ORDER NO. 88260

IN THE MATTER OF THE APPLICATION OF DAN'S MOUNTAIN WIND FORCE, LLC FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A 59.5 MW WIND ENERGY GENERATING FACILITY IN ALLEGANY COUNTY, MARYLAND	* * * * * * * *	BEFORE THE PUBLIC SERVICE COMMISSION OF MARYLAND _____ CASE NO. 9413 _____

Issue Date: June 16, 2017

ORDER AFFIRMING PROPOSED ORDER OF PUBLIC UTILITY JUDGE

On January 25, 2017, the Maryland Public Service Commission's ("Commission") Public Utility Law Judge ("PULJ") Division issued a Proposed Order denying the application of Dan's Mountain Wind Force, LLC ("Applicant" or "Company") for a certificate of public convenience and necessity ("CPCN") to construct a 59.5 megawatt ("MW") wind energy generation facility (the "Project") in western Allegany County, Maryland (the "Application"). The Applicant filed a Notice of Appeal of the Proposed Order on February 22, 2017, followed by a Memorandum on Appeal on March 6, 2017. The Board of County Commissioners of Allegany County, Maryland (the "County") filed a Reply Memorandum on March 24, 2017, and on March 27, 2017 the Department of Natural Resources ("DNR"), Power Plant Research Program ("PPRP"), the Maryland Office of People's Counsel ("OPC"), the Technical Staff of the Commission, and *Pro Se* Intervenors Erin O. Stark ("Stark"), and William R. Park Sr. ("W. Park") and K. Darlene Park ("K.D. Park") filed Reply Memoranda.

The Commission affirms the Proposed Order with further justification as set forth herein.

The Procedural History and Background of this matter are set forth in the Proposed Order and are incorporated herein by reference.[1]

Section III of the Proposed Order addresses the issue of preemption of the County's land use code § 360-92. We adopt the reasoning contained in Section III of the Proposed Order and affirm the finding that the General Assembly has granted the Commission the sole authority to site a generating facility in Maryland and issue a CPCN after due consideration of the factors set forth in Public Utilities Article, *Annotated Code of Maryland* ("PUA"), § 7-207 and a finding of public convenience and necessity, thus implicitly preempting the field.

The Applicant has "the burden to demonstrate that the benefits of the generating facility, including economic benefits, outweigh the environmental, safety, and societal costs of siting the generating facility" at the Project location. *Dominion Cove Point LNG, LP Generating Station*, 105 Md. P.S.C. 228, 256 (May 30, 2014). In determining whether the Applicant has met its burden, the Commission must consider the factors delineated in PUA §7-207. Pursuant to that section, the Commission must give due consideration to the following factors prior to taking action on an application for a CPCN:

[1] This Project has history that pre-dates this case. The Company initially applied for, and was granted, an exemption from obtaining a CPCN pursuant to PUA 7-207.1 in 2009 in Case No. 9164. Under that exemption, the Company was required to obtain all applicable local authorizations and permits. When it was unable to do so, the Company returned to the Commission in January, 2016, seeking a CPCN under PUA 7-207 in order to preempt those local authorizations. We are troubled that an applicant would utilize such a strategy for substantially the same project when no significant time had elapsed or conditions had changed. Notwithstanding this potential collateral estoppel issue, we will proceed to decide this case on its merits.

(e)(1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station or overhead transmission line is proposed to be located; and
(2) the effect of the generating station or overhead transmission line 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 and water pollution; and
(vii) the availability of means for required timely disposal of wastes produced by any generating station.

Section V of the Proposed Order contains an in-depth analysis of each of the applicable factors in PUA §7-207(e), including discussion of the various Parties' positions, as well as findings and recommendations;[2] such analysis is adopted herein. As OPC noted, "Chief PULJ Romine correctly and thoroughly carried out her Commission-delegated duty" and determined, "after reviewing three rounds of written testimony, two evening hearings for public comment, a two-day evidentiary hearing in Cumberland on September 15 and 16, 2016, evidence from the Company and *pro se* intervenor Erin Stark submitted after the evidentiary hearing, and one to two rounds of briefing from the parties and intervenors ..." that the Application would be denied.

Section V. (A) of the Proposed Order outlines the PULJ's consideration of the County's Recommendations as required by PUA §7-207(e)(1), and as we have stated in

[2] Page 51 of the Proposed Order should read, "I have recommended maximum sound threshold levels outside of a dwelling from 35 dBA or less for the nighttime to 55 dBA for the ***daytime***." [emphasis added]

previous decisions, this Commission gives significant weight to the views and recommendations of County and local governments On September 14, 2016, the County filed a Memorandum to memorialize its recommendations in the proceeding for consideration pursuant to PUA §7-207(e)(1).[3] Attached to the County's Memorandum as Exhibit 1 is the Findings of Fact and Opinion of the Allegany County Zoning Board of Appeals ("County Zoning Opinion"). According to the County Zoning Opinion, in order for the Project to meet the criteria of the zoning code, a variance to the separation distance is required for eight (8) residences and a variance to the setback requirements are necessary at two (2) locations. After citing *Cromwell v. Ward,* 102 Md.App. 691, 701 (1995) for the general rule that the authority to grant a variance should be exercised sparingly and under exceptional circumstances, the Allegany County Board of Zoning Appeals ("County Zoning Board") denied the Applicant's request for a variance to the separation distance requirements in Allegany County Code, §360-92(A)(2). The County Zoning Board also denied the Applicant's request for a variance to the property line setback distance requirements in Allegany County Code, §360-92(B)(3). In doing so, the County Zoning Board noted that twelve of the seventeen wind turbines (70.5%), as located, do not meet the criteria of the Allegany County zoning code. The County Zoning Board concluded that its opinion was that the proposed Project "is simply too large in scope for the land available."

In addition to the discussion in Section V. (A) of the Proposed Order regarding the County's recommendations, in accordance with PUA §7-207(e)(1) we give due consideration to the foregoing opinion. The County's position is, in essence, opposition

[3] Transcript at 6-7.

to the Project unless the Project complies with, in particular, certain separation distance and the setback requirements. Even though, as set forth above, the County code is preempted, the County's application thereof with respect to the Project's ability to comply with certain physical constraints is relevant to our determination of whether, on the facts in the record in this case, the Project would be beneficial at this particular time and place.

With regard to the economics factor, PUA §7-207(e)(2)(ii), we recognize that the Project would be of some economic benefit, given in particular, as Staff points out in its Reply Memorandum, that only 1.5% of the wind Renewable Energy Credits ("RECs") associated with the generation attributes of Renewable Energy Facilities, and used by Maryland suppliers for complying with the Renewable Portfolio Standard ("RPS") requirement in 2015, were associated with wind energy facilities in Maryland.[4]

OPC states in its Reply Memorandum that "PUA §7-207 grants the Commission broad discretion to review applications for certificates of public necessity and convenience to operators wishing to generate electricity."[5] Actually, PUA §7-207 sets out the factors to which the Commission must give due consideration prior to taking

[4] The Commission takes note of Staff Reply Memorandum comments at p. 4-6, specifically with respect to Staff's observation that the Project will create more renewable energy generation *in Maryland*. Without new in-state renewable generation, out-of-state resources will increase as a percentage of our RPS requirement. In order to realize the General Assembly's intent that the benefits of renewable energy resources accrue to the State in the form of long-term decreased emissions, increased energy security, and decreased reliance on imported energy resources (*see* PUA § 7-702(b)(1)), we must strike a balance between the requirements of PUA § 7-207(e)(1) and advancing the State's RPS mandate.

[5] OPC Reply Memorandum, p. 2.

action on an application for a CPCN. From appellate decisions,[6] we know that we indeed have broad discretion when reviewing applications for CPCNs. We have given due consideration to the factors delineated in PUA §7-207(e) and determined that the Application must be denied.

In its Reply Memorandum, the Company contends that the findings in the Proposed Order merited approval of the Project because there was a finding of 'slight economic benefit' from the Project, versus a 'potential adverse impact' to esthetics with neutral results on all of the other statutory factors.[7] The Company's contention is misguided for several reasons. First, the result of considering PUA §7-207(e)(1) is not "neutral" as the Company maintains. The County's position with respect to the Project cannot be described as one of neutrality. Rather, as explained above, the County Zoning Board concluded that its opinion was that the proposed Project "is simply too large in scope for the land available."

Second, use of the word 'potential' does not have the effect Applicant implies; "slight" is not somehow greater than mere "potential."

Third, the PULJ found a slight adverse visual impact. At page 93 of the Proposed Order, the PULJ states that "[b]ased on the Applicant's and PPRP's viewshed analysis, I find that the far views of the Wind Project result in an unavoidable adverse impact, but

[6] Courts of appeal review the Commission's decisions on applications for CPCNs as they do all final Commission orders under PUA §3-203. So long as the findings and the record reflect that the Commission gave due consideration to each of the requisite statutory factors, the Commission's decision will "enjoy a high degree of judicial deference," *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Pub. Serv. Comm'n*, 451 Md. 1 (2016), because, "[r]ecognizing the experience and special expertise of the Commission and its staff, a reviewing court must not substitute its judgment for that of the Commission." *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Pub. Serv. Comm'n*, 227 Md.App. 265, 288 (2016), *cert. granted sub nom. Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Pub. Serv. Comm'n.*, 448 Md. 724, and *aff'd sub nom. Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Pub. Serv. Comm'n*, 451 Md. 1 (2016).

[7] Company Memorandum on Appeal, p. 2.

the impact is slight." Thus, the visual impact was not limited to only a potential impact. The Project will have a slight adverse far visual impact.

Fourth, the PULJ continues: "The Applicant, however, has failed to present sufficient evidence to the extent or level of impact on the near views of the turbines that are not shielded by vegetation or topography, even though its Viewshed Analysis shows that there are areas within a one-mile radius that will have views of multiple turbines. PPRP also determined that the Applicant's analysis was inconclusive as to the extent of the visual impact on certain properties and whether any mitigation existed due to vegetation or topography."[8] Thus, the reason the PULJ uses the term "potential adverse impact" is because she found the Applicant had not met its burden of proof that the Project will have either no adverse impact or a minimal adverse impact on the esthetics of the areas surrounding the Project. After finding the Applicant's failure to document or demonstrate the expected near-view visual impacts on the non-participating properties astounding, the PULJ determined that "it is the cumulative adverse impact on the non-participating properties' near views that must be considered in weighing whether overall the Project will have 'minimal' or 'significant' impact on the local area's esthetics."[9] The PULJ found that the Applicant failed to meet its burden of proof that the Project will have either no adverse impact or a minimal adverse impact on the esthetics of the areas surrounding the Project. The PULJ next examined the other evidence presented, including PPRP's limited viewshed analysis and related testimony. But the limitations of that evidence cannot be balanced in favor of the Applicant. An applicant for a CPCN

[8] Proposed Order, p. 93.
[9] *Id.,* p. 96.

cannot, through a failure to present sufficient evidence, somehow turn the term "potential," given the unknowns caused by its own failure, to its advantage.

Fifth, the PULJ's conclusive finding that the Project will have an adverse impact on the esthetics of the local communities on and around Dan's Mountain incorporated not only the "potential" adverse impact to views but also the adverse impact caused to the comfort of nearby residents by the noise produced and the shadow flicker perceived, which will not be fully mitigated by incorporating licensing conditions into a CPCN. Given all of the evidence presented, the PULJ found that the Project will have ***more than a*** minimal adverse impact on the esthetics of the local communities surrounding Dan's Mountain. The PULJ's finding that "PPRP final recommended Licensing Condition No. 25 [sic] does not mitigate the potential adverse impact" does not somehow change the primary finding that the Project will have more than a minimal adverse impact on the esthetics of the local communities surrounding Dan's Mountain.

Lastly, even if somehow a "potential" impact were deemed less than a "slight" impact, which we do not believe is correct, the formulaic approach that the Applicant is suggesting is not appropriate. As the Court of Special Appeals stated in *Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Maryland Pub. Serv. Comm'n*, 227 Md.App. 265, 288 (2016), *cert. granted sub nom. Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Pub. Serv. Comm'n.*, 448 Md. 724, and *aff'd sub nom. Accokeek, Mattawoman, Piscataway Creeks Communities Council, Inc. v. Pub. Serv. Comm'n*, 451 Md. 1 (2016), the public convenience and necessity standard of PUA §7-207(e) does not require that the Commission "employ a particular formula or method." Rather, "[l]ike many other determinations that the General Assembly has

entrusted to the Commission's discretion [ ], the public convenience and necessity standard of PUA §7–207(e) requires that the Commission consider all relevant facts and factors and exercise reasonable judgment." *Id.*

FINDINGS AND CONCLUSIONS

To determine whether the grant of the CPCN is in the public convenience and necessity, the Commission weighs the potential benefits of the construction and operation of the Project against the adverse impacts to the State, the County, and the local residents. We find that the benefits of the Project are:

- A temporary, short-term economic benefit to the County and State accruing from the construction and operation of the Project and a very slight net economic benefit to the County and the State during the useful life of the Project.

- The Project's potential contribution toward the State's attainment of its renewable energy portfolio standard.

Subject to the applicable recommended licensing conditions, we find that the Project will have no adverse permanent impact on aviation safety, potable water supplies, electromagnetic interference, transportation, historic and cultural resources, disposal of waste, and the stability and reliability of the electric system. The licensing condition requiring a decommissioning plan and associated bond will protect the County residents from any costs associated with removing the wind turbines in the event the Applicant or applicable land owners fail to do so at the end of the Project's useful life or abandonment of the Project. Thus, these factors do not weigh against the grant of the CPCN, but none may be considered a benefit of the Project.

We acknowledge and consider significant in this case the County's effective recommendation that the proposed Project's size and scope on the Applicant's property renders the Project inappropriate at this particular time and place.

We find that the Project will have an adverse impact on the esthetics of the local communities on and around Dan's Mountain. Further, we find that the adverse impact caused to the comfort of nearby residents by the noise produced and the shadow flicker perceived will not be fully mitigated by incorporating licensing conditions into a CPCN. Overall, in weighing the benefits against the adverse impacts that are unable to be mitigated by incorporating licensing conditions into the CPCN grant, we find that benefits that may accrue to the public at large by construction of the Project do not justify or offset subjecting the local community to the adverse impacts that will result from the Project's construction and operation. Consequently, after giving due consideration to each of the factors required by PUA §7-207(e) and the other issues raised by the Parties, we find that grant of a CPCN for the Project is not in the public convenience and necessity.

Accordingly, we hereby deny the Application and the Applicant's request for a CPCN. Further, the denial of the Application moots the Applicant's request for waiver of the two-year filing requirement in PUA § 7-208, and it is therefore dismissed.

IT IS THEREFORE, this 16th day of June, in the year Two Thousand and Seventeen, by the Public Service Commission of Maryland,

ORDERED: (1) That the Proposed Order of the Public Utility Law Judge issued on January 25, 2017 is hereby affirmed;

(2) That the Application of Dan's Mountain Wind Force, LLC for a Certificate of Public Convenience and Necessity to construct a 59.5 MW wind generating station on Dan's Mountain is hereby denied; and

(3) That any outstanding requests or motions not granted herein are hereby denied.

/s/ W. Kevin Hughes

/s/ Harold D. Williams

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell
Commissioners