

**ORDER NO. 90199**

THE APPLICATION OF NEW MARKET SOLAR, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A 50 MW SOLAR PHOTOVOLTAIC GENERATING FACILITY IN DORCHESTER COUNTY, MARYLAND	* * * * * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND  _____  Case No. 9635  _____
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**Issue Date: April 27, 2022**

**ORDER AFFIRMING AND ADOPTING PROPOSED ORDER**

1. On January 24, 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 of notices of appeal from the County Council of Dorchester County and the Town of East New Market, Maryland (individually, the “County” and the “Town,” together, the “Local Governments”).

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

**I. Background**

3. On February 14, 2020, New Market Solar, LLC (“Applicant”) filed an Application for a CPCN for authority to construct a 50 megawatt solar photovoltaic alternating current generating facility in Dorchester County, Maryland (the “Project”).

4. On February 20, 2020, the Commission docketed the application and delegated the conduct of the proceedings to the PULJ Division.
5. On December 22, 2021, PULJ Kristin Case Lawrence issued a Proposed Order, granting the Application. Pursuant to *Annotated Code of Maryland*, Public Utilities Article (“PUA”), § 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 January 22, 2022.
6. On January 21, 2022, Dorchester County, which had not previously sought to intervene as a party, filed a notice of appeal of the Proposed Order.
7. On January 24, 2022, the Town of East New Market, which had also not previously sought to intervene as a party, filed a notice of appeal of the Proposed Order.
8. On January 24, 2022, the Commission issued a notice that it would conduct further proceedings and that any non-parties wishing to participate should seek leave to intervene no later than January 31, 2022.
9. On January 28, 2022, Dorchester County filed a Petition to Intervene, followed by a Memorandum in Support of Appeal filed on January 31, 2022.<sup>1</sup>
10. On January 31, 2022, the Town of East New Market filed a Petition to Intervene, followed by a Memorandum in Support of Appeal filed on February 17, 2022.<sup>2</sup>
11. On February 10, 2022, the Commission granted the interventions of the County and the Town.
12. On March 3, 2022, responsive memoranda were filed by New Market Solar, LLC (the “Applicant”),<sup>3</sup> the Department of Natural Resources Power Plant Research

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<sup>1</sup> Maillog No. 238866. (“County”)

<sup>2</sup> Maillog No. 239215. (“Town”)

Program (“PPRP”),<sup>4</sup> the Commission’s Technical Staff (“Staff”),<sup>5</sup> and the Maryland Office of People’s Counsel (“OPC”).<sup>6</sup>

## **II. Party Positions**

13. The Local Governments urge the Commission to either deny the Application, amend the Proposed Order to require additional conditions, or order additional hearings.<sup>7</sup> In turn, the Applicant, PPRP, OPC, and Staff urge the Commission to affirm the Proposed Order as written.<sup>8</sup> The specific areas of disagreement are discussed below.

### **A. Due consideration to local land use concerns**

#### **1. The Local Governments**

14. First and foremost, the Local Governments 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 Governments argue that the Application is inconsistent with the County’s comprehensive plan, a central feature of which is the preservation of the agricultural history, culture, and economy of Dorchester County, because the proposed Project would result in the repurposing of prime agricultural land into a solar energy farm.<sup>9</sup>

15. The Local Governments state that the Commission is not in the land use business and lacks an appreciation of the legal and professional nuances of local land use

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<sup>3</sup> Maillog No. 239427. (“Applicant”)

<sup>4</sup> Maillog No. 239428. (“PPRP”)

<sup>5</sup> Maillog No. 239429. (“Staff”)

<sup>6</sup> Maillog No. 239431. (“OPC”)

<sup>7</sup> The Town has joined the County in all of its arguments, in addition to raising additional arguments. For simplicity, all arguments made by the Town or the County will be attributed to the Local Governments.

<sup>8</sup> The responding parties – the Applicant, PPRP, OPC, and Staff – also sometimes make duplicative responses to the positions of the Local Governments. For simplicity, this Order will describe each responsive argument only once.

<sup>9</sup> County at 4-5.

regulation.<sup>10</sup> They argue that the Proposed Order erred in relying on details regarding designated growth areas and priority funding areas (“PFAs”) because different counties use such designations differently due to the varying land use needs of rural versus suburban communities. They also argue that the Proposed Order should have been more critical of the testimony of Applicant witness Ryan Showalter that the Project was permissible under the special exception criteria of the County’s zoning ordinance. They state that the exemption is a fact-driven exercise that depends on proof that a proposed use will not create unique adverse effects upon neighboring properties.

16. They also state that the Town has been trying to use the State’s Smart Growth Initiative process to create a growth area for future annexation, but it has not been able to afford the infrastructure yet. They also argue that the Proposed Order is internally inconsistent as to whether the Application is consistent with the 2021 County comprehensive plan.

17. The Town requests that the Commission require: (1) proper compliance with the current Dorchester County Planning and Zoning Ordinances and Comprehensive Plan; (2) proper approval of the required Special Use Exception from the Dorchester County Board of Appeals; (3) proper application to the Dorchester County Planning Commission of a “Site Plan” and approval of same; (4) a new public hearing to be held that is directly available to the County, Town, and local residents; and (5) that any and all agricultural preservation easement agreements be scrutinized and the project

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<sup>10</sup> County at 5.

information be submitted to the Maryland Agricultural Preservation Foundation for approval.<sup>11</sup>

## 2. New Market Solar LLC

18. The Applicant disputes the Local Governments’ argument that the Proposed Order made errors in giving due consideration to the PUA § 7-207 factors, relating to land use and the recommendation of the local government. The Applicant states that, under the Court of Appeals decision in *Perennial Solar*,<sup>12</sup> local recommendations and planning are only some of the several factors that the Commission must balance in reaching its decision.<sup>13</sup>

19. The Applicant further argues that, under *Perennial Solar* and prior Commission case law,<sup>14</sup> the Commission need only consider local land use requirements but need not actually apply or mimic the local land use requirement that the Project receive a “special exception.”<sup>15</sup>

20. The Applicant also argues that the local governments have misstated the special exception standard. The Applicant states that Maryland law presumes the validity of a proposed land use unless rebutted by opponents,<sup>16</sup> and that the Applicant sponsored testimony from multiple witnesses who testified that the Project satisfies the County’s

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<sup>11</sup> Town at 3-4.

<sup>12</sup> *Board of County Commissioners v. Perennial Solar, LLC*, (“*Perennial Solar*”) 464 Md. 610 (2019)

<sup>13</sup> Applicant at 12.

<sup>14</sup> Citing Order No. 89938, Case No. 9408, 13-14 (September 17, 2021).

<sup>15</sup> Applicant at 12, 14.

<sup>16</sup> Citing *Schultz v. Pritts*, 291 Md. 1, 22-23 (1981).

requirements and would have no detrimental impact on property values in the immediate vicinity.<sup>17</sup>

21. The Applicant also states that the Project will not negatively impact the underlying farmland, that the land will be returned to its current condition after the commercial life of the Project, and that the Commission has historically approved CPCN applications for solar projects to be constructed on prime farmland.<sup>18</sup>

22. The Applicant also states that PPRP conducted a review and found no conservation easements encumbering the Project site.<sup>19</sup> The Applicant also states that the irrigation systems present on portions of the site will be removed prior to construction.<sup>20</sup> The Applicant also states that the dirt lane on the project site is a gated, unpaved farm lane and not a public right of way.<sup>21</sup>

23. The Applicant argues that the Commission should reject the request for additional hearings.<sup>22</sup> The Applicant states that the County's planning director already provided comments which were incorporated into the Proposed Order.<sup>23</sup>

24. The Applicant also argues that the Local Governments have deliberately attempted to delay the Application throughout the CPCN process.<sup>24</sup> The Applicant states that in June 2020, the Applicant and PPRP filed a joint motion with the PULJ to suspend the procedural schedule to allow time to voluntarily seek a special exception

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<sup>17</sup> Applicant at 13.

<sup>18</sup> *Id.* at 10.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 11.

<sup>22</sup> *Id.* at 15.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 4.

from the County.<sup>25</sup> That request was granted, and on June 26, 2020, the Applicant applied for a special exception with the County Planning Commission. The Applicant states that the County Planning Commission waited three months before deciding not to make any recommendation to the County Board of Zoning Appeals.<sup>26</sup> The Applicant states that, following a hearing before the Board of Zoning Appeals on December 3, 2020, the County elected to table the application and then took no further action, prompting the Applicant to request the PULJ to reopen the CPCN process, which was granted on July 24, 2021. The Applicant also states that it thereafter submitted supplemental testimony adjusting its Application in response to local feedback during the Board of Zoning Appeals hearing.<sup>27</sup> The Applicant argues that no additional process is necessary.<sup>28</sup>

### **3. Power Plant Research Program**

25. PPRP argues that the Proposed Order gave due consideration to the PUA § 7-207 factors, addressing them at length despite limited input from the County or the Town.<sup>29</sup> PPRP also argues that the Commission should give no weight to proposed local land use requirements that have not been placed into law.<sup>30</sup>

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<sup>25</sup> *Id.* at 1.

<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 3.

<sup>28</sup> *Id.* at 15.

<sup>29</sup> PPRP at 2-3.

<sup>30</sup> *Id.* at 2.

#### 4. Office of People's Counsel

26. OPC argues that the issues now raised by the Local Governments were addressed at length by the PULJ in the Proposed Order.<sup>31</sup> OPC argues that the Local Government's late entry and request for further hearings creates basic unfairness to the Applicant, which risks undermining trust in the CPCN process.<sup>32</sup>

#### 5. Commission Staff

27. Staff argues that, while the Project is inconsistent with certain parts of Dorchester County's land use policies that seek to limit the size of solar installations and to preserve the County's rural landscape, the relevant local land use policies in this case are outweighed by the Commission's statutory duty to implement Maryland's environmental protection policy of expanding local renewable energy production.<sup>33</sup>

28. Staff points in particular to language added in 2021 to PUA § 7-207(e)(4)(iv), requiring the Commission, when considering a CPCN application for a generating station, to consider the impact on statewide greenhouse gas emissions and the consistency of the application with the State's climate commitments for reducing statewide greenhouse gas emissions.<sup>34</sup> Staff also points to the recent Commission decisions in *Biggs Ford Solar* and *Perennial Solar*, where the Commission affirmed the Proposed Orders, granting the applicants' requested CPCNs despite opposition from the local government and conflict with local planning rules, based in part on the need to

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<sup>31</sup> OPC at 5-9.

<sup>32</sup> OPC at 4.

<sup>33</sup> Staff at 1-5.

<sup>34</sup> Staff at 8.



develop large-scale solar projects in Maryland in order to meet State renewable energy goals.<sup>35</sup>

**B. Visual impact and landscaping**

**1. The Local Governments**

29. The Local Governments state that the Application and Proposed Order call for a chain-link fence around the Project that will clash with the surroundings and that landscaping required under the Proposed Order may deteriorate, reducing the visual barrier between the Project and its surroundings.<sup>36</sup> They request that, if the Commission grants the Application, it should further condition the grant of the Application on the use of a neutral or green mesh being chosen for the fence and on continued upkeep and irrigation of landscaping to assure good health. They also request that the Commission agree to consider any complaints that the Applicant is failing to meet its obligations to minimize the visibility of the Project.

30. Relatedly, the Local Governments also argue that Condition 19 is confusing because 19(a) requires compliance related to landscaping while 19(b) requires site approval, but site approval cannot be given without a demonstration that all required landscaping will be installed and maintained.<sup>37</sup> They request that Condition 19 be modified to include landscaping requirements as part of the Dorchester Planning Commission's review of the application for site plan approval.

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<sup>35</sup> Staff at 8-10 (citing *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 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)).

<sup>36</sup> County at 2, 6.

<sup>37</sup> *Id.* at 4, 6.

## 2. New Market Solar LLC

31. The Applicant disputes the Local Governments' characterization of the evidence that the Project will create a negative visual impact on the surrounding area.<sup>38</sup> The Applicant states that PPRP performed a visual impact study and concluded that a landscaping plan conforming to the County's setback and buffering requirements will mitigate Project visibility and reduce incompatibilities with surrounding land uses.<sup>39</sup> The Applicant further states that PPRP Condition 26 requires that the Project be consistent with those requirements.<sup>40</sup> The Applicant also describes various revisions to the Project's initial design based on feedback from the County and community that substantially increase buffers from neighboring properties.<sup>41</sup> The Applicant also states that Condition 19(a) requires the Project to certify that the facility is designed in substantial conformity to County site plan requirements and Condition 19(b) requires the Project to obtain site plan approval from the County, which will include landscape buffer requirements.<sup>42</sup>

32. The Applicant also disputes the Local Governments' concerns that landscaping might not be maintained, resulting in negative visual impact.<sup>43</sup> The Applicant points to PPRP Condition 29, which requires that the Project "shall include in the landscape and buffer plan a planting and maintenance agreement that assigns the Project owner sole responsibility for maintenance and replacement of dead species as needed throughout

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<sup>38</sup> Applicant at 6.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.* at 8.

<sup>43</sup> *Id.* at 7.

the life of the Project,” and Condition 30, which requires that an executed surety or other financial assurance is in place to cover replacement of planting.<sup>44</sup>

33. The Applicant also disputes the Local Governments’ concerns about enforcement of the landscaping conditions of the Proposed Order. The Applicant states that Condition 28 creates a process for filing a complaint related to visibility of structures, reflective glare, or noise.<sup>45</sup>

**C. Public access to the property**

**1. The Local Governments**

34. The Town states that a survey of one parcel of land turned up a “dirt lane” that was a “potentially prescribed right of way” and went through the center of the parcel and onto an adjacent parcel; two large circular pivot point irrigation systems; and an historic cemetery associated with the Faith Community United Methodist Church.<sup>46</sup> The Town requests further evaluation of the dirt lane as a potential prescribed right of way and that the Applicant be required to coordinate with and receive the approval of the Trustees of Faith Community United Methodist Church regarding the continued use of the cemetery and access thereto.

**2. New Market Solar LLC**

35. The Applicant states that the cemetery on the project site was addressed by the PULJ in Conditions 33 and 34, which address construction around the cemetery and fencing, and Maryland law requiring an owner of a burial site to provide reasonable

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<sup>44</sup> *Id.*, quoting Proposed Order, Appendix A, Conditions 29-30.

<sup>45</sup> *Id.* at 8.

<sup>46</sup> Town at 1-2.

access to any person in interest that requests it.<sup>47</sup> The Applicant also states that the dirt lane is a private road and not a public right of way.

**D. Other benefits of the Project**

**1. The Local Governments**

36. The Local Governments state that they do not expect to receive any economic benefit from the Project because neither the associated jobs nor the materials will be locally provided. The Town also states that the Proposed Order did not discuss the air quality benefits of an ongoing farming operation to neutralize pollutants and improve air quality and oxygen levels.<sup>48</sup>

**2. New Market Solar LLC**

37. The Applicant argues that, contrary to the arguments of the Local Governments, the Project will provide substantial economic benefits to both the State and local areas.<sup>49</sup> As it relates to local benefits in particular, the Applicant states that the Project would source construction work from the local labor pool if workers and contractors are available and bid competitively. The Applicant further states that the Project will generate approximately \$270,000 in business personal property taxes in the first full year of operations, while drawing little in public service expenses.

**3. Commission Staff**

38. Staff argues that this Project will make a significant contribution to meeting Maryland's renewable energy and environmental quality goals.<sup>50</sup> Staff also argues that

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<sup>47</sup> Applicant at 11.

<sup>48</sup> Town at 3.

<sup>49</sup> Applicant at 5.

<sup>50</sup> Staff at 11-12.

the Project will have a positive or mitigated impact on the other factors, beyond local land use concerns, enumerated in PUA § 7-207(e)(2).<sup>51</sup>

### **III. Applicable Law**

39. 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
  - (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,

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<sup>51</sup> *Id.* at 14-15.

including those specified in Title 2, Subtitle 12 of the Environment Article.

40. 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. *Bd. of Cnty. Comm'rs v. Perennial Solar, LLC*, 464 Md. 610, 644 (2019). 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.*

41. 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**

42. 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 Governments have failed to present any persuasive argument or evidence of error within the Proposed Order that would compel a different result.

43. The central concern voiced by the Local Governments, the impact of the Project on rural character, watershed, and local planning priorities for the surrounding area was

addressed at length in the Proposed Order.<sup>52</sup> Moreover, the Proposed Order includes a lengthy list of conditions designed to protect local interests and mitigate any possible negative impact of the Project.

44. Although the Local Governments argue that the PULJ should have been more critical of certain evidence presented by the Applicant, such decisions are within the discretion of the PULJ in their role as the initial fact-finder. The Commission finds that the Local Governments have presented no persuasive argument or evidence that the PULJ abused that discretion.

45. The Commission finds that the conclusions of the PULJ with regard to the landscaping and the access to the cemetery are reasonable and that the PULJ did not err in declining to address conservation easements or affected rights-of-way, for which the Local Governments have not pointed to any record evidence. The relevant conditions provided in the Proposed Order are well calculated to satisfy the concerns raised by the Local Governments. Although the Local Governments have expressed concern that the Applicant or its assigns may fail to comply with those conditions at some point in the future, any violation of a Commission order may be brought to the attention of the Commission.

46. Neither is the Commission convinced that additional proceedings are necessary to develop new evidence. Although the Commission has permitted the Local Governments to make late entry into this case, the Commission agrees with OPC that further proceedings risk the procedural fairness of the CPCN process by introducing undue and potentially abusive delays to address issues that should have been presented

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<sup>52</sup> Proposed Order at para.'s 22, 34-45, and 67-85.

before the PULJ and within the procedural schedule. Although the Commission is committed to involving local authorities in the CPCN process, it is incumbent upon those authorities to actively participate and present evidence if they wish their interests to be represented in the manner of their choosing. Timely participation is particularly important in CPCN cases because the earlier issues are raised, the more likely they are to receive the full attention of other parties and be addressable by the PULJ and the applicant.

47. Finally, the Commission finds that the PULJ's ultimate reasoning and conclusion that issuance of the CPCN was in the public interest, despite the Project being in conflict with certain portions of the recommendations and planning preferences of the Local Governments, was reasonable and supported by the evidence. 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 may 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.<sup>53</sup>

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<sup>53</sup> *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 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).



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

**ORDERED:** That 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