annexation is complete. This is a simple, binary determination (*i.e.*, the annexation did or did not occur) that would be handled at an Administrative Meeting.

Staff's next boogieman is the purchase option, imagining that the Commission would be forced into determining the "fair market value" of land purchased for the construction of a wastewater treatment facility and/or stormwater management facility under Condition 4 of the Settlement. Here again, pure fantasy. The Settlement simply requires the agreement to be executed prior to construction.⁴⁰ The Commission would only become involved if the agreement is not executed prior to construction and the Applicant begins building the Project. Again, this is a binary determination without the possibility of the technical and legal morass Staff imagines.

The absurdity of Staff's catastrophizing is further demonstrated when applied to Staff's own licensing conditions. In every solar CPCN proceeding, including this case, Staff proposes a condition that requires the receipt of interconnection approvals from PJM and execution of associated interconnection agreements prior to the start of construction.⁴¹ While FERC, not the Commission, has jurisdiction over these interconnections, Staff nonetheless includes these conditions to provide the Commission with oversight authority via the CPCN process pursuant to the grid impact review factor under PUA § 7-207(e)(2)(i). If accepted, Staff's reasoning would

⁴⁰ Settlement at 4.

⁴¹ See Proposed Order, Appendix C, Condition 3 (requiring "the signed ISA and CSA executed by Citizens UB Solar with PJM and PE be filed with the Commission prior to the commencement of construction").

suggest these conditions are inappropriate because they require the Commission to resolve complex disputed issues under PJM's Open Access Transmission Tariff or the signed interconnection documents. Obviously, this is not the case. The condition simply requires the documents to be entered into prior to the start of construction and filed with the Commission.

The Settlement includes nothing beyond the Commission's appropriate oversight role, as exercised in previous cases of non-compliance.⁴²

4. Staff's position would undermine the ability of solar CPCN applicants and local jurisdictions to engage in settlements to resolve contested issues during a time of significant anticipate solar development.

The Settlement resolves major siting issues at the heart of CPCN proceedings and of utmost importance to local jurisdictions, including consistency with zoning, economics, and visual buffers. The Settlement avoided the need for the Chief Judge to conduct a full evidentiary hearing and render a decision on contested issues. This allowed the Town to negotiate key terms related to annexation, siting in certain zoning districts, and esthetics. And, it puts the State on an expedited path of realizing 8.172 MW of additional solar generation.

Granting Staff's request would discourage parties from engaging in settlements, increasing the likelihood of litigation and reducing the flexibility of local jurisdictions and developers to work directly to resolve siting issues. It would also increase the number of cases in which the Commission must resolve highly technical siting and zoning issues, many of which are controversial. And it would do it at precisely the wrong time, when Maryland must build significant in-State solar generation to meet the 14.5% solar carve out by 2028.⁴³

⁴² For instance, in Case No. 9463 the Commission noted a filing from the Maryland Department of Environment determining that a solar project had not satisfied a preconstruction PPRP licensing condition related to the protection of Tier II streams. *See* ML#: 227012 (October 2, 2019 Letter Order). This did not require the Commission to delve into complex environmental issues related to stream quality. Instead, it was a binary decision (yes or no) that allowed the Commission to serve an oversight role. This is precisely what would occur under the Settlement.

⁴³ PUA § 7-703(b).

Affirming the Chief Judge's decision is simply good policy. Granting Staff's request would result in the opposite outcome.

III. Conclusion

1. For the reasons stated above, the Settling Parties respectfully request that the Commission affirm the Proposed Order without modification.

2. In the alternative, insofar as the Settlement was reached upon the reasonable assumption that it would form part of the Commission's Order, if the Commission determines this is not the case then the Settling Parties request leave to reconsider and renegotiate the Settlement before entry of a Final Order.

Respectfully submitted,

CITIZENS UB SOLAR, LLC

By: /s/

David W. Beugelmans

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THE TOWN OF UNION BRIDGE,
MARYLAND

By: /s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 14th day of April 2020 a copy of this document was e-mailed to the parties on the Service List in this proceeding.

By: /s/

David W. Beugelmans