

ORDER NO. 88963

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| IN THE MATTER OF THE APPLICATION | * | BEFORE THE |
| OF MASSEY SOLAR, LLC FOR A | * | PUBLIC SERVICE COMMISSION |
| CERTIFICATE OF PUBLIC CONVENIENCE | * | OF MARYLAND |
| AND NECESSITY TO CONSTRUCT A 5.0 | * | _____ |
| MW SOLAR PHOTOVOLTAIC | * | |
| GENERATING FACILITY IN KENT | * | |
| COUNTY, MARYLAND | * | CASE NO. 9407 |

Issued: December 31, 2018

On November 9, 2015, Massey Solar, LLC (“Massey” or “the Company”) filed an application (“Application”) with the Maryland Public Service Commission (“Commission”) requesting a Certificate of Public Convenience and Necessity (“CPCN”) to construct a 5.0 MW solar photovoltaic generating facility in Kent County, Maryland. The Commission set the Application for hearing, and delegated the matter to the Public Utility Law Judge (“PULJ”) Division. After extensive proceedings, including evidentiary and public input hearings, Chief PULJ Ryan C. McLean, issued a Proposed Order, granting Massey the requested CPCN, subject to conditions recommend by the Maryland Department of Natural Resources, Power Plant Research Program (“PPRP”) and the Commission Staff (“Staff”). However, in the Proposed Order, Chief Judge McLean amended PPRP Condition No. 4 to require full compliance with the Maryland Forest Conservation Act (“FCA”).¹

Massey appealed the Proposed Order on September 20, 2018, challenging amended Condition No. 4. PPRP and Staff filed reply briefs opposing the Company’s

¹ *Md. Ann. Code*, Sections 5-1602(b)(5) and 5-1603 of the Natural Resource Article (“Nat. Resource Art.”)

appeal, recommending that the Proposed Order be affirmed, including amended Condition No. 4.

A. Massey Solar's Appeal

On appeal, the Company asserts that the Chief Judge erred in giving significant weight to Kent County's demand for full FCA mitigation, arguing that requiring full mitigation—not only for this project but with implications for other solar and renewable projects that do not remove trees — will increase the cost of development of these projects and penalize companies for siting projects on sites that obviate the need for tree clearing or otherwise conforming to the State's no-net loss policy.² Massey argues that no County representative appeared at the evidentiary hearing to assert the County's position,³ and that the PULJ rejected the original version of PPRP Condition No. 4, only by describing it as “vague” and likely to lead to a stalemate between the parties over forest mitigation in a manner that would necessitate further litigation.⁴

The Company acknowledges that the Commission must give due consideration to the project's impact on State forest resources and whether the project conforms to the State policy of no net loss of forest; however, Massey argues that the Chief Judge erred in requiring 6.4 acres of forest mitigation for its project based on Kent County's recommendation, when — according to the Company — the County Forest Conservation Ordinance (“FCO”) exempts CPCN projects that minimize loss of forest and are subject to the Commission's due consideration review. Notwithstanding the representations made by County officials during public input hearings, Massey argues that absent a

² Massey Solar Brief on Appeal at 2.

³ *Id.* at 4.

⁴ *Id.*

County ordinance that codifies those recommendations, they are not entitled to the significant weight accorded by the PULJ.⁵

Finally, Massey argues that full compliance with the FCA will have long-term adverse repercussions for solar development in Maryland and creates an awkward competition between two beneficiary and complementary State policies: one that promotes solar and renewable energy development, and another that encourages no net loss of State forest resources.

B. PPRP and Staff Opposition to Massey's Appeal

1. PPRP

In its reply brief, PPRP submits that Company witness Thomas Anderson conceded during questioning at the evidentiary hearing that the FCA and Kent County's FCO both apply to the Company's project. PPRP also emphasizes that "due consideration" is a discretionary review standard "that allows the Commission award full FCA compliance, no FCA compliance, or some amount in between, provided the decision is supported by the record."⁶ Finally, PPRP notes that the State FCA is mirrored by the County's FCO that requires the Commission give due consideration to the reforestation and afforestation provisions of the FCA "even where there is an exception from strict compliance with the FCA."⁷

2. Staff

Staff also recommends that the Commission deny Massey's appeal and affirm the Proposed Order. In its reply brief, Staff emphasizes that there is clear evidence in the

⁵ *Id.* at 11.

⁶ PPRP Reply Brief at 2.

⁷ *Id.* at 3.

record indicating that Kent County would require approximately 6.4 acres of afforestation (planting trees to compensate for land removed from hosting forest) for the Massey project. Further, Staff notes that the recent amendment to *Md. Code Ann.*, Public Utilities Article (“PUA”) § 7-207 requires that the Commission give “due consideration” to additional factors; namely county and municipal concerns with regard to the approval of generation station-related CPCN applications. Specifically, the added PUA § 7-207(e)(3) factors that require Commission due consideration for generation stations, as noted by Staff (also noted in the Proposed Order), are:

- (i) the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where any portion of the generating station is proposed to be located; and
- (ii) the efforts to resolve any issues presented by a county or municipal corporation where any portion of the generating station is proposed to be located.

Staff observes that that these additional factors require the Commission also to give due consideration to forest conservation ordinances, such as the Kent County FCO.⁸

C. Commission Decision

The record in this case references substantial and material representations on behalf of Kent County indicating that the County desires mitigation by Massey with respect to land that would be removed from hosting forest. During the May 2, 2018 evidentiary hearing, Company witness Thomas Anderson acknowledged a letter from the counsel for the Kent County Commissioners and the Kent County Planning Director noting, among other things, that “[t]he County continues to be concerned about the

⁸ Since the County’s representatives indicated that the Kent County FCO would require afforestation in the amount of 6.4 acres for the Massey project, and since the County and the Company were unable to resolve this issue, Staff opines that the Commission should give due consideration to the County’s position.

precedent which would be set in not giving due consideration to the FCA requirements for utility scale solar projects in light of the many CPCN projects in Kent.”⁹

PPRP’s initial recommendation in this case with regard to Condition No. 4 provided that Massey would be required to consult with the County “to identify mitigation measures for the Project, consistent with Kent County Land Use Ordinance Article IV, Section 8 implementing the Forest Conservation Act (FCA)”¹⁰ Under this condition, as originally proposed, prior to the date of construction, the Company would have been required to provide documentation to PPRP and the Commission that a FCA plan had been approved by the County.¹¹ While arguing that the Chief Judge rejected the original version of PPRP Condition No. 4, *only* by describing it as “vague” and likely to lead to a stalemate between the parties over forest mitigation in a manner that would necessitate further litigation, the Company asserts that Condition No. 4 — presumably in any form — is not justified under the due consideration standard because the project will not remove trees and is consistent with the goals of the FCA.¹² On the other hand, PPRP’s recommendation in this case evolved from a provisional condition, allowing the Applicant and the County to continue consulting with regard to the scope of mitigation, to full compliance with the FCA, which PPRP interpreted was the County’s

⁹ ML# 220216, letter from G. Mitchell Mowell to Chief Judge Ryan C. McLean, dated April 24, 2018; Massey Ex. 8; May 2, 2018 Transcript at 13-15, 27-31.

¹⁰ PPRP Proposed Condition No. 4.

¹¹ The Maryland Office of People’s Counsel (“OPC”) filed a letter (in lieu of a reply brief) urging the Commission to adopt all of the licensing conditions presented in PPRP’s Direct Testimony, which included Condition No. 4 (as initially proposed) requiring the Applicant to consult with the County to identify acceptable mitigation requirements. OPC’s letter in lieu of brief takes no position with regard to Condition No. 4 as amended.

¹² Massey Brief on Appeal at 11.

position based on Massey Ex. 8 (counsel's letter on behalf of Kent County Commissioners and Kent County Planning Director).¹³

The Commission agrees that PPRP Condition No. 4, as originally proposed, was vague, or at least *only* provisional, and would have subjected the parties to ongoing consultation. Furthermore, given the Company's insistence that no FCA mitigation is required versus the County's insistence on afforestation in order to compensate for land removed from hosting forest, the condition, as initially proposed would have — in all likelihood — led to further litigation before the Commission. That result, in this case would have neither provided Massey with the certainty that it suggests would be of great value, nor conserved the resources of the County, PPRP, and the Commission.

By amending Condition No. 4 to require full compliance with the FCA, the Chief Judge clarified the record by establishing that Massey *shall* be responsible for 6.4 acres of mitigation (*i.e.*, afforestation) with respect to land removed from hosting forest in Kent County, thereby giving due consideration to the County's comprehensive plan and the issues presented by the County in this case.

Finally, Massey argues that the Proposed Order departs from the due consideration standard applied by the Commission in other recently decided FCA-related CPCN cases,¹⁴ and further argues that the County's request that the project be required to

¹³ May 2, 2018 Transcript at 29.

¹⁴ The Company cites *In the Matter of Pinesburg* (Case No. 9395) and *In the Matter of OneEnergy* (Case Nos. 9387 and 9392), noting that the Commission must give due consideration to the project's impact on state forest resources and whether the project conforms to the state policy of no net loss of forest. Massey Brief on Appeal at 5.

fully comply with the FCA—which in this case requires 6.4 acres of mitigation—should be given no weight.¹⁵ The Commission disagrees.

In *Pinesburg*, the Commission concluded that “[i]n the process of ascertaining whether a CPCN application qualifies for the exception to the FCA ... we find that the Commission must simultaneously exercise due consideration of local ordinances ... 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.’”¹⁶ As Staff notes, since then, PUA § 7-207 was amended by the General Assembly requiring that the Commission specifically give due consideration to additional enumerated factors (i) the consistency of a CPCN application with a local government’s comprehensive plan and zoning, and (ii) the efforts to resolve any issues presented by a county or municipality where any portion of the generating station is proposed to be located.

With respect to the “efforts to resolve any issues presented by a county or municipal corporation” factor under PUA § 7-207(e)(3), the intention of the Legislature could not be more clear. In this case, Kent County government representatives made substantial representations as to the County’s expectation that the project fully comply with the FCA, and that this is an issue that the Applicant and the County have been unable to resolve. The Chief PULJ gave due consideration to the County’s representations, and appropriately modified Condition No. 4 to address the County’s concerns without the risk of further uncertainty between the Applicant and the County regarding FCA mitigation.

¹⁵ *Id.* at 9.

¹⁶ *In the Matter of Pinesburg*, Order No. 88053 at 13.

While the full FCA compliance requirement may increase the developer's cost in the project, the specification of 6.4 acres of mitigation eliminates the uncertainty of this cost, and could save — at least potentially — the cost of further litigation regarding this issue. Given the additional factors now required to be given due consideration under PUA § 7-207(e)(3), the Commission finds no merit in the Company's arguments that Proposed Order departs from the due consideration standard applied by the Commission in other FCA-related CPCN cases.

IT IS, THEREFORE, this 31st day of December, in the year Two Thousand and Eighteen, by the Public Service Commission of Maryland,

ORDERED: (1) That Massey Solar, LLC's appeal of the Proposed Order of the Chief Public Utility Law Judge is hereby denied;

(2) That Massey Solar, LLC's application for a Certificate of Public Convenience and Necessity to construct a 5.0 MW solar photovoltaic generating facility in Kent County, Maryland, is granted, subject to the conditions recommended by Maryland Department of Natural Resources, Power Plant Research Program, including Condition No. 4 as amended by the Proposed Order, and the conditions recommended by Commission Staff.

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Anthony J. O'Donnell

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman

Commissioners