

**BEFORE THE PUBLIC SERVICE
COMMISSION OF MARYLAND**

IN THE MATTER OF THE APPLICATION OF	*	
UB SOLAR FOR A CERTIFICATE	*	
OF PUBLIC CONVENIENCE AND NECESSITY	*	Case No. 9483
TO CONSTRUCT AN 8.2 MW SOLAR	*	
PHOTOVOLTAIC GENERATING FACILITY	*	
IN CARROLL COUNTY, MARYLAND.	*	

ON APPEAL TO THE PUBLIC SERVICE COMMISSION OF MARYLAND

**REPLY MEMORANDUM OF THE DEPARTMENT OF NATURAL RESOURCES,
POWER PLANT RESEARCH PROGRAM**

The Maryland Department of Natural Resources, Power Plant Research Program (PPRP), through undersigned counsel, submits this reply memorandum in response to issues raised in the Memorandum on Appeal, filed on March 26, 2020, by counsel for the Public Service Commission's Technical Staff (hereafter, "Staff").

QUESTION FOR REVIEW

As noted in Staff's opening Memorandum on page 2, as well as the Proposed Order at 34-35, the issue in this case is whether it is appropriate for the Public Service Commission ("Commission") pursuant to Md. Code Ann., Public Utilities Article § 7-207,

to incorporate the Settlement Agreement between the Applicant and the Town of Union Bridge (“the Town”) into the Certificate of Public Convenience and Necessity (“CPCN”) granted to the Applicant.

THE PROPOSED ORDER CORRECTLY APPLIED SECTION 7-207 TO THE FACTS IN THIS CASE, AND APPROPRIATELY FOUND IT TO BE IN THE PUBLIC CONVENIENCE AND NECESSITY TO INCORPORATE THE SETTLEMENT AGREEMENT INTO THE CPCN GRANTED TO THE APPLICANT

Staff opposes incorporating the settlement agreement between the Applicant and the Town into the CPCN for the Project on the basis that the Commission does not have authority to add the agreement to any CPCN granted for the project, even though it would minimize the Project’s harmful impacts on the local community and provide economic benefits to the Town. Staff contends that since certain financial commitments do not relate to the project’s environmental effects or operation, the Commission is without jurisdiction to include them in a CPCN. Instead, Staff asserts, the Commission may only consider the Settlement as a part of its public interest review under Section 7-207, but it is powerless to assure that the provisions are implemented and can be enforced through their inclusion as a part of the CPCN. Staff’s contention is contrary to statute, controlling caselaw and Commission precedent.

This important deficiency in Staff's arguments on appeal is demonstrated by the recent Court of Appeals' decision in *Board of County Commissioners of Washington County, Maryland v. Perennial Solar*, 464 Md. 610 (2019) (hereafter “*Perennial*” or “*Perennial Solar*”), which reaffirmed arguments set forth in the Maryland Public Service Commission’s

Amicus Curiae brief filed on April 17, 2019 in the *Perennial* case (hereafter “Commission *Amicus*”), As the Commission stated in its *Amicus* brief, “the Commission is responsible for reaching the final balance and that includes local zoning [preferences] as one of several factors.” Commission *Amicus* at 8. The Commission is well suited in obtaining the right balance between various differing State policy goals. See Order No. 87941, Case No. 9409 (*Gateway Solar*) pp. 20-21 (Jul. 28, 2016) (referring to balancing Maryland’s renewable energy goals with its forest conservation goals). It is well settled that “[l]ike many other determinations that the General Assembly has entrusted to the Commission’s discretion,”[in accordance with its authority under PUA §7-207(e)] “due consideration” of an application for a CPCN ‘requires that the Commission consider all relevant facts and factors and exercise reasonable judgment.” Order No. 88260, Case No. 9413 (*Dan’s Mountain Wind*) pp. 8-9 (Jun 16, 2017) (referencing caselaw).

In the instant case, after considering all relevant factors and exercising reasonable judgment, the Chief Public Utility Law Judge McLean determined that “the settlement commitments support a finding that the Project is in the public interest and that, for this reason, the settlement commitments should be included in the CPCN.” Proposed Order at 3. The Staff’s appeal to reverse this decision should be rejected.

A. The Commission Has Broad Authority to Assure a Project is Constructed and Operated in the Public Convenience and Necessity.

Staff’s argument seeks an unnecessarily limited reading of the Commission’s broad authority to assure that CPCNs that it grants are in the public convenience and

necessity. Staff asserts that the Commission should only require commitments to matters that “affect the operations or the environmental or other impacts of the proposed generating station,” and are within its area of expertise. This narrow and mechanical reading of PUA §7-207 is contrary to the statute, its application by the Commission, and caselaw regarding the Commission’s jurisdiction.

When implemented, the Settlement Agreement’s provisions will mitigate the Project’s negative impacts and provide benefits directly related to PUA §7-207(e) factors. As summarized by the Chief Public Utility Law Judge McLean, “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.” Proposed Order at 37, para. 109.

These future economic benefits will result from the Applicant’s financial commitments and its commitment related to annexation of the Project site. Specifically, as part of the Settlement Agreement, Applicant commits to executing a Payment in Lieu of Taxes or PILOT agreement, which will result in significant additional tax revenue to the Town; initiating annexation and entering into an Annexation Agreement with the Town; executing a purchase option agreement for the construction of a wastewater treatment facility and/or stormwater management facility for the Town; and providing reimbursement to the Town to cover related litigation expenses. Proposed Order at 35, para. 104. The Chief Public Utility Law Judge explained that these provisions of the

Settlement provide for economic benefit to the Town through personal property tax, real property tax revenue as a result of the annexation, and an option to purchase land on the project parcel for a wastewater treatment plant and stormwater management facility. Proposed Order at 34, para. 100; 36-37, para. 106.

Staff argues that these financial commitments and the land annexation commitments cannot be required as part of a CPCN by the Commission as it is outside of its authority. In duly considering the factors required by PUA §7-207(e), the Commission considers “whether the benefits that may accrue to the public at large by construction of the Project....justify or offset subjecting the local community to the adverse impacts that will result from the Project’s construction and operation.” Order No. 88260, Case No. 9413 (*Dan’s Mountain Wind*) p. 9 (Jun. 16, 2017). The Settlement Agreement resolved the adverse impacts to the local community, as represented by the Town, and removes the Town’s opposition. Still, Staff disagrees that the Settlement’s commitments - which assure the Settlement’s benefits and mitigation are realized - should be incorporated into the CPCN.

The General Assembly has explicitly noted that such conditional approvals of a CPCN should be included by the Commission, when necessary. As required by §3-306(c) of the Natural Resources Article, in each CPCN review, PPRP submits a joint recommendation of the reviewing State Agencies *including, but not limited to*, any specific conclusions as to any private wetlands involved and any specific conclusions as to any water use or restriction of water use involved (“Secretarial Letter”). The seven State

agencies are Maryland's Departments of Agriculture, Commerce, Environment, Planning (including the Maryland Historical Trust), and Transportation, and the Maryland Energy Administration (collectively, the “reviewing State agencies”). PPRP’s review and recommendation is coordinated with these State agencies. Each reviewing State agency has the requisite expertise in its area to assure that appropriate conditions are recommended to minimize impacts related to the PUA §7-207 (e)(ii) factors and to assure that federal and State laws are followed.

In this case, the Secretarial Letter noted that the annexation of project lands into the town was contemplated by the Comprehensive Plan and recommended that the Applicant continue discussions with the Town of Union Bridge regarding annexation. Secretarial Letter, ML No. 226062 (filed Jul. 12, 2019). With the Applicant’s commitment as set forth in the Settlement Agreement, it will take the appropriate action to address potential inconsistencies in the local Comprehensive Plan and to resolve the Town’s concerns. The Settlement provides assurances that these commitments made pursuant to §7-207(e)(iii) are carried out. Thus, they should be included in the CPCN.

Staff disagrees. It asserts “the land annexation commitment in the settlement is not relevant to the factors delineated in PUA §7-207(e) for evaluating whether the Project is in the public interest.” Staff Memorandum at 5. This position, however, conflicts with the Court of Appeal’s (“COA”) holding in *Perennial Solar*. In *Perennial*, the COA explained that “local land use interests are designated by statute as a factor requiring “due consideration” by the Commission in evaluating and approving generating stations.

Perennial at 632. In addition, the COA noted that recent state legislation has given final approval authority to the Commission pertaining to comprehensive planning and local zoning regulations and, thus, the Commission must give them “due consideration” as part of its review and approval of a generating station. *Id.* at 26. As a component of its review, the Commission must also duly consider “whether to approve a [solar generation project] at a particular location.” *Id.* at 634. *See also* fn. 17 (Noting under PUA § 7-207, the many of similarities with local governments’ land use decisions (esthetics, impact on historical sites, adverse environmental conditions, local public hearings)).

Staff dismisses the importance of the Applicant’s Settlement commitments to the Project’s construction and operation as specified in the CPCN. Staff’s alternative – simply considering the Settlement – is unrealistic; as the compromise solution developed by the Applicant and the Town will not be possible absent the Settlement Agreement’s incorporation into the CPCN. However, not only does Staff’s alternative contradict *Perennial’s* holding, it also materially impedes the implementation of the Settlement Agreement.

In *Perennial*, the COA made clear that PUA §7-207 addresses “all regulatory matters associated with the approval and operation of generating stations, including siting and locational approvals.” *Id.* at 633. With the Settlement, the Applicant has amended its application to reflect the Project’s reconfiguration and future annexation into the Town. As with the assertions and commitments set forth in an application, portions of the Settlement are now part of the Applicant’s request for a CPCN. Without

incorporation of the Settlement into the CPCN, the changes to the Project, and the commitments therein, disappear. Incorporating the parties' Agreement, along with its detailed commitments, is not only within the Commission's jurisdiction, but also necessary to assure the Project is constructed and operated consistent with the Commission's public interest finding. As found by Chief Public Utility Law Judge McLean, the settlement commitments support a finding that the Project is in the public interest and, for this reason, the settlement commitments should be included in the CPCN. Proposed Order at 37 -38.

B. The Commission Has Access to Technical Expertise to Ensure that a CPCN for a Solar Project is Implemented Efficiently, Safely and for the Benefit of the State.

Staff suggests that including the Settlement's financial and annexation-related commitments will likely "embroil" the Commission into litigation concerning contractual obligations between the Applicant and the Town; an area outside the Commission's area of expertise. Staff Memorandum at pp. 1-2, 15. This argument, however, is inconsistent with past Commission experience.

In deciding "whether, where, and on what terms to site the various components of a [project], the Commission looks to the local authority for its expertise and competency in this core area and gives it significant weight." Order No. 87835, Case Nos. 9387/9392 (*Blue Star Solar/ Ibis Solar*) 16 (Mar. 23, 2018).¹ Speaking to this point, the Chief Public Utility Law Judge determined that "[i]t is not reasonable to simply consider, rather than

¹ See also Order No. 88613, Case No. 9429 (*Le Gore Bridge Solar*) Dissent D-3 (explaining the Commission relies "on the expertise of local government for CPCN approvals" and the importance that local government is actively engaged) (Mar. 23, 2018))

fully accept and incorporate, the settlement and the commitments that fall specifically within PUA § 7-207 based solely on speculative concerns that the Commission may be drawn into an enforcement action involving an issue that may be beyond its expertise.” Chief Public Utility Law Judge McLean notes that while some of the Settlement’s terms, such as annexation and reimbursement of expenses, are not typically contained in a Settlement, “it can and should be incorporated into Citizens UB Solar’s CPCN. Proposed Order at 37, para. 109. He explains these items are “no different than many other commitments or conditions that the Commission routinely imposes on applicants”.

The Commission’s oversight of the Applicant’s compliance with the its voluntary Settlement commitments should not present unique concerns. The Commission is adept at addressing a breadth of areas. For example, many of the license conditions routinely included in a CPCN are not limited to environmental effects or operation of the project, and many are outside the Commission’s area of expertise. PPRP regularly recommends license conditions in CPCN cases that require further permitting, authorization, or review from those agencies or other authorities (local jurisdictions). Should a non-compliance issue arise, the normal recourse is to settle it before the Commission or demonstrate to the Commission that the issue has been resolved.

It is not rare for difficulties to arise in compliance with one of the CPCN conditions. In these cases, the Commission routinely addresses the matter, taking the appropriate action to assure that the construction and operation of the project is in the public convenience and necessity. The Commission’s authority to address noncompliance

matters outside the realm of express statutory authority has been demonstrated in recent reviews of solar projects where CPCN compliance was questioned. Unlike traditional generation projects, solar projects are typically extensive in area (approximately 5 acres/MW) and, therefore, usually sited in more rural areas, where land acquisition is cost effective. They, generally, are in close proximity to neighboring residents, roads and streets. Even though solar CPCN compliance matters may include some novel nuances, the Commission is adept at addressing them, including coordination with other oversight agencies with relevant expertise.

Recently, the Commission addressed solar project noncompliance matters both as they relate to CPCN conditions associated with county government oversight (*Great Bay Solar*, PSC Case No. 9380) as well as those involving the enforcement authority of another State agency (*Maryland Solar II*, PSC Case No. 9463). As to the former, after receiving a CPCN to construct a 150 MW project in Somerset County, Great Bay Solar faced noncompliance with license conditions due to unanticipated problems confronted during construction. While Somerset County worked with Great Bay Solar in approving site plans for the project and enforcing requirements related to pre-construction activities,² the Commission revised the CPCN to incorporate a necessary phased approach for construction. Great Bay Solar then worked with Somerset County to bring the project's

² These activities include enforcement of local requirements for the installation of access roads, erosion and sediment controls, stormwater management controls, site entrances, perimeter fencing, and vegetative buffering. See PPRP Correspondence to Commission, PSC Case No. 9380 (*Great Bay Solar*), ML No. 226109, (filed Jul. 17, 2019). These matters are also required by the CPCN license conditions.

construction into compliance with both County requirements and the related CPCN license conditions.

Similarly, in the case of *Maryland Solar II*, which received a CPCN to construct a 27.5 MW project in Charles County, the Commission coordinated with Maryland Department of Environment (“MDE”) in its oversight of CPCN license condition 13(2), the Tier II Stream Protection Condition. In May 29, 2019, MDE notified the Commission that MD Solar II was in noncompliance with condition 13(2) and should not begin construction until the matter was resolved, as MDE has enforcement authority in this substantive area and the authority to prohibit construction in such cases.³ In this instance, the Commission considered this matter and, in reviewing MDE’s filing, it found that MD Solar II had not satisfied the license condition. (Commission correspondence to MDE counsel, ML No. 227012 (Oct. 2, 2019)). MD Solar II is working with MDE and the other relevant entities to resolve this underlying matter before beginning construction of the solar project.

It is well settled that the Commission has the requisite “broad authority and access to technical expertise to ensure that decisions, such as the proper siting of solar projects, are accomplished efficiently, safely and for the benefit of the entire State”. Commission *Amicus* at 11. The UB Solar Project, as amended by the Settlement Agreement between the Applicant and the Town of Union Bridge, provides for the most

³ See MDE Correspondence to Commission, ML No. 226612 (filed May 29, 2019).

beneficial and least impactful siting of this solar facility. Thus, the Commission should incorporate the agreement into any CPCN granted in this case.

C. The Settlement Agreement's Provisions Reflect the Intent of PUA 7-207(e)(iii) and Should be Incorporated Into the CPCN.

The Settlement Agreement between the Applicant and the Town of Union Bridge represents constructive solutions to what can be an intractable problem. The General Assembly appears to have encouraged this type of solution with its adoption of PUA § 7-207(e)(iii), which further refined the key role for local government in the CPCN review and approval process. *Perennial* at 632. Now, with these amendments, the General Assembly has further “clarified the role of the local comprehensive plan and zoning regulations and local government input in the PSC’s process for approving a solar energy project. *Perennial* at 635.

PUA § 7-207(e)(3) emphasizes the Commission’s responsibility to duly consider local government’s concerns, particularly regarding local zoning and planning.⁴ With the inclusion of PUA § 7-207(e)(3)(i) (consistency of the application with the comprehensive plan and zoning), the General Assembly has “recognized the importance of the local comprehensive plan... in considering the placement of [a solar generation

⁴ The Court of Appeals notes that “the General Assembly’s intent to preempt local government’s zoning approval authority over generating stations is clear from the plain text of the statute, which specifically defines the role of local government, as well as the planning and zoning considerations, in the PSC review and approval process. *Perennial* at 632. As noted herein, the Commission has consistently noted the significant weight it gives the local government’s recommendations, particularly in land use matters.

project].” *Perennial* at 636. Given the Commission’s continued preemptive authority over local government’s planning and zoning requirements, such consideration is essential.

Similarly, §207(e)(3)(ii) illustrates the General Assembly’s desire for respective applicants and local governments to resolve matters of significant concern regarding projects. As stated by the Commission, “a close working relationship is expected between the applicant and the [local government].” Order No. 88644, Case No. 9439 (*Biggs Ford Solar*) p. 2-3 (Apr. 16, 2018). Only through such a relationship were the Applicant and the Town able to resolve local government’s issues presented in this case, including potential inconsistencies with the Comprehensive Plan.

Working together, the Town and the Applicant developed Settlement Agreement provisions to mitigate harmful impacts to the Town and to provide economic benefits, instead of potential economic harm to the local community. Consequently, the incorporation of the Settlement Agreement eliminates the disputed matters in this case and will assure a more expedient final determination. Such expediency is particularly important in the Commission’s review of solar generation cases given the requirement for Maryland to achieve its renewable portfolio standard goals adopted by the General Assembly. As recently expressed by the Commission, “the Commission’s ability to meet the General Assembly’s timetables depends in part on its ability to process solar CPCN applications in a timely and consistent manner.” Commission *Amicus* at 11.

This effective outcome, the Settlement, was possible only because the Town of Union Bridge actively participated in the Project’s CPCN application review and the

Applicant compromised to address the Town's concerns. Playing out the role carved out by General Assembly, the Town was "aggressively engaged" in the CPCN application process. *Le Gore Bridge Solar* at D-2. Voicing its recommendations and concerns, the Town of Union Bridge provided testimony in the CPCN review as to the Project's consistency with local zoning and land use planning and, with the Applicant, worked to find solutions to address its concerns. Such efforts are to be commended. The Commission is on record as encouraging such input and has indicated that it will work with local government who appropriately participate in the CPCN proceedings. *Id.* at 4-5. However, while the Settlement Agreement exemplifies the purpose underlying the 2017 amendments, it will not be realized unless it is incorporated into the CPCN. Failing to do so would not only adversely affect successful and expeditious resolution in this case, it would also significantly hinder similar successes in future cases.

If local governments are unable to rely on an applicant's voluntary commitments negotiated in the CPCN process, their incentive to actively participate and seek resolution before the Commission in future CPCN reviews will be significantly diminished. Adopting Staff's position would likewise undermine an applicant's willingness to compromise and to develop negotiated solutions to address local land use concerns. Subsequently, the resolution of local land use matters in future CPCN cases would be diminished and, with it, the opportunity for encouraging and expediting the siting of solar generation in Maryland. Such a result would run afoul of the General Assembly's intent not only for enacting the recently added PUA 7-207(e) factors, but also for adopting

the statutes relating to Maryland's renewable energy efforts. Given the Commission's need to process solar CPCN applications in a timely and consistent manner, this would be a most unfortunate outcome.

CONCLUSION

The PSC must give due consideration to each of the factors enumerated in PUA §7-207(e) (3). These factors include balancing the project's benefits against its detrimental impacts and considering the recommendation of local government as well as efforts to resolve local land use concerns. The Applicant and the Town of Union Bridge have provided the Commission with a sound solution to minimize the Project's detrimental impacts and provide additional benefits. Granting Staff's appeal would obviate these results for this Project and others in the future. Such an outcome is counter to the applicable statute, contrary to Commission precedent and unworkable going forward. Accordingly, Staff's appeal should be denied.

Respectfully Submitted,



Sondra Simpson McLemore
Assistant Attorney General
Counsel to the DNR, Power Plant
Research Program
1800 Washington Blvd., Suite 755
Baltimore, MD 21230
Tel: 410-537-4062
e-mail: sondra.mclemore@maryland.gov