

ORDER NO. 87603

IN THE MATTER OF THE APPLICATION
OF ENERGY ANSWERS INTERNATIONAL,
LLC FOR A CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY TO
CONSTRUCT A 120 MW GENERATING
FACILITY IN BALTIMORE, MARYLAND

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BEFORE THE
PUBLIC SERVICE
COMMISSION
OF MARYLAND

CASE NO. 9199

Issue Date: June 13, 2016

To: Parties of Record and Interested Persons

On April 15, 2016, the Public Service Commission (“Commission”) issued an Order to Show Cause (Order No. 87497) requiring Energy Answers International, LLC (“Applicant”) to demonstrate why the Certificate of Public Convenience and Necessity (“CPCN”) for its Fairfield Renewable Energy Project (“Fairfield Facility”)¹ should not be revoked as a result of the expiration of the air permit issued by the Maryland Department of the Environment (“MDE” or “Department”). The Commission has reviewed the Applicant’s written response to the Show Cause Order (hereinafter “EA Response”), as well as reply comments submitted by MDE and Technical Staff (“Staff”), and joint comments by United Workers Association, Inc. (“United Workers”) and the Environmental Integrity Project (“EIP”). For the reasons stated below, the Commission confirms the expiration of the air quality provisions of the Fairfield Facility CPCN and

¹ The Fairfield Renewable Energy Project refers to the construction of a 120 MW waste-fuel electricity generating station located at 1701 East Patapsco Avenue in Baltimore City. The Commission issued the Fairfield Facility CPCN on August 6, 2010 (Order No. 83517), which was later amended on January 10, 2013, to extend the commencement date for construction of the facility to August 6, 2013 (Order No. 85269).

revokes the CPCN in its entirety without prejudice to Energy Answer's ability to reapply for a new CPCN.

The Public Utilities Article ("PUA") of the Annotated Code of Maryland authorizes the Commission to grant CPCNs for the construction of generation facilities in the State and requires that a person must first obtain a CPCN before any construction may begin.² PUA § 7-207(b)(1). Under PUA § 7-208, the Commission may "grant the [CPCN], subject to conditions the Commission determines to be appropriate...." *Id.* § 7-208(f)(1)(ii). Moreover, each CPCN issued under § 7-208 must include "the requirements of the federal and State environmental laws and standards that are identified by the Department of the Environment" as well as the methods and conditions deemed appropriate by the Commission to comply with those laws and standards. *Id.* § 7-208(g)(1). In accordance with these provisions, the Commission granted the Fairfield Facility CPCN subject to specific licensing conditions that were agreed to by the Applicant and incorporated into the CPCN to ensure compliance with all applicable environmental standards and regulatory requirements. *See Energy Answers Int'l, LLC*, 101 Md. P.S.C. 331 (2010) [hereinafter "Order No. 83517"]. Failure by the Applicant to satisfy any of the required conditions would, in turn, provide cause for the Commission to deny, or in this instance, revoke, the CPCN. Condition No. A-6 of the Fairfield Facility CPCN adopts the language of COMAR 26.11.02.04 and provides, in pertinent part, as follows:

In accordance with COMAR 26.11.02.04B, the air quality provisions expire if, as determined by MDE-ARMA:

² A person may seek a waiver of the CPCN requirement where applicable. *See* PUA § 7-207.1.

- a) Construction is not commenced within 18 months after the date of issuance of a final CPCN;
- b) Construction is substantially discontinued for a period of 18 months or more after it has commenced; or
- c) Construction is not completed within a reasonable period of time after the issuance of a final CPCN.”

Order No. 83517 at 8.

On March 17, 2016, MDE made a final determination that the Applicant had discontinued construction for more than 18 months. Consequently, under subsection b of Condition No. A-6 and COMAR 26.11.02.04B, the air quality conditions of the CPCN had automatically expired. This expiration effectively invalidated the Applicant’s approvals under the Clean Air Act Prevention of Significant Deterioration and Nonattainment New Source Review programs, as well as any construction approvals and air permits issued by MDE. Without these environmental approvals, Applicant cannot comply with a substantial portion of the CPCN.

The Applicant does not appear to challenge MDE’s conclusion that the air quality requirements in the Fairfield Facility CPCN have expired³ or maintain that its air permit remains valid. Instead, Applicant joins the Department and other interested parties in asking the Commission to confirm the expiration of the air emissions provisions of the CPCN.⁴ Finding no dispute regarding MDE’s conclusion on this point, the Commission hereby confirms that the air quality provisions of the Fairfield Facility CPCN have expired as a result of discontinued construction for more than 18 months. The

³ The Applicant disagrees with but does not contest MDE’s conclusion regarding the sufficiency of the Applicant’s activities at the Fairfield Facility. *See* EA Response ¶ 3. Therefore, the Commission does not review MDE’s final determination that construction on the Fairfield Facility was discontinued for more than 18 months after it commenced.

⁴ *Id.* at 4.

Commission's analysis, however, does not end there. The Applicant also asks the Commission to preserve the remaining provisions of the CPCN, arguing that the "savings clause" of General Condition No. G-2 allows the Commission to discard the expired air quality requirements and leave the remainder of the CPCN intact "pending a future submission demonstrating that the [Fairfield] Project has received the necessary air quality approvals from MDE."⁵ General Condition No. G-2 provides: "If any provision of this CPCN shall be held invalid for any reason, the remaining provisions shall remain in full force and effect and such invalid provision shall be considered severed and deleted from this CPCN." Order No. 83517 at 5. The Commission finds, however, that the Applicant's request for relief is flawed in two ways.

First, this case is not one where the licensing requirement is unconstitutional or otherwise invalid because it offends the law. Nor is this a case where the provision is invalid because it conflicts with another provision of the Commission's Order granting the CPCN. Rather, the air quality provisions of the Fairfield Facility CPCN expired under the express terms of the CPCN itself; they were not stricken. Accordingly, General Condition No. G-2 is not implicated in this matter.

Second, while the presence of a savings clause does raise a presumption of separability, the clause does not save the remainder of the CPCN in view of PUA § 7-208(g)(1). The Commission is guided by Maryland courts in their construction of similar severability clauses found in statutes. A severability clause "is not absolute or an inexorable command." *City of Baltimore v. A.S. Abell Co.*, 218 Md. 273, 290 (1958). The proper analysis applied to such clauses has been described as follows:

⁵ *Id.* ¶¶ 6-7.

[The saving clause] is merely an aid to interpretation. It must be afforded a reasonable interpretation, but does not operate to save provisions which clearly would not have been enacted into law except upon the assumption that the entire act was valid. The true test of separability is the effectiveness of an act to carry out, without its invalid portions, the original legislative intent in enacting it; and a saving clause will not be given effect where such invalid provisions affect the dominant aim of the whole statute.

Id. (internal citations omitted).

Applying that test here, the Commission was required, by legislative mandate, to incorporate the air quality requirements and other environmental conditions into the Fairfield Facility CPCN “to ensure compliance with all applicable regulatory standards and requirements related to the environment.” Order No. 83517 at 1; *see* PUA § § 7-208(g)(1). The Applicant agreed to those conditions as part of its settlement with MDE, the Department of Natural Resources, and Power Plant Research Program (collectively, “MDE/PPR”). While it follows that MDE/PPR would not have reached settlement absent the necessary environmental protections, more importantly, the Commission could not have issued the CPCN under § 7-208(g)(1) without the conditions. The air quality provisions of the CPCN satisfied a material, statutory requirement for issuing the certificate. With their removal, the CPCN cannot comply with the statute because it no longer includes “(i) the requirements of the federal and State environmental laws and standards that are identified by the Department of the Environment; and (ii) the methods and conditions that the Commission determines are appropriate to comply with those environmental laws and standards.” PUA § 7-208(g)(1). The Commission concludes therefore that the expiration of the air quality conditions not only impairs the dominant

aim of the CPCN, but also renders the remainder of the CPCN void in view of § 7-208(g)(1).⁶

The Commission further anticipates that certain factors enumerated under PUA § 7-207(e)(2) may have also changed considerably given the notable passage of time. Specifically, the Commission considers the possibility that reviving construction of the generating facility after a three-year hiatus could implicate different economic, esthetic, and air and water pollution concerns today compared to 2010, when the CPCN was granted. *See* PUA § 7-207(e)(2). For example, in 2015, Baltimore City announced that it terminated its power purchase agreement with the Applicant to buy power from the Fairfield Facility.⁷ This development, which removed an important source of revenue for the project, may have a significant impact on the Applicant's ability to run the facility profitably. The Commission also observes that since granting the CPCN in 2010, a growing number of local residents and public interest groups have publicly expressed concerns about the environmental and community impacts of the facility. It is consistent with the public interest to reevaluate the Project under the statutory factors of § 7-

⁶ The Applicant acknowledges in its Response that the purpose of the 18-month requirement in both the CPCN and COMAR 26.11.02.04B is "to ensure that emissions limits do not become stale and outdated." *See* EA Response ¶ 3. In its comments, MDE advised the Commission that the Applicant received only provisional PM10 limits (particulate matter 10 micrometers or less) for the Fairfield Facility CPCN at the time of issuance because there was insufficient data at the time and virtually no history of PM10 limits that also accounted for condensable particulate matter. *See* MDE Comments ¶ 4. Since 2011, all applicable PSD and Nonattainment New Source Review permits issued in Maryland must include condensable PM in establishing PM10 and PM2.5 (fine particulate matter) limits. *Id.* Because the Fairfield Facility CPCN issued before this requirement took effect, reevaluation of an air permit addressing the PM10 and PM2.5 condensables issue may be appropriate. Notwithstanding the expired air quality conditions, one commenter has also suggested that additional approvals required under the Fairfield Facility CPCN may be outstanding. The Commission does not address these factual allegations, however, because its decision is based on statutory interpretation.

⁷ Fern Shen, *City Ends Pact with Fairfield Incinerator Developer*, BaltimoreBrew (Mar. 26, 2015, 6:44 PM), <https://www.baltimorebrew.com/2015/03/26/city-ends-pact-with-fairfield-incinerator-developer/#comments> (last visited June 7, 2016).

207(e)(2) and afford an opportunity for public comment and hearing on any renewed application for a CPCN concerning the Fairfield Facility.

Simply directing the Applicant to obtain a new air permit while suspending the remainder of the CPCN will not adequately address the above concerns. The Commission finds that revocation of the Fairfield Facility CPCN in its entirety is legally proper, administratively efficient, and in the best interest of the State. The Applicant may reapply for a new CPCN that satisfies current federal, state, and local environmental standards.

IT IS THEREFORE this 13th day of June, in the year Two Thousand and Sixteen, by the Public Service Commission of Maryland,

ORDERED: (1) That the Certificate of Public Convenience and Necessity previously granted by Order No. 83517 and amended by Order No. 85269, for the construction of the electricity generating facility known as the Fairfield Renewable Energy Project, is hereby revoked in its entirety, without prejudice to Energy Answers International, LLC's ability to reapply for a new Certificate of Public Convenience and Necessity that addresses all applicable, current regulatory standards and requirements related to the environment; and

(2) That pending the Commission's decision on any new application for a CPCN in this matter (if any), the Applicant shall refrain from any construction-related activities in connection with the Fairfield Project.

By Direction of the Commission,

/s/ David J. Collins

David J. Collins
Executive Secretary