

ORDER NO. 90200

THE APPLICATION OF MORGNEC
ROAD SOLAR, LLC FOR A
CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY
TO CONSTRUCT A 45 MW SOLAR
PHOTOVOLTAIC GENERATING
FACILITY IN KENT COUNTY,
MARYLAND

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

Case No. 9499

Issue Date: April 27, 2022

ORDER AFFIRMING AND ADOPTING PROPOSED ORDER

1. On February 7, 2022, following the issuance by the Commission's Public Utility Law Judge ("PULJ") Division of a Proposed Order granting a Certificate of Public Convenience and Necessity ("CPCN") for the construction of a photovoltaic facility in Dorchester County, Maryland, the Commission received notices of appeal from the County Commissioners of Kent County (the "County") and the Kent Conservation and Preservation Alliance (the "Alliance").¹

2. The Proposed Order of the PULJ is affirmed for the reasons described herein.

I. Background

3. On November 30, 2018, Morgnec Road Solar, LLC ("Applicant") filed an Application for a CPCN for authority to construct a 45 megawatt solar photovoltaic alternating current generating facility in Kent County, Maryland (the "Project").

¹ The County and the Alliance have filed nearly identical briefings in this appeal. For simplicity, all arguments made by the County and/or the Alliance will be attributed to the "Local Interests."

4. On February 3, 2018, the Commission docketed the application and delegated the matter to the PULJ Division to conduct evidentiary proceedings.

5. On January 7, 2022, PULJ Kristin Case Lawrence issued her Proposed Order, granting the Application. Pursuant to Public Utilities Article (“PUA”), *Annotated Code of Maryland* § 3-113(d), the Proposed Order would become a final order of the Commission if no party filed a notice of appeal on or before February 8, 2022.

6. On February 7, 2022, the County and the Alliance filed notices of appeal of the Proposed Order, followed by memoranda on February 17, 2022.²

7. On March 9, 2022, responsive memoranda were filed by the Applicant, the Commission’s Technical Staff (“Staff”), the Power Plant Research Program of the Maryland Department of Natural Resources (“PPRP”), and the Maryland Office of People’s Counsel (“OPC”).³

II. Party Positions

8. The Local Interests urge the Commission to deny the Application. In turn, the Applicant, PPRP, OPC, and Staff urge the Commission to affirm the Proposed Order as written and grant the Application.

A. Local Interests

9. The Local Interests argue that the Proposed Order failed to give “due consideration” to local land use concerns, as required by PUA § 7-207(e)(4). The Local Interests point to language from the Maryland Court of Special Appeals that the Commission must provide a full explanation of the bases of rejecting evidence and for

² Maillog Nos. 239192 (“Alliance”); and 239206 (“County”).

³ Maillog Nos. 239490 (“Applicant”); 239483 (“Staff”); 239491 (“PPRP”); and 239493 (“OPC”).

accepting other evidence.⁴ They also state that a dictionary definition of "due consideration" means "appropriate" "careful thought," or "thoughtful and sympathetic regard." They also argue that due consideration requires looking to the Local Government Article, Express Powers Act.⁵

10. The Local Interests also allege that the decision to grant the Application was preordained because of the need to approve CPCNs to meet Maryland's Renewable Energy Portfolio Standard ("RPS"), discussed below. The Local Interests argue that this is improper because the PUA § 7-207(e) factors, described below, are non-hierarchical and thus, for example, "safety and reliability of the electric system" is no more or less important than "the comprehensive plan and zoning of each county."⁶

11. The Local Interests also argue that the Proposed Order arbitrarily favored the testimony of PPRP witnesses, disfavored the testimony of local land use professionals and elected officials, and failed to reference concessions that witnesses sponsored by the Applicant or PPRP made on cross examination.⁷

12. For example, the Local Interests argue that the Proposed Order improperly relied on the testimony of John Hall for the proposition that the soil on the property is not high or prime quality farmland because, they state, Mr. Hall also testified that the USDA has designated approximately 75% of the soils on the property as prime farmland and that Mr. Hall did not test the soils against the 2017 criteria to be applied by the Natural

⁴ Citing *Accokeek, Mattawoman, Piscataway Creeks Cmty. Council, Inc. v. Md. PSC*, 227 Md. App. 265, 286 (2016); *Balt. Gas & Elec. Co. v. Pub. Serv. Com.*, 75 Md. App. 87, 100 (1988).

⁵ *Md. Code Ann.*, Local Government Article, Titles 10 and 11.

⁶ Alliance at 5.

⁷ *Id.* at 3, 7.

Resources Conservation Service.⁸ The Local Interests also state that Mr. Hall did not request crop production information from the owners of the property and that the owners have not mentioned poor crop yields as a reason for leasing the property as a solar facility, but these facts were not mentioned in the Proposed Order.⁹

13. The Local Interests also state that the Proposed Order did not mention the testimony of Joseph Stevens that he did not investigate how many of the existing undeveloped lots in Kent County and the Town of Chestertown could be used for residential purposes.¹⁰ They also state that Mr. Stevens testified that many lots remain undeveloped because they will not support on-site septic systems, have nontidal wetlands or forest cover, or are too small to meet modern standards and desires.

14. The Local Interests also criticize the Proposed Order for not being more critical of the testimony regarding Maryland Historical Trust standards by Robert Sadzinski, who they state has no known expertise in preservation of historical structures or cultural heritage.¹¹

15. The Local Interests also argue that PPRP is acting outside its limited statutory obligations by becoming an advocate for CPCN applications. They argue that the settlement between the Applicant and PPRP was improper because it did not also involve the seven Secretaries who have the statutory requirement to offer recommended license conditions under *Md. Code Ann.*, Natural Resources Article, § 3-306.¹² They state that PPRP does not have the statutory or regulatory authority to settle or make

⁸ *Id.* at 6.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 6-7.

¹² *Id.* at 3-4, 11.

stipulations in a contested CPCN application and that revisions to the licensing conditions proposed by the seven Secretaries must come from the Secretaries themselves.¹³ The Local Interests also argue that it is improper for PPRP to endorse the efficacy or sufficiency of an applicant's efforts to resolve differences with local government or to opine on local land use law.¹⁴ They request that the Commission excise from the Proposed Order the settlement agreement between PPRP and the Applicant and examine the merits of the Project without consideration of the settlement.¹⁵

16. The Local Interests also state that Commission procedures are sometimes not contained in regulations and are not conducive to full participation for the uninitiated. They state that, although RM72—a recent rulemaking on CPCN procedures—will be helpful to local governments, small towns lack the staff or financial wherewithal to monitor Commission proceedings, and mailings from the Commission are overlooked or misunderstood.¹⁶ They ask the Commission to create clearer rules of procedure and evidence for hearings.

17. The Local Interests also challenge the Proposed Order's conclusion that the project can be considered consistent with the County Comprehensive Plan, despite conflict with local zoning, based on language in the Comprehensive Plan extolling the benefits of clean air and environmental and resource protection.¹⁷ The Local Interests state that such language is generalized, largely gratuitous, and "not nearly" as important

¹³ *Id.* at 12.

¹⁴ *Id.*

¹⁵ *Id.* at 13.

¹⁶ *Id.* at 4-5.

¹⁷ *Id.* at 7.

as the Plan's desire to maintain and protect the County's agricultural and cultural lands and heritage. The Local Interests further state that there is no coal or natural gas generating plant located in the County that the Project will be replacing, nor is any coal or natural gas being extracted in Kent County, and there is thus no environmental benefit of the Project relevant to Kent County.

18. The Local Interests further argue that the Proposed Order erred in finding that the designation of a portion of the land as a Priority Funding Area (as defined in *Md. Code Ann.*, State Finance and Procurement Article § 5-7A-01) supported the finding that the Project was consistent with the County Comprehensive Plan.¹⁸ They argue that the objective of Priority Funding Area (“PFA”) designation is to further the local Comprehensive Plans, zoning codes, and zoning maps and has nothing to do with placing utility-scale solar facilities within growth areas adjacent to municipalities.¹⁹

19. The Local Interests also challenge the Proposed Order's conclusion that local zoning does not permit the construction of utility-scale solar facilities.²⁰ They argue that the Proposed Order provides no basis for adopting the Applicant's suggested standard of whether a 20+ MW facility is permitted, does not examine whether 5-20 MW solar arrays can be developed on the 3,200 acres in Kent County where solar facilities are permitted, or why smaller facilities are not economically feasible.²¹

20. Lastly, the Local Interests argue that this Application should be controlled by Order No. 88021 in Case No. 9411, (“Mills Branch Solar”) wherein the Commission

¹⁸ *Id.* at 8, quoting Proposed Order at para.’s 141-143.

¹⁹ *Id.* at 9.

²⁰ *Id.* at 10.

²¹ *Id.*

rejected the CPCN application because of, among other reasons, conflict with local zoning.

B. The Applicant

21. The Applicant asks the Commission to affirm the Proposed Order. The Applicant argues that the Local Interests' suggestion that the Commission, in balancing the PUA § 7-207 factors, should favor local land use policies that ban solar facilities in certain locations over the consideration of which locations can feasibly host solar facilities is unreasonable.²² The Applicant argues that the legislature's decision to limit the role of local government in favor of the Commission in the CPCN approval process evidenced a rejection of the Local Interests' position.²³

22. The Applicant further argues that the PULJ is not obligated to go line by line through testimony to qualify as a sufficiently reasoned opinion and that the mere fact that an issue was raised before the PULJ does not require them to address it in their Proposed Order.²⁴

23. The Applicant argues that PPRP's role in this case was consistent with its general role in CPCN proceedings and that a substantial percentage of conditions requested by PPRP are standard across CPCNs.²⁵ The Applicant also argues that the settlement between itself and PPRP did not limit the proceedings at all and was merely a procedural tool communicating that two parties agreed on certain modifications.

²² Applicant at 5.

²³ *Id.* at 5-6.

²⁴ *Id.* at 7.

²⁵ *Id.* at 9.

C. PPRP

24. PPRP urges the Commission to affirm the Proposed Order, arguing also that the Local Interests have failed to produce evidentiary support for their arguments that the Proposed Order did not give due consideration to local interests.²⁶

25. PPRP further argues that the Local Interests have failed to explain how the conditions in the settlement between itself and the Applicant were to the detriment of local officials and interested parties.²⁷ PPRP states that the conditions were based, in part, on concerns raised by Kent County, the Town of Chestertown, and the KCPA, and worked to eliminate and avoid the negative impacts of the Project.

26. PPRP also argues that this case is not comparable to Mills Branch Solar because in that case the Commission concluded that the weight of the opposing parties' evidence was significant as to the project's negative impacts on the local agricultural economy and on the viewshed, factors not present in this case.²⁸

D. OPC

27. OPC also urges the Commission to affirm the Proposed Order. OPC argues that the Proposed Order gave due consideration to the positions of the Local Interests and that they misinterpret the consideration owed to the positions of local government within the CPCN evaluation process.²⁹ OPC argues that due consideration does not equate

²⁶ PPRP at 2-3.

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 2-3.

²⁹ OPC at 7.

with giving local government veto authority over projects, nor does it require deference to the views of local government.³⁰

28. OPC further argues that PPRP's involvement was consistent with its historic and statutory role of consolidating recommendations from state agencies, including recommended conditions.³¹

29. Additionally, OPC argues that the zoning ordinances of Kent County act as a de facto ban on the location of solar facilities in the County.³²

E. STAFF

30. Joining the Applicant, PPRP and OPC, Staff also urges the Commission to affirm the Proposed Order and argues that preemption of the Kent County zoning law is justified because the County's zoning law and opposition would unreasonably limit the development of solar generation facilities in Maryland.

31. Staff points to the Maryland Court of Appeals' conclusion in *Perennial*³³ that preemption is required in order for the Commission to meet its RPS, codified at PUA §§ 7-701 through 7-713, and Maryland's greenhouse gas emission reduction goals, a factor requiring due consideration in this matter under PUA § 7-207(e).³⁴ Staff states that the Commission has, in pursuit of those goals, repeatedly authorized solar projects that are inconsistent with County zoning law and opposed by local governments.³⁵

³⁰ *Id.* at 12.

³¹ *Id.* at 8-10.

³² *Id.* at 4-7.

³³ *Bd. of Cty. Comm'rs v. Perennial Solar, LLC*, 464 Md. 610 (2019).

³⁴ Staff at 1-4, citing *Perennial*, 464 Md. at 622-23.

³⁵ Staff at 5-6.

32. Staff argues that the Proposed Order correctly determined that the Kent County zoning law unreasonably restricts the placement of utility-scale solar. Staff points to evidence that, within those areas where the Kent County zoning law allows utility-scale solar, there are only 10 land parcels that are both near to the electric distribution system and that contain sufficient acreage to support utility scale solar of 10 MW or more, with the largest having a developable capacity of 31 MW.³⁶ Staff further points to evidence that Kent County limits solar projects to five acres in areas zoned Rural Residential or Agricultural Zoning or Resource Conservation, with the latter two constituting 97.9 percent of the total acreage in Kent County where utility-scale solar is allowed at all, and then only with a special exception variance.³⁷ Staff further points to evidence from the Applicant that attempting to stretch the Project's 45 MW capacity across multiple parcels would increase costs and risk the viability of the Project.³⁸ Staff argues that these restrictions are at odds with State policy and are thus unreasonable.

33. Staff challenges the Local Interests' position regarding soil quality, arguing that the evidence supported the conclusion that the soil was of lower quality than that required for designation as prime farmland.³⁹

34. Staff also argues that the Applicant has made a good faith effort to address the Local Interests' concerns, pointing to the settlement terms agreed between PPRP and the Applicant, which require compliance with Kent County's solar system standards and site

³⁶ *Id.* at 10.

³⁷ *Id.* at 10-11.

³⁸ *Id.* at 11.

³⁹ *Id.* at 8-9

plan requirements, as well as setbacks and visual screening to minimize impact on adjacent properties.⁴⁰

35. Staff also challenges the Local Interests' position that the Project would usurp the intended growth patterns envisioned by Kent County and the Town of Chestertown.⁴¹ Staff argues that the evidence of the actual growth patterns of Chestertown and the County make it unlikely that the Project site will be needed for either residential or commercial growth in the near future.⁴² Staff argues that concerns about future growth patterns have been mitigated by the Applicant agreeing to decommission the Project within 30 years of its operations date or 34 years from the date of CPCN issuance, whichever is sooner, unless extended by the County.⁴³

III. Applicable Law

36. Under PUA § 7-207(e), the Commission may take final action on a CPCN application for a generating station like the Project only after due consideration of a list of factors:

- (1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station is proposed to be located;
- (2) 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 quality and water pollution; and

⁴⁰ Staff at 12-13.

⁴¹ *Id.* at 9.

⁴² *Id.* 9.

⁴³ *Id.* at 13.

- (vii) the availability of means for the required timely disposal of wastes produced by any generating station; and
- (3) the effect of climate change on the generating station based on the best available scientific information recognized by the Intergovernmental Panel on Climate Change; and
- (4) for a generating station:
 - (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;
 - (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;
 - (iii) the impact of the generating station on the quantity of annual and long-term statewide greenhouse gas emissions, measured in the manner specified in § 2-1202 of the Environment Article and based on the best available scientific information recognized by the Intergovernmental Panel on Climate Change; and
 - (iv) the consistency of the application with the State's climate commitments for reducing statewide greenhouse gas emissions, including those specified in Title 2, Subtitle 12 of the Environment Article.

37. The Maryland Court of Appeals has held that PUA § 7-207(e) preempts by implication local zoning authority approval for the siting and location of solar energy generating stations which require a CPCN. *Perennial*, 464 Md. at 644. Local zoning laws are not directly enforceable by local governments as applied to generating stations which require a CPCN, but rather are one of multiple statutory factors requiring due consideration by the Commission in rendering its ultimate decision. *Id.*

38. The Maryland Court of Special Appeals has held that the "flexible multi-factor balancing" required by PUA § 7-207(e) does not require the Commission to employ a particular formula or method, nor can it be reduced to "mere calculations." *Accokeek, Mattawoman, Piscataway Creeks Cmtys. Council, Inc. v. Md. PSC*, 227 Md. App. 265, 288 (2016).

IV. Commission Decision

39. The Commission affirms the PULJ’s conclusion that, after due consideration of the statutory factors, the issuance of the requested CPCN is in the public interest. The Proposed Order demonstrates a careful consideration of each factor and the applicable evidence and argument in the record. The Local Interests have failed to present persuasive argument or evidence of error within the Proposed Order that would compel a different result.

40. As the Local Interests have observed, there is presently a conflict between the mandates of State energy and environmental policy, such as the RPS, and some local preferences to prevent the nearby construction of renewable energy generation. This conflict—as noted in the Proposed Order—can exist even within local planning documents, notwithstanding the Local Interests’ suggestion that the drafters of Kent County’s Comprehensive Plan considered its stated environmental objectives to be a lower priority than protecting historic land use patterns. In applying a statute such as PUA § 7-207(e), which contains multiple factors that must be weighed against one another, it is inevitable that some factors will not be fully and perfectly satisfied. Although the Commission strives to respect the preferences and enactments of local governments, the Commission has also repeatedly affirmed that due consideration and weighting of the § 7-207(e) factors favors mitigation of local impacts, rather than rejection, in order to allow otherwise well-supported projects that conflict with local zoning and planning to go forward.⁴⁴

⁴⁴ *In the Matter of the Application of Biggs Ford Solar Center, LLC For a Certificate of Public Convenience and Necessity to Construct a 15.0 MW Solar Photovoltaic Generating Facility in Frederick County, Maryland*, Case No. 9439, Order No. 89668 (Nov. 24, 2020)(Maillog No. 232718); *In the Matter*

41. The Commission affirms the Proposed Order’s conclusion that the Kent County land use regime unreasonably restricts the placement of solar generating facilities. The Local Interests’ implied suggestion, that issuance of a CPCN should only occur where all other possible projects on other pieces of land whose locations may be preferable to the local authorities have been fully examined and rejected as infeasible, would create an impossible regulatory burden both for applicants and the Commission. Local governments should make a good faith effort to accommodate realistic utility-scale solar development, in which case the Commission will give greater weight to local preferences to exclude utility-scale solar from specific areas.

42. Relatedly, the Commission also affirms the Proposed Order’s finding that the Project will not unreasonably interfere with likely growth of Chestertown during the Project’s lifecycle. The PULJ considered the testimony of local witnesses about future growth plans, including the designation of a Priority Funding Area as indicative of local intent to locate future development in that area.⁴⁵ The PULJ’s findings regarding the likely growth needs of Chestertown, and the availability of land to accommodate that growth, are reasonable and supported by the record. Moreover, the Proposed Order’s conditions requiring decommissioning and removal of the Project are well constructed and will ultimately open that land up to further urban expansion, as requested by the Local Interests.

43. Although the Local Interests also argue that the PULJ should have been more critical of certain evidence presented by the Applicant and PPRP, and should have given

of the Application of Perennial Solar LLC For a Certificate of Public Convenience and Necessity to Construct an 8.0 MW Solar Photovoltaic Generating Facility in Washington County, Maryland, Case No. 9408, Order No. 89938 (Sept. 7, 2021)(Maillog No. 237066).

⁴⁵ Proposed Order at para.’s 115, 124, 132, and 144-45.

greater attention to certain evidence that supports the Local Interests' position, such decisions are within the discretion of the PULJ in their role as the initial fact-finder. The Commission finds that the Local Interests have presented no persuasive argument or evidence that the PULJ abused that discretion.

44. The Commission also finds no error by the PULJ in accepting the participation of PPRP and consideration of the settlement between PPRP and the Applicant. Under the Natural Resources Article, *Maryland Annotated Code*, § 3-306, the Department of Natural Resources ("DNR") is directed to participate in CPCN proceedings and, among other things, recommend licensing conditions for the construction, operation, or decommissioning of any proposed facility. The Commission accepts the filings of PPRP on their face as the recommendations of DNR, unless specifically noted otherwise. The same applies for proposed settlements and licensing conditions. Moreover, settlements between parties to a CPCN indicate only that the parties have reached a common position. Here, the PULJ approved the settlement, noting that regardless, the Commission still must give due consideration to the factors in PUA §7-207(e).⁴⁶

45. In all cases, the Commission reserves the right to reject any settlement it considers to be against the public interest. The settlement here, however, satisfies the legal standards adopted by the Commission for approving settlements.⁴⁷ The Commission finds no error in the PULJ's reliance on the settlement in structuring the ultimate licensing conditions.

⁴⁶ Proposed Order at para. 42.

⁴⁷ See, *In the Matter of the Commission's Inquiry into the Competitive Selection of Electricity Supplier/Standard Offer Service*, 224 P.U.R 4th 185 (Apr. 29, 2003).

46. The Commission also finds that this case does not closely analogize to the decision in Mills Branch Solar for the reasons articulated by PPRP.

47. Lastly, the Commission has noted the complaints by the Local Interests that its CPCN procedures are challenging for local governments and the suggestion that the Commission should establish more formal procedures. The Commission is committed to engaging with all stakeholders, and its relaxed approach to hearing procedures are aimed at allowing less experienced parties to appear and present evidence and argument. Specific procedural suggestions may be directed to the Commission’s Staff Counsel.

IT IS THEREFORE, this 27th day of April, in the year of Two Thousand Twenty Two, by the Public Service Commission of Maryland,

ORDERED: The Proposed Order of the PULJ is affirmed and adopted as a final Order of the Commission.

/s/ Jason M. Stanek _____

/s/ Michael T. Richard _____

/s/ Anthony J. O’Donnell _____

/s/ Odogwu Obi Linton _____

/s/ Mindy L. Herman _____

Commissioners