ML 201279

ORDER NO: 87835

IN THE MATTER OF THE APPLICATION OF ONEENERGY BLUE STAR SOLAR, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A 6.0 MW SOLAR PHOTOVOLTAIC GENERATING FACILITY IN KENT COUNTY, MARYLAND	*	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND
	*	CASE NO. 9387
IN THE MATTER OF THE APPLICATION OF ONEENERGY IBIS SOLAR, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A 6.0 MW SOLAR PHOTOVOLTAIC GENERATING FACILITY IN SOMERSET COUNTY, MARYLAND	*	CASE NO. 9392

Issue Date: October 21, 2016

This matter comes before the Public Service Commission of Maryland ("Commission") on appeal from the April 6, 2016 Proposed Orders of a Public Utility Law Judge. Upon consideration of the record developed in these matters, and as more fully explained herein, the Commission hereby finds that Maryland's Forest Conservation Act does apply to the two applications at issue; that the Commission's statutory authority does preempt local ordinances pertaining to forestry control matters; and that the licensing conditions imposed upon the applicants by the Proposed Orders are affirmed.

I. Procedural Background

On July 10, 2015, OneEnergy Blue Star Solar, LLC filed an application requesting a Certificate of Public Convenience and Necessity ("CPCN") to construct a 6.0 megawatt ("MW") solar photovoltaic generating facility in Kent County, Maryland, to be known as the OneEnergy Solar Farm. On August 21, 2015, OneEnergy Ibis Solar, LLC (hereinafter, collectively with OneEnergy Blue Star Solar, LLC, "OneEnergy" or "the Applicants") filed an application requesting a CPCN to construct a 6.0 MW solar photovoltaic generating facility in Somerset County, Maryland, to be known as the Ibis Solar Farm (hereinafter, collectively with the OneEnergy Solar Farm, "the Projects").

The applications were delegated to the Public Utility Law Judge ("PULJ") Division, after which pre-hearing conferences were held, procedural schedules were established, and direct and rebuttal testimonies were filed in both matters. The Parties agreed that there was only one contested issue, that is: to what extent, if any, did Maryland's Forest Conservation Act[1] ("FCA" or "the Act") obligations apply to the Projects. Given that the Parties also agreed that the contested issue was identical in both matters, an evidentiary hearing was held on both applications on February 5, 2016. Initial briefs were filed on February 29, 2016; reply briefs were filed on March 7, 2016; and the PULJ issued Proposed Orders on April 6, 2016 (hereinafter, "9387 Proposed Order," "9392 Proposed Order," and, collectively, "Proposed Orders").

On May 6, 2016, Commission Staff ("Staff") filed a Notice of Appeal to both Proposed Orders. Its respective Memorandum on Appeal was filed in each matter on May 16, 2016 ("Staff 9387 Appeal Memo" and "Staff 9392 Appeal Memo,"

[1] Md. Code Ann., Nat. Res. ("NR") § 5-1601-1613.

respectively). On June 3, 2016, a Joint Reply Memorandum on Appeal of OneEnergy Blue Star Solar, LLC and OneEnergy Ibis Solar, LLC ("OneEnergy Reply Memo") was filed. The Department of Natural Resources, Power Plant Research Program filed it's Consolidated Reply Memorandum on June 6, 2016.

II. Initial Positions

A. OneEnergy

In its initial brief,[2] OneEnergy asserted that the Projects are exempt from the FCA, and are instead subject to a more flexible review of forestry-related matters by the PULJ. OneEnergy took the position that the PULJ should impose no forestry-related obligations upon the Applicants based on past precedent[3] and the unique attributes of the Projects[4]. OneEnergy further argued that, if the PULJ were to determine that forestry-related obligations should be imposed upon the Applicants, the requirements of the FCA should not be followed, but rather should be adjusted based on the amount of impervious surface added to the Projects' property. Finally, with regard to the Ibis Solar Farm Project, OneEnergy asserted that the issuance of a CPCN by the Commission preempts local County forest conservation programs and their implementing ordinances.[5]

[2] Joint Initial Forest Conservation Act Brief of OneEnergy Blue Star Solar, LLC and OneEnergy Ibis Solar, LLC, Case Nos. 9387 and 9392 ("OneEnergy Initial Brief"), February 29, 2016 (ML#184625).
[3] OneEnergy notes that the Commission did not impose specific FCA requirements on previous solar CPCN projects. *Id.* at 15.
[4] OneEnergy asserts that the Projects are of temporary land use with minimal on-site impacts, provide broad environmental benefits, and satisfy the General Assembly's stated preference for solar. *Id.* at 2.
[5] *Id*. at 12.

B. Power Plant Research Program

The Department of Natural Resources Power Plant Research Program ("PPRP", or "the State") notes in its initial briefs[6] that, while there are no *exemptions* from the FCA, there are several *exceptions* as set forth in NR § 5-1602(b). PPRP takes the position that OneEnergy does not qualify for an exception under the FCA, but rather is subject to the statutory requirement that the PULJ give due consideration to the provisions of the FCA. PPRP disputed OneEnergy's claims that past precedent[7] and Project attributes[8] should exclude the Projects from forestry-related obligations. Instead, PPRP called for the PULJ to direct OneEnergy to comply fully with the State's recommended afforestation[9] measures, which included the following relevant condition for the OneEnergy Solar Farm:

> Revised Recommended Licensing Condition 2(e) -- Construction and operation of the solar facility shall be undertaken in accordance with this certificate and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following: Forest Conservation – Maryland's Forest Conservation Act (FCA), Md.Code, Sections 5-1602(b)(5) and 5-1603 of the Natural Resources Article. Consistent with Kent County ordinances implementing the FCA, OneEnergy Blue Star shall provide for 5.3 acres of mitigation.[10]

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[6] State of Maryland, Department of Natural Resources, Power Plant Research Program's Brief in Opposition to OneEnergy's "Motion for Expedited Ruling on Forest Conservation Act Exemption," Case No. 9387 ("9387 PPRP Initial Brief"), February 29, 2016 (ML#184546), and State of Maryland, Department of Natural Resources, Power Plant Research Program's Brief in Opposition to OneEnergy's "Motion for Expedited Ruling on Forest Conservation Act Exemption," Case No. 9392 ("9392 PPRP Initial Brief"), February 29, 2016 (ML#184621).

[7] PPRP acknowledged that "the failure to correctly apply the FCA to several initial solar projects 'was an omission on our part of something that should have been a requirement in [past solar] CPCN cases.'" 9387 PPRP Initial Brief at 3.

[8] PPRP noted that solar projects possess similar attributes to other forms of renewable energy, none of which are or should be treated differently than other forms of electric generation as the FCA does not afford special consideration to any type of project. *Id.*

[9] NR § 5-1601(b) defines "afforestation" as "the establishment of a tree cover on an area from which it has always or very long been absent, or the planting of open areas which are not presently in forest cover."

[10] *Id*. at 13, 14.

The counterpart condition for the Ibis Solar Farm read as follows:

> Initial Recommended Licensing Condition 2(e) -- Construction and operation of the solar facility shall be undertaken in accordance with this certificate and shall comply with all applicable local, State, and federal laws and regulations, including but not limited to the following: Forest Conservation – Maryland's Forest Conservation Act (FCA), Md.Code, Sections 5-1602(b)(5) and 5-1603 of the Natural Resources Article. Consistent with Somerset County ordinances implementing the FCA, OneEnergy Ibis shall provide for 6.8 acres of mitigation.[11]

The State's recommendations were based on formulas set forth in NR § 5-1606, which governs afforestation requirements and is enforced through county-level ordinances.[12]

C. Staff

In its initial briefs,[13] Staff took the position that OneEnergy is not exempt from the FCA, but is entitled to an exception from full compliance with the Act. Staff points out that, in accordance with NR § 5-1603(f), the PULJ is to give due consideration to forestry-related obligations stated in the FCA. Staff called for the PULJ to take a balanced approach when considering the afforestation requirements under the Act along with Maryland's strong desire to promote solar energy development. Ultimately, Staff proposed that the PULJ impose a condition upon OneEnergy that is midway between

[11] 9392 PPRP Initial Brief at 5.
[12] *Id*. at 6, 7. The ordinances applicable to the Projects were the Kent County Land Use Ordinance ("LUO"), Article VI § 8 – Special Provisions for the OneEnergy Solar Farm and the Somerset County Forest Conservation Ordinance ("FCO"), § 3. 9387 Proposed Order at 48 and 9392 Proposed Order at 59, respectively.
[13] Brief of the Staff of the Public Service Commission, Case No. 9387 ("9387 Staff Initial Brief"), February 29, 2016, and Brief of the Staff of the Public Service Commission, Case No. 9392 ("9392 Staff Initial Brief"), February 29, 2016.

zero compliance and full compliance with the FCA.[14] Regarding the issue of preemption, Staff stated, "Rather than the FCA or the local government ordinances passed pursuant to the FCA, projects are instead subject to the Commission's 'due consideration' with respect to issues covered by the FCA."[15]

III. Proposed Order

The PULJ was tasked with determining to what degree, if at all, are the Projects subject to the FCA and its forestry-related requirements. This issue also called into question whether or not the Commission's statutory authority under the FCA preempts a local forestry control ordinance. In the Proposed Orders, the PULJ noted the applicable laws to be Md. Code Ann., Public Utilities Article ("PUA") § 7-207(e), which contains factors the Commission must give due consideration to as part of its review of an application for a CPCN; PUA § 7-208(g)(1), which requires the Commission to include requirements pertaining to environmental laws and standards in any CPCN it issues; NR § 5-1602, which covers the applicability of the FCA; NR § 5-1603, which places requirements on units of local government as well as the Commission regarding forest conservation obligations; Kent County's LUO § 8.2, which covers the applicability of the County's forest conservation requirements to the OneEnergy Solar Farm; and Somerset County's FCO § 3.1, which covers the applicability of the County's forest conservation requirements to the Ibis Solar Farm. After applying these statutes to the evidence presented on the Projects, the PULJ found that the FCA does not apply to the Projects,

[14] "Staff suggests that the PULJ impose a condition requiring the payment of a fee-in-lieu in the amount of $39,353, representing half of the amount that would be required for full compliance with the FCA." 9387 Staff Initial Brief at 10. "Staff recommends that the CPCN incorporate a condition requiring the Applicant to pay a fee-in-lieu of $44,105, representing the mid-point of the proposals set forth by the Applicant and [PPRP]." 9392 Staff Initial Brief at 13, 14.
[15] *Id*. at 5.

and that FCA-related rulings by the Commission do not preempt local forest conservation ordinances.

When addressing the issue of whether or not the FCA was applicable to the Projects, the PULJ began with an analysis of NR § 5-1602(a), which states, "Except as provided in subsection (b) of this section, this subtitle shall apply to any public or private subdivisions plan or application for a grading or sediment control permit by any person, including a unit of State or local government on areas 40,000 square feet or greater." No subdivision plan or application for a grading or sediment control permit was filed on behalf of the Projects. A sediment and erosion control *plan* had been submitted for review, but the PULJ stated that "the submission of a sediment and erosion control plan is not the same as an application for a sediment control permit,"[16] and therefore held that the FCA, in its entirety, did not apply to the Projects.[17] The PULJ did note, however, that Kent County's LUO[18] and Somerset County's FCO[19] applied to their respective Projects, even though the FCA did not.

[16] "PPRP confirmed that a sediment and erosion control plan is required to be filed for a proposed land disturbance, which must be approved by the County's Department of Planning and Zoning, after preliminary approval by the County's Soil Conservation District, and a sediment control permit is then issued. Additionally, PPRP provided Section 9 – Erosion and Sediment Control – of the LUO which indicated that in order to obtain a sediment control permit, an applicant must submit a sediment and erosion control plan *and* an application, as well as a fee and bond if required." 9387 Proposed Order at 56 and 57. Furthermore, "OneEnergy indicated that it has yet to file either its grading or sediment control permit applications, which are not typically submitted until the site plan has been approved." 9392 Proposed Order at 67 and 68.

[17] 9387 Proposed Order at 57, 9392 Proposed Order at 68.

[18] "The County's specific inclusion of site plans [in LUO § 8.2] makes the Project subject to the LUO, as OneEnergy filed a site plan on June 25, 2015." 9387 Proposed Order at 58.

[19] "The FCO's application provision is broader than the FCA and specifically includes 'site plan review.' OneEnergy confirmed that on October 15, 2015, it filed its site plan for initial review, and on February 19, 2016, a revised site plan was filed with the County. Therefore, the FCO applies to the Project even though the FCA does not." 9392 Proposed Order at 68.

In both Proposed Orders, the PULJ acknowledged that, because the FCA, in its entirety, did not apply to the Projects, the "due consideration" provision of NR § 5-1603(f) was not applicable, either. NR § 5-1603(f) reads as follows:

> After December 31, 1992, the Public Service Commission shall give due consideration to the need to minimize the loss of forest and the provisions for afforestation and reforestation set forth in this subtitle together with all applicable electrical safety codes, when reviewing applications for a certificate of public convenience and necessity issued pursuant to § 7–204, § 7–205, § 7–207, or § 7–208 of the Public Utilities Article.

Despite the provision being inapplicable, the PULJ analyzed its application in the context of the OneEnergy Solar Farm Project, and arrived at the holding that, based upon the past-tense nature of the word "issued," "due consideration is only required under the plain language of the statute when reviewing CPCNs that have already been issued by the Commission such as a modification to an existing CPCN." [20]

As to the issue of preemption, in its 9392 Proposed Order, the PULJ sought to determine whether the Commission's CPCN authority preempts the Somerset County FCO which was adopted in accordance with NR § 5-1603(a):

> (1) A unit of local government having planning and zoning authority shall develop a local forest conservation program, consistent with the intent, requirements, and standards of this subtitle.
>
> (2) By April 30, 1992 all units of government with planning and zoning authority shall submit a proposed

[20] When considering OneEnergy's claim that its Solar Farm Project was exempt from the County's LUO, the PULJ noted that Kent County essentially adopted the State's NR § 5-1602(b) exceptions for its own LUO § 8.2 exceptions, which triggered the analysis of past tense conditions like "have been issued," thereby leading to the brief analysis of the past-tense condition stated in NR § 5-1603(f). 9387 Proposed Order at 57-62. Conversely, no such analysis was performed in the context of the Ibis Solar Farm Project because, as stated by the PULJ, "Given [the finding that the FCA does not apply] and the fact that the FCO has no CPCN-related exemption, it is unnecessary to address… if the Commission may exercise 'due consideration' in accordance with NR § 5-1603(f)." 9392 Proposed Order at 68.

> forest conservation program, which meets or is more stringent than the requirements and standards of this subtitle, to the Department for its review and approval.

The PULJ initially ruled out two of the three types of preemption recognized by Maryland courts: conflict preemption[21] and express preemption,[22] and instead focused primarily on whether or not implied preemption[23] was present. The PULJ noted that, while the Commission has broad authority over projects such as those at issue, the authority is by no means absolute. The PULJ pointed to the "many reviews and approvals outside of the Commission's authority which are necessary and required to obtain the authority to construct a project such as a generating station"[24] as support for its finding that the Somerset County FCO was not preempted by the PUA.

IV. Appeal Positions

A. Staff

In its appeals, Staff noted that it has no objection to the substantive conditions imposed on OneEnergy. Rather, Staff's appeals are based solely on what it views as a misinterpretation by the PULJ of the FCA. Staff challenges the PULJ's reading of the

[21] "Conflict preemption occurs when a local ordinance 'prohibits an activity which is intended to be permitted by state law, or permits an activity which is intended to be prohibited by state law.' In this case, neither of those scenarios exist. The FCO is simply more restrictive than the State's FCA, which is specifically permitted by NR § 5-1603(a)(2). The FCO does not prohibit anything permitted by either the FCA or PUA, nor does it permit something either the FCA or PUA prohibit. While the FCO does not contain an exemption for CPCNs, that does not equate to a prohibition." *Id*. at 69.

[22] "Express preemption occurs when the General Assembly by statutory language prohibits local legislation in a field. The exact opposite is true in this case. Even though the Commission has broad authority over CPCNs, the General Assembly mandated counties to create their own forest conservation ordinances and permitted those ordinances to be more stringent than the FCA." *Id*. at 70.

[23] In relation to implied preemption, the PULJ noted, "Generally, state law preempts by implication local law where the local law 'deal[s] with an area in which the [State] Legislature has acted with such force that an intent by the State to occupy the entire field must be implied,'" and that "the primary indicia of a legislative purpose to preempt an entire field of law is the comprehensiveness with which the General Assembly has legislated in the field." The PULJ stated that the Legislature's explicit requirement that local ordinances have their own forest conservation ordinances was proof that the Legislature did not intend on the Commission occupying the entire field of CPCN approval matters. *Id*. at 73 and 74.

[24] *Id*. at 73.

FCA, as it would "all but eliminate any ability or necessity for the Commission to carry out its statutory responsibility to give due consideration to FCA issues in CPCN cases."[25] Specifically, Staff disagrees with the PULJ's findings that the FCA is only implicated if an applicant previously applied for a grading or sediment control permit and, consequently, that the Commission shall only exercise due consideration when reviewing modifications to existing CPCNs. Staff also disagrees with the PULJ's finding that the PUA does not preempt the FCA, instead contending that the Commission's authority controls over local forest conservation ordinances.[26] Staff also requests that a clause be removed from the Proposed Orders out of concern that its wording diminishes the requirement and the exercise of due consideration by the Commission.[27]

B. OneEnergy

As with Staff, OneEnergy noted in its Reply Memorandum that it does not object to the substantive conditions placed upon it by the Proposed Orders, and states its intention to fully satisfy all FCA requirements called for therein. Instead, OneEnergy's Reply Memorandum focuses on what it refers to as "deeply flawed legal reasoning" found in the Proposed Orders with regard to the PULJ's interpretation of the FCA.[28]

[25] Staff 9387 Appeal Memo at 6, Staff 9392 Appeal Memo at 6.
[26] *Id*. at 10.
[27] Staff requests that the clause "[c]onsistent with Kent County ordinances implementing the FCA" be removed from the previously mentioned Recommended Licensing Condition 2(e) in the 9387 Proposed Order, and the clause "[c]onsistent with Somerset County Ordinances implementing the FCA" be removed from the previously mentioned Initial Recommended Licensing Condition 2(e) in the 9392 Proposed Order. In both Proposed Orders, ordering paragraph 2 reads, "That the conditions in Appendices A and B attached and incorporated herein are hereby accepted as licensing conditions of the Certificate of Public Convenience and Necessity in accordance with the findings of this Proposed Order." 9387 Proposed Order at 77, 9392 Proposed Order at 94. The previously mentioned Conditions 2(e) are within Appendix A to the respective Proposed Orders.
[28] OneEnergy points out that no party in either matter arrived at an interpretation of the FCA similar to that made by the PULJ and, furthermore, the parties reached a consensus shortly after the evidentiary hearing that "the Commission decides all forestry issues under the 'due consideration' standard prescribed by NR § 5-1603(f)." OneEnergy Reply Memo at 5.

Specifically identifying its concerns with the PULJ's conclusions that the FCA applies only in very limited circumstances and that Commission orders do not preempt county forest conservation ordinances, OneEnergy requests that the Commission grant the relief sought by Staff in its appeals of the Proposed Orders.

C. PPRP

In its Consolidated Reply Memorandum on appeal, PPRP argues that, to the extent Staff suggests the Commission should not require full compliance with the FCA by requesting removal of the clause referencing the local ordinances in Condition 2(e), it disagrees. Full compliance with the FCA is one of the options available under the "due consideration" standard according to PPRP.[29] PPRP also notes that the conditions attached to CPCNs often include compliance with various local ordinances.[30] Finally, PPRP disagrees with Staff's assertion that an Applicant's needs are one of the considerations under PUA 7-207(e), although it agrees with Staff that the Commission should treat FCA issues in the same manner as it treats other PUA 7-207(e) factors.[31]

V. Commission Decision

The issue at hand is one of statutory interpretation, that is: how NR § 5-1602 is to be read so as to determine the applicability of the FCA to the Projects, and how NR § 5-1603(f) is to be read so as to determine whether or not local ordinances created in accordance with the FCA are preempted by the Commission's CPCN authority. The PULJ construed NR § 5-1602(a) in a way that severely limited the Act's application and, consequently, the Commission's jurisdiction. NR § 5-1603(f) was interpreted to mean

[29] PPRP Consolidated Reply Memorandum at 3.
[30] *Id.* at 4.
[31] *Id.* at 5.

that the Commission's exercise of due consideration would not preempt local ordinances. We disagree with the PULJ's reasoning and the resulting Proposed Orders on both counts.

The Maryland Court of Appeals has long held that, "The cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature," a task that "begins with the plain language of the statute."[32] The PULJ analyzed the plain language of NR § 5-1602(a), focusing so intently on the word "permit" within the "this subtitle shall apply to any… application for a grading or sediment control permit" provision that an extremely narrow finding was made: unless a grading or sediment control *permit* has been applied for, a CPCN application is not yet subject to the FCA. While the PULJ followed this basic tenet of statutory interpretation, unfortunately, it was followed so strictly that the result severely limits the application of the FCA to CPCN submissions and, consequently, the due consideration requirement placed on the Commission. We do not believe this to be what the Legislature intended.

Another well-founded rule of statutory interpretation looks beyond the plain language. "The plain language of a provision is not interpreted in isolation. Rather, we analyze the statutory scheme as a whole..."[33] Thus, in analyzing the applicability of the Act, we turn to NR § 5-1602 as a whole. First, applicants typically do not apply for the grading or sediment control permit noted in NR § 5-1602(a) until *after* obtaining a CPCN, as the CPCN itself sets forth the final configuration and requirements of the

[32] 9392 Proposed Order, *citing Kushell v. Dep't of Natural Resources*, 385 Md. 563, 576, 870 A.2d 186, 193 (2005).
[33] *Denville v. State*, 383 Md. 217, 223, 858 A.2d 484, 487 (2004).

project, and that information is generally included in a permit application.[34] Second, if a permit has been applied for, a project may still qualify for one of the thirteen broad exceptions to the Act as detailed in NR § 5-1602(b). Under the PULJ's interpretation, the majority of CPCN applications would not be subject to the FCA due to the typical order of filings, and the applications in the minority may be further excluded from the FCA if found to qualify for one of the many statutory exceptions. It is difficult to believe that the Legislature, after carefully referencing the CPCN provisions of the PUA in § 5-1602(b)(5) and granting the Commission the broad power of "due consideration" in § 5-1603(f), intended for the FCA to rarely, if ever, apply to CPCN projects before the Commission. Perhaps this inflexible interpretation of NR § 5-1602(a) would be appropriate if the Legislature's intent was to minimize the importance of forest conservation, but that position would defy both public policy and common sense,[35] and it begs the question of why the Act was created in the first place. Rather than defining when in time that the FCA applies (i.e. after a grading or sediment control permit has been applied for), it is more in keeping with the purpose of the FCA to understand § 5-1602(a) as describing the projects to which it applies (i.e. projects which require a grading or sediment control permit). We believe this interpretation is more in keeping with the Legislature's intent, and it allows more CPCN applications to pass NR § 5-1602(a) and move on to the carefully crafted exceptions to the Act that are found in NR § 5-1602(b).

[34] Staff 9387 Appeal Memo at 6.

[35] "In every case, the statute must be given a reasonable interpretation, not one that is absurd, illogical, or incompatible with common sense." *State v. Johnson*, 415 Md. 413, 421-22, 2 A.3d 368 (2010).

Given that OneEnergy filed its sediment and erosion control plans for the Projects,[36] this finding has the Projects being subject to the FCA under NR § 5-1602(a), and in need of analysis under the exceptions of NR § 5-1602(b) so as to further determine whether or not the Act is applicable. NR § 5-1602(b) lists thirteen well-defined circumstances which, if met, would have a CPCN application excepted from the requirements of the FCA. At first glance, it appears that the Projects may qualify for the exception under NR § 5-1602(b)(5):

> (b) The provisions of this subtitle do not apply to:
>
> (5) The cutting or clearing of public utility rights–of–way or land for electric generating stations licensed pursuant to § 7–204, § 7–205, § 7–207, or § 7–208 of the Public Utilities Article, provided that: (i) Any required certificates of public convenience and necessity have been issued in accordance with § 5–1603(f) of this subtitle; and (ii) The cutting or clearing of the forest is conducted so as to minimize the loss of forest;

It is undisputed, however, that neither Project would require the cutting or clearing of trees.[37] Given that neither the NR § 5-1602(b)(5) exception nor any other exception applies to the Projects, we find that they are subject to the terms and conditions of the FCA.

The Proposed Order in Case 9392 notes that the Somerset County Forest Conservation Ordinance is more restrictive than the State FCA,[38] as allowed by NR § 5-1603(a)(2).[39] Having found that the Somerset County Ordinance applies to the Ibis Solar

[36] 9387 Proposed Order at 56, 9392 Proposed Order at 68.
[37] "These projects were designed to avoid environmental impacts, and accordingly neither will impact a single tree." OneEnergy Initial Brief at 3.
[38] We note that, conversely, the Kent County Ordinance is identical to the State FCA statute; therefore this issue was not specifically addressed in the appeal of the Proposed Order in Case 9387.
[39] 9392 Proposed Order at 69.

Project, it is necessary to address OneEnergy's and Staff's argument that the FCO is preempted by the Commission's CPCN authority under PUA § 7-207 and NR § 5-1603(f). The Proposed Order found that the Commission's authority did not preempt local ordinances. We do not agree.

The Proposed Order in Case 9392 correctly cited a Maryland Court of Appeals case in which it was held that the General Assembly's grant of the Commission's CPCN authority includes implied preemption of local laws in the entire field of siting and construction of electrical generation and transmission.[40] However, the Proposed Order proceeds to parse the types of local approvals required for such projects to determine if a County FCO is preempted, finding "The application of the County's FCO to a solar generator is clearly not the same as the attempted application of zoning regulations to a transmission line."[41] This is essentially a more limited conflict preemption analysis. The FCA directive in NR § 5-1603(f) that the Commission only need give "due consideration" to provisions for afforestation and reforestation reinforces our conclusion that the local FCOs are included within the field of preemption.[42] We find that the result of the "due consideration" exercised by the Commission in accordance with NR § 5-1603(f) may supersede the application of the local LUO or FCO.

[40] 9392 Proposed Order at 70, citing *Howard County v. Potomac Elec., Power Co.,* 319 Md. 511, 523 (1990). Accord *PEPCO v. Montgomery County,* 80 Md. App. 107 (1989)..
[41] *Id.* at 75.
[42] The Proposed Order overstates the Commission's dicta in *Re Potomac Edison Co.,* 100 Md. P.S.C. 276 (2009). There the Commission specifically withheld determination of which substations would be included within the field of "integral" to the proposed transmission project. 100 Md. P.S.C. at 284.

Our preemption finding does not nullify the applicable local ordinances.[43] It should only be a very rare instance in which the exercise of due consideration results in the complete preemption of all afforestation and reforestation requirements. Particularly where, as here, the General Assembly has granted the counties authority to pass ordinances even stronger than the State Forest Conservation Act, it is necessary to give such local ordinances significant weight. Thus, we reiterate what our colleagues wrote seven years ago:

> And beyond the statutory requirement that we consider the County's recommendation in deciding the CPCN, we recognize that land use decisions fall within the core expertise and competency of local authorities such as Frederick County, not this Commission. As such, we will give appropriate – which is to say, significant – weight to the views and recommendations of local authorities in the course of deciding whether, where, and on what terms to site the various components of a transmission line falling within our authority.[44]

Furthermore, as in the instant case, local conservation regulations may prove to be reasonable and justified to the point that they are adopted as a licensing condition by the Commission. It follows that, while the Commission does not have to follow the terms of local forest conservation ordinances in whole or even in part, the Commission may choose to do so. Such is the situation with the OneEnergy Projects as we uphold the PULJ's adoption of the licensing conditions recommended by the local authorities. In these cases, we find that the PULJ paid careful attention to the evidence presented, the positions of the Parties, and the afforestation called for under the Act. The direction

[43] Our finding herein regarding CPCN preemption is limited to local ordinances pursuant to the Forest Conservation Act, and we leave to another day consideration of other local ordinances regarding land use, and the like.
[44] 100 Md. P.S.C. at 284.

given by the PULJ to OneEnergy regarding the afforestation to be performed as a licensing condition was reasonable and well-supported by the record. Furthermore, we note that no Party challenged the actual content of the imposed conditions. We see no need or basis to alter the licensing conditions placed upon the Projects.

IT IS THEREFORE, this 21st day of October, in the year Two Thousand Sixteen, by the Public Service Commission of Maryland,

ORDERED: (1) That, as stated herein, the findings in the Proposed Orders are hereby modified to reflect the application of the FCA to the OneEnergy Solar Farm Project and the Ibis Solar Farm Project, and the holding that orders issued by the Commission in accordance with NR § 5-1603(f) may preempt local forest conservation ordinances; and

(2) That the licensing conditions imposed upon the Projects by the Proposed Orders are hereby affirmed.

/s/ W. Kevin Hughes

/s/ Harold D. Williams

/s/ Jeannette M. Mills

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell
Commissioners