ORDER NO. 88053

IN THE MATTER OF THE APPLICATION OF PINESBURG SOLAR, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT AN 8.0 MW SOLAR PHOTOVOLTAIC GENERATING FACILITY IN WASHINGTON COUNTY, MARYLAND	* * * * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND CASE NO. 9395

Issue Date: March 3, 2017

This matter comes before the Public Service Commission of Maryland ("Commission") on appeal from the June 7, 2016 Proposed Order of a Public Utility Law Judge. Upon consideration of the record developed in this matter, and as more fully explained herein, the Commission hereby clarifies and affirms the Proposed Order regarding the applicability of the Forest Conservation Act.

I. Procedural Background

On September 4, 2015, Pinesburg Solar LLC ("Pinesburg" or "Applicant") filed an application requesting a Certificate of Public Convenience and Necessity ("CPCN") to construct an 8.0 megawatt ("MW") solar photovoltaic generating facility in Washington County, Maryland (hereinafter referred to as "the Project"). The application was delegated to the Public Utility Law Judge ("PULJ") Division, after which a procedural schedule was established, direct and rebuttal testimonies were filed, and a public hearing was held. The Parties agreed that the contested issue was: to what extent, if any, did

Maryland's Forest Conservation Act[1] ("FCA" or "the Act") obligations apply to the Project. The Parties were also asked to address their views of the relationship between the FCA and the Washington County Forest Conservation Ordinance ("FCO").

The Commission's Office of Staff Counsel ("Staff") and Pinesburg filed Initial Briefs ("Staff Initial Brief" and "Pinesburg Initial Brief," respectively) on March 10, 2016. The State of Maryland's Department of Natural Resources – Power Plant Research Program ("PPRP") filed its Reply Brief ("PPRP Reply Brief") on March 17, 2016. On April 12, 2016, Pinesburg filed a consolidated Reply Brief to Staff's Initial Brief and Rebuttal to PPRP's Reply Brief ("Pinesburg Reply Brief"). Pinesburg filed a Legislative Supplement to its Reply Brief on April 14, 2016 ("Pinesburg Supplement"). The PULJ issued a Proposed Order on June 7, 2016.[2]

On June 9, 2016, PPRP filed a Notice of Appeal to the Proposed Order. Its respective Memorandum on Appeal was filed on June 21, 2016 ("PPRP Appeal Memo"). On July 11, 2016, Staff filed a Reply Memorandum ("Staff Reply Memo"). Pinesburg filed a Motion for Leave to File Out-of-Time and its Reply Memorandum ("Pinesburg Reply Memo") on July 12, 2016.

II. Initial Positions

A. Commission Staff

In its Initial Brief, Staff noted that the County FCO is verbatim the FCA and expressly incorporates § 5-1603(f) of the Act, which requires the Commission to give

[1] Md. Code Ann., Nat. Res. ("NR") §§ 5-1601 - 1613.
[2] The PULJ initially issued the Proposed Order on May 13, 2016. An Errata to the Proposed Order was issued on June 7, 2016. All references made herein to the Proposed Order shall be considered to the June 7, 2016 Proposed Order unless otherwise stated.

"due consideration to the need to minimize the loss of forest and the provisions for afforestation and reforestation" for electric generating CPCN cases.[3] Staff also noted that the Kent County ordinance at issue in Case No. 9387[4] did, as well, calling both local ordinances "functional equivalents" of the FCA.[5] As such, Staff adopted and incorporated by reference into its Initial Brief the legal arguments and conclusions set forth in its briefs in Case No. 9387.

In Case No. 9387, Staff took the position that the Applicant was not exempt from the FCA, but rather was entitled to an exception from full compliance with the Act.[6] Staff called for the PULJ to take a balanced approach when considering the afforestation requirements under the Act along with Maryland's Renewable Energy Portfolio Standard policy promoting solar energy development. Ultimately, in that case Staff proposed that the PULJ impose a condition upon the Applicant that was midway between zero compliance and full compliance with the FCA.[7]

Regarding the issue of preemption, Staff also stated in Case No. 9387, "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."[8] Staff reiterates that position in the instant matter by stating, "The opinions and recommendations of PPRP and local jurisdictions are normally given

[3] Staff Initial Brief, page 1 and 2.
[4] *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*.
[5] Staff Initial Brief at 2.
[6] Brief of the Staff of the Public Service Commission, Case No. 9387 ("9387 Staff Initial Brief"), February 29, 2016. Maillog #184547.
[7] "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, page 10.
[8] *Id*. at 5.

considerable deference and weight in this process, but an Applicant's needs must also be considered, and the precise wording and effect of the ultimate CPCN is up to the Commission."[9] Staff concluded with, "The PULJ and ultimately the PSC have the discretion to determine what remedial actions, if any, are required of the Applicant for compliance under the FCA based upon the evidentiary record before them."[10]

B. Pinesburg Solar LLC

Pinesburg took the position that, having minimized the loss of forest in the development of the Project, it is exempt from compliance with the FCA.[11] In support of its position, Pinesburg pointed to 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.

This provision is mirrored in the FCO and was interpreted by Pinesburg to mean that CPCN projects that minimize forest loss are not subject to FCA reforestation requirements.[12] Although Washington County did not intervene, Pinesburg noted that the

[9] Staff Initial Brief at 3.
[10] *Id.* at 3 and 4.
[11] Pinesburg Initial Brief, page 1.
[12] *Id.* at 3.

Washington County Board of Zoning Appeals determined the Project was exempt under the County FCO as further support for its position.[13]

While asserting that the Project is exempt from the FCA, Pinesburg simultaneously contended that it is subject to NR § 5-1603(b)(2), which imposes the due consideration standard upon the Commission. Pinesburg held that due consideration is not equivalent to full compliance and, citing the Maryland Court of Appeals, stated, "the recommendations from other state agencies and local governing bodies are advisory only and not controlling."[14] While not stated expressly, the implication was that Pinesburg believes the Commission's exercise of due consideration may supersede the application of a local forest conservation ordinance.

C. Power Plant Research Program

In its initial brief, PPRP also likened the instant matter to Case No. 9387, stating that the issues are nearly identical, as are the party positions and recommended outcomes.[15] PPRP incorporated by reference into its Initial Brief the legal arguments and conclusions set forth in its briefs in Case No. 9387.[16] PPRP reiterated its position that this Project is subject to the FCA, and that the Commission's responsibility to exercise due consideration under the FCA preempts the FCO. PPRP held that, after exercising the required due consideration, the Commission should direct Pinesburg to fully comply with the FCA, and therefore adopt PPRP's Recommended Condition 2(e), the afforestation of 8.2 acres, as a term required for the issuance of the CPCN to Pinesburg.

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[13] *Id.* at 2.
[14] *Id.* at 5, *citing, Howard County v. PEPCO*, 573 A.2d 821 (Md. 1990).
[15] PPRP Initial Brief, page 1.
[16] *Id*. at 2.

PPRP rejected Pinesburg's claim that the Project is exempt from the FCA on two counts. First, NR § 5-1602(b)(5)(1) states that the FCA does not apply, provided that, "Any required certificates of public convenience and necessity have been issued…" Pointing to the past-tense language, PPRP's interpretation is that only modifications to awarded, existing CPCNs may be considered exempt from the FCA under the provision. Therefore, since no CPCN had yet been issued, the Project is not exempt.

PPRP next addressed Pinesburg's claim that the Commission's exercise of due consideration should lead to the imposition of no additional forestry measures since the Project was developed in such a way as to minimize forest loss. PPRP pointed out that NR § 5-1603(f) requires the Commission to give due consideration to both "the need to minimize the loss of forest *and* the provisions for afforestation and reforestation set forth in this subtitle." (emphasis added). Thus, PPRP contends that the Commission is required to consider the afforestation and reforestation obligations under the FCA, regardless of Pinesburg's minimization of forest loss.

III. Proposed Order

The PULJ was tasked with determining to what degree, if at all, is the Project 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 Order, the PULJ noted the applicable laws to be Md. Code Ann., Public Utilities Article ("PUA") § 7-207(e), which contains factors that the Commission must give due consideration to as part of its review of an application for a CPCN; 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; and Washington County's FCO, which covers the applicability of the County's forest conservation requirements to the Project.

Upon review of NR § 5-1602(a),[17] the PULJ determined that the Project was subject to the FCA. The PULJ next turned to NR § 5-1602(b) to determine whether or not the Project was covered by an exemption from the Act. In short, and in relevant part, NR § 5-1602(b) exempts from the FCA generating stations for which "[a]ny required certificates of public convenience and necessity have been issued" and the cutting or clearing of forests is minimized. The PULJ analyzed the statutory language and found that, "despite the use of the past tense, the sense of this provision is that it applies to projects applying for a CPCN."[18] This interpretation led the PULJ to find that the Project is subject to, but exempt from, the FCA.

The PULJ next examined the applicability and effect of NR § 5-1603(f), which 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.

[17] NR § 5-1602(a): "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."
[18] Proposed Order at 19, 20.

Despite finding that the Project is exempt from the Act under NR § 5-1602(b), the PULJ also found that the § 5-1603(f) due consideration requirement regarding afforestation and reforestation remained in place.[19] The PULJ stated that due consideration does not require implementing, wholly or partially, the FCA,[20] and subsequently chose to reject PPRP's proposed condition 2(e), the afforestation of 8.2 acres, which was based on FCA requirements. Instead, the PULJ required the replacement of trees with higher quality trees in an area equal to the acreage of trees that were removed for the Project, which was stated to be slightly less than half an acre.

The issue of whether or not the Commission's authority under NR § 5-1603(f) preempts local forest conservation ordinances did not rise to the forefront of this matter, given the parties' shared position; however; the PULJ included in the Proposed Order two definitive statements that should not go unrecognized. First, as part of the analysis of NR § 5-1603(f), the PULJ noted, "[I]f the Legislature had intended to substitute the counties' ordinances for Commission consideration, it could have so stated, and could have omitted NR § 5-1603(f)."[21] Next, in a footnote to action taken by the Washington County Board of Zoning Appeals, the PULJ stated, "A county zoning ordinance cannot take precedence over the Commission's statutory authority."[22] It follows that the PULJ was also of the position that Commission rulings do preempt local forest conservation ordinances.

[19] *Id*. at 21.
[20] *Id*. at 22.
[21] Proposed Order at 21.
[22] *Id*.

IV. Appeal Positions

A. PPRP

PPRP appealed the Proposed Order on two counts. First, PPRP asks the Commission to correct the methodology used by the PULJ when applying the FCA. PPRP notes its agreement with the PULJ that the Project is subject to the FCA under NR § 5-1602(a) and that the Commission must give due consideration to reforestation and afforestation requirements under NR § 5-1603(f). PPRP also agrees with the PULJ's ultimate conclusion that the FCA "applies to projects applying for a CPCN,"[23] but disagrees with the path taken by the PULJ in getting to the conclusion. PPRP argues there is no need to analyze the tenses used in NR § 5-1602(b) and, consequently, make the findings stated in the Proposed Order. PPRP takes the position that, "If a party already has been issued a CPCN, then there is no dispute that the project covered by the CPCN is exempt from either further, or strict, compliance with the FCA."[24]

PPRP next appeals what it considers a failure by the PULJ to properly apply due consideration as required under NR § 5-1603(f). PPRP points out that, under this section, the Commission is to "give due consideration to… the provisions for afforestation and reforestation set forth in this subtitle." In its rejection of PPRP's proposed condition 2(e), the PULJ ultimately required reforestation by directing the Applicant to replace trees in an area equal to the acreage of trees that were removed, but required no afforestation mitigation. PPRP acknowledges that the PULJ was not required to adopt PPRP's

[23] *Id*. at 20, emphasis in original.
[24] PPRP Appeal Memo, page 5.

recommendation in full, but takes issue with its refusal to do so without explanation in support of the decision to reject afforestation of 8.2 acres.[25]

B. Staff

In Staff's Reply Memo, Staff contends that the PULJ correctly applied the FCA to the Project, and that the clarification being sought by PPRP is not necessary as PPRP and the PULJ ultimately reached the same conclusion.[26] Staff also holds that the mitigation ordered by the PULJ is fair and reasonable, and "amply supported by the record."[27] Ultimately, Staff takes the position that the Commission should deny PPRP's appeal and affirm the Proposed Order.

C. Pinesburg

Pinesburg also takes the position that the Commission should deny PPRP's appeal and affirm the Proposed Order. Pinesburg holds that the record demonstrates that the PULJ appropriately exercised its due consideration, and finds its Proposed Order in no need of clarification. Pinesburg further holds that the forest conservation mitigation directed within the Proposed Order was supported by substantial evidence.

V. Commission Decision

For the reasons outlined below, we affirm the Proposed Order with respect to the question of statutory interpretation of NR § 5-1602(b)(5) and with respect to the statutory application of NR § 5-1603(f). In sum, we uphold in its entirety the Proposed Order,

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[25] "That omission violates the standard of review set forth in Pub. Utilities Art., § 3-203(6), which requires in a contested proceeding, as here, that the findings be supported by 'substantial evidence on the record considered as a whole.'" *Id*.

[26] "PPRP takes exception to the PULJ's grammatical interpretation of the FCA in reaching his decision, but not his conclusion to apply the FCA and give it due consideration. PPRP simply prefers its own analysis as the right way to arrive at the same conclusion." Staff Reply Memo, page 4.

[27] *Id*. at 2.

seeking only to clarify the reasoning on which the PULJ relied for rejection of the contested licensing condition (PPRP condition 2(e)). All statutory language, whether difficult and problematic or not, deserves consistent analysis and interpretation. Otherwise, as Staff points out, diverse interpretations are likely to occur. These diverse interpretations may coincidentally produce identical outcomes, though, more likely than not, this will not always be the case. Varying outcomes have the potential to decrease developers' willingness to cultivate projects, delay the progress of planned generating stations, hinder settlements, and increase litigation.

As a preliminary matter, we note that the interpretation of NR § 5-1602(b)(5) and NR § 5-1603(f) cannot be conducted in silos, given that the result is a nonsensical rendering of legislative intent with respect to the overall application of the FCA. As noted in the Proposed Order, the Maryland Court of Appeals has stated that "[t]he cardinal rule of statutory interpretation is to ascertain and effectuate the intent of the Legislature" and that "the plain language must be viewed within the context of the statutory scheme to which it belongs, considering the purpose, aim or policy of the Legislature in enacting the statute."[28] In reliance on these, as well as other principles of statutory construction (such as that it must be approached from a "commonsensical" perspective),[29] we therefore conclude that the PULJ correctly interpreted and applied the two statutory provisions at issue in the instant proceeding, as discussed further below.

[28] *Williams v. Peninsula Reg. Medical Ctr*, 440 Md. 573, 581 (2014), citing *Lockshin v. Semsker*, 442 Md. 257, 275-76, 987 A.2d 18, 28-29 (2010).
[29] *Id.*, citing *Frost v. State*, 336 Md. 125, 137, 647 A.2d 106, 112 (1994).

First, we concur with the PULJ that the Project is subject to both the FCA and the Washington County FCO.[30] Indeed, to the extent that any ambiguity existed previously regarding the applicability of the FCA to CPCN filings, we note that Order No. 87835 resolved this issue in the affirmative.[31] Thus, having concluded that all CPCN applications are subject to the FCA as a threshold matter, we find that the subsequent step must be to ascertain whether one of the 13 enumerated exceptions to the FCA subtitle may be applicable to this specific Project. In this instance, the PULJ concluded that the fifth delineated exception is satisfied (*i.e.* NR § 5-1602(b)(5)), and we concur.

In reaching this determination, the PULJ concluded that NR § 5-1602(b)(5) outlines an exception to the FCA for projects *applying* for a CPCN.[32] We find that the alternative interpretation advocated for by PPRP in this matter results in the carefully crafted exception to the FCA only being applicable in the event that an existing generating station sought a modification to a previously-issued CPCN. Such a result seems at odds with the principle requiring a commonsensical approach to statutory construction, given that a CPCN modification for an existing generating station generally would not require the cutting or clearing of forest to such an extent that could reasonably be construed as necessitating a mitigation strategy contemplated by NR § 5-1602(b)(5)(ii). Such a strict interpretation of the provision would likely limit its applicability to so few situations that we cannot agree that this must be what the Legislature intended.

[30] 9392 Proposed Order at 18.
[31] Order No. 87835 (Oct. 21, 2016) at 13.
[32] Regardless of the use of the past tense ("…have been issued…"), we concur with the PULJ that this exemption seeks to impose a concurrent procedural requirement, thus ensuring that a CPCN application is appropriately subjected to other required statutory reviews while securing an exemption from the FCA.

In the process of ascertaining whether a CPCN application qualifies for the exception to the FCA enumerated in NR § 5-1602(b)(5), we find that the Commission must simultaneously exercise its due consideration of local ordinances[33] regarding this subject matter, specifically with an eye toward "the need to minimize the loss of forest and the provisions for afforestation and reforestation set forth in [the FCA] together with all applicable electrical safety codes."[34] Thus, we find that the PULJ's proposed interpretation of the FCA subjecting the Project to the due consideration requirement is aligned with the Legislature's intent and the Court of Appeals' directive to view the language within the context of the statutory scheme to which it belongs. In support of this finding, we note that the statute governing the Commission's issuance of CPCNs references repeatedly the inclusion of local and municipal viewpoints in the regulatory process.[35] Therefore, in keeping with this policy of considering local governmental viewpoints, even though the Commission's ability to preempt such ordinances has been affirmed, it is logical that the Legislature would move to ensure that an exception to a statewide law (in this case the FCA) would not trample unduly on local concerns properly reflected in a local ordinance.[36] In this particular instance, Washington County concluded that the Project was exempt from its FCO, and even still, the PULJ adopted certain licensing conditions in recognition of the broader policy goals of the FCA, taking

[33] The heading of the statutory section in which the "due consideration" clause is included is titled as "local forest conservation program." *See* NR § 5-1603.
[34] NR § 5-1603(f).
[35] *See, e.g.* PUA § 7-207(d).
[36] This interpretation aligns with the notion that a local ordinance could reflect forest protection requirements more stringent than the FCA; thus, even if a project is exempted from the statewide law, due consideration must still be given to the requirements of the forest conservation program adopted by the local unit of government. *See* NR § 5-1603(a).

into consideration the recommendations proffered by PPRP.[37] Thus, given that the record indicates that the Applicant's approach to the cutting or clearing of the forest is to be conducted so as to minimize the loss of forest, and because a CPCN is issued in this proceeding in accordance with NR § 5-1603(f) where due consideration was given to the local FCO in the context of the broader FCA policy provisions, we affirm the determination of the PULJ that this Project qualifies for an exception to the FCA pursuant to NR § 5-1602(b)(5).

Lastly, we disagree with PPRP's position on the question of whether the PULJ sufficiently articulated a reason as to why an additional licensing condition regarding afforestation is appropriately denied. On the contrary, we find that the overarching public policy goal of the FCA, which was most recently articulated as a "no net loss of forest" policy,[38] was properly effectuated in this specific instance through the condition requiring reforestation of an acreage amount equivalent to that being displaced by the Project (*i.e.* 0.44 acres). The statutory requirement that the Commission give due consideration to local forest conservation programs – specifically with an eye toward the need to minimize the loss of forest and the provisions for afforestation and reforestation set forth in the FCA – does not require implementing the FCA wholly or partially, nor does it necessitate separate findings of fact for afforestation versus reforestation. Rather,

[37] In affirming the Proposed Order, we note also that by exercising the required due consideration in this proceeding, the guidance provided by PPRP regarding licensing conditions was weighed carefully by the PULJ and on appeal. As observed in Staff's Initial Brief, "The opinions and recommendations of PPRP and local jurisdictions are normally given considerable deference and weight in this process;" however, we concur with Staff's further observation that "an Applicant's needs must also be considered." *See* Staff Initial Brief at 3. Nevertheless, the Commission will continue to weigh carefully the recommended licensing conditions offered by PPRP in prospective proceedings. We observe that PPRP provides its recommendations under the cover of seven interested State unit signatories in the context of the "Environmental Review" pursuant to NR § 3-306(b) and PUA § 7-207 – 208.

[38] *See* 2013 Md. Laws, Ch. 384, and accompanying fiscal and policy note.

afforestation and reforestation are simply two options available to effectuate the public policy of no net loss of forest. Further, the requirement of due consideration is demonstrated implicitly and overtly through the adoption of a condition that goes above and beyond "no net loss" by requiring that the new plantings be of higher quality than the current species. Put simply, the PULJ concluded that despite being exempt from both the FCA and the Washington County FCO, the statewide policy seeking "no net loss of forest" required mitigation, properly effectuated in this instance through reforestation.

In summary, we uphold the findings articulated in the Proposed Order of the PULJ. We believe that the Legislature intended to articulate a viable exception to the FCA for projects *applying* for a CPCN, but that in so doing, the Legislature expected the Commission to give due consideration to the local forest conservation programs while keeping in mind the overarching public policy goal of the FCA (*i.e.* no net loss of forest). Further, we believe that the statutory requirement of due consideration delineated in NR § 5-1603(f) is not an "out" that the Commission may exercise in lieu of the FCA remediation provisions; rather, it is a directive requiring the Commission to give significant weight to duly enacted local forest conservation programs that seek to further the statewide public policy objective – even in the event (or perhaps especially in the event) that the CPCN is exempt from the statewide FCA law. As stated in prior Commission holdings, local FCOs are included within the field of preemption, but the Legislature clearly intended that the Commission give due consideration to local viewpoints both in the application of the FCA and in the broader CPCN process. Finally, "due consideration" does not amount to enforcement of the FCA, or FCO, provisions in full or in part; it may, however, justify imposition of reforestation and/or afforestation

conditions even in the event that the local authority has determined the project to be exempt.

IT IS THEREFORE, this 3rd day of March, in the year Two Thousand Seventeen, by the Public Service Commission of Maryland,

ORDERED: (1) That the appeal noted by PPRP is hereby DENIED;

(2) That the Proposed Order of the PULJ is hereby AFFIRMED, subject to the additional clarification discussed herein;

(3) That Pinesburg Solar's Motion for Leave to File Out-of-Time is granted; and

(4) That the docket on this matter is hereby closed.

/s/ W. Kevin Hughes

/s/ Harold D. Williams

/s/ Jeannette M. Mills

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell
Commissioners