

ORDER NO. 89668

In the Matter of the Application of Biggs Ford
Solar Center LLC for a Certificate of Public
Convenience and Necessity to Construct a
15.0 MW Solar Photovoltaic Generating
Facility in Frederick County, Maryland

*
*
*
*
*
*
*

BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9439

Issue Date: November 24, 2020

ORDER DENYING APPEAL

1. On October 5, 2020, Frederick County, Maryland filed a timely appeal of a decision by the Commission’s Chief Public Utility Law Judge to grant Biggs Ford Solar Center LLC (“Biggs Ford”) a Certificate of Public Convenience and Necessity to construct a solar photovoltaic generating facility in Frederick County. For the reasons discussed below, the Commission denies Frederick County’s appeal and affirms the Chief Judge’s decision.

I. BACKGROUND

2. On February 16, 2017, Biggs Ford filed an application with the Commission, requesting a Certificate of Public Convenience and Necessity (“CPCN”) to construct a 15.0 megawatt solar photovoltaic generating facility in Frederick County, Maryland (the “Application”).¹

3. The Commission delegated the review of the Application to the Public Utility Law Judge (“PULJ”) Division. After extensive proceedings, the Chief PULJ issued his

¹ Maillog No. 212774.

Proposed Order on December 5, 2017, denying the Application. The Chief PULJ noted that he “place[d] significant weight on the County’s opposition to the Project, the Project’s inconsistency with the County’s CP [i.e., Comprehensive Plan], and the lack of proposed licensing conditions that adequately address implementation and compliance issuances associated with construction and operation of the Project.”²

4. Although the Chief PULJ denied the Application, he found that “the suggestion that [Biggs Ford] seek the approval of a floating zone classification for its Project to be unnecessary”³ because “application of the ordinance results in an attempt to severely restrict or ban utility-scale solar facilities.”⁴

5. Following the Applicant’s appeal, on April 16, 2018, the Commission remanded this case to the Chief PULJ to provide Biggs Ford with an opportunity to seek a floating zone reclassification, based upon Frederick County’s recent change to its zoning ordinance, within 30 days of the remand. Since the County’s ordinance was new, the Commission decided that it was premature to conclude that the zoning ordinance would prevent the approval of all solar project applications.⁵

6. On April 17, 2018, Biggs Ford informed the Commission of its intent to initiate the floating zone reclassification process in accordance with Order No. 88644.⁶ While on

² Dec. 5, 2017 Proposed Order at 94.

³ *Id.* at 62.

⁴ *Id.* at 75.

⁵ Order No. 88644 at 2. Commissioner O’Donnell dissented from the Majority Opinion in Order No. 88644, urging that instead of remanding the matter the Commission dismiss the Application, without prejudice, to allow the Applicant an opportunity to submit a new application that includes a good faith attempt at compliance with Frederick County’s zoning ordinance.

⁶ Order No. 88644 required Biggs Ford to submit its floating zone application within 30 days. However, due to various procedural requirements, the Commission allowed several extensions of time once it was clear that Biggs Ford intended to comply with the Order.

remand, the matter was held in abeyance to allow Biggs Ford to submit a floating zone application to Frederick County.

7. On April 3, 2019, the County notified the Chief PULJ that Biggs Ford's floating application had been denied, and on May 3, 2020, the Chief PULJ held a status conference to establish an updated procedural schedule.

8. During the course of the proceeding, the Department of Natural Resource's Power Plant Resource Program ("PPRP"), Frederick County and Biggs Ford all submitted witness testimony. An evidentiary hearing was held on October 29, 2019 and the parties submitted supplemental testimony after the hearing at the request of the Chief PULJ. Thereafter, the Commission's Technical Staff Counsel ("Staff"), Frederick County, and Biggs Ford submitted initial and reply briefs.

9. On August 27, 2020, the Chief PULJ issued a Proposed Order, granting Biggs Ford's Application. Specifically, the Chief PULJ concluded:

After reviewing the entire record in this case, including testimony, evidence, public and written comments, and briefs, I find that the Applicant has remedied the deficiencies that served as bases to reject the Project as initially proposed in Phase I. I further find that approving Biggs Ford's CPCN Application and the Project, as amended, to be in the public's convenience and necessity. I specifically find that the benefits of the Project and its contribution to the State's Renewable Portfolio Standard (RPS) outweigh the Project's inconsistency with both the County's and the Town's Comprehensive Plans ("CP"). A project's consistency with the respective jurisdiction's CP is but one of many factors that must be evaluated pursuant to Public Utilities Article, *Annotated Code of Maryland* ("PUA") § 7-207.⁷

⁷ August 27, 2020 Proposed Order at 2.

10. Additionally, the Chief PULJ concluded that Frederick County’s Commercial Floating Zone District constituted a *de facto* ban on utility-scale solar facilities. Although the Chief PULJ noted that exercising the Commission’s authority to pre-empt the County’s zoning ordinance should not be taken lightly, he concluded that the record in this case supports the exercise of pre-emption because doing otherwise would “create a dangerous precedent throughout the State” and “make achieving the RPS’s increased goal of 14.5% solar renewable energy by 2030 completely unrealistic.”⁸

11. On October 5, 2020, Frederick County filed a timely appeal of the Chief PULJ’s decision to the Commission.

II. FREDERICK COUNTY’S APPEAL

12. In its appeal, Frederick County requests the Commission to reverse the Chief PULJ’s decision and deny Biggs Ford’s CPCN application. Specifically, the County makes four separate arguments in response to the Proposed Order.

13. First, Frederick County contends that its recommendations regarding its opposition to the Application are binding upon the Commission. The County argues that based upon PUA § 7-207(e), the Commission is required to give the County’s evaluation and recommendations “due consideration” — but that the Commission cannot give such consideration without first hearing the County’s recommendations and determining whether the Application is consistent with the County’s Comprehensive Plan.

14. After setting forth several legal authorities recognizing the value of local governance in protecting the interests of local communities, the County contends that its local ordinances are not subject to review by the Commission. Rather, the County

⁸ *Id.* at 3-4.

contends that only the Circuit Court may review whether a local ordinance violates either the State or federal constitution.⁹

15. Specifically, the County claims that “[t]he Commission has no authority under statute or common law to disregard, criticize, or ignore a State or local government’s duly enacted legislation.”¹⁰

16. Further, the County claims that Biggs Ford waived its right to challenge the County Council’s findings regarding its floating zone Application because it did not seek judicial review of the Commission’s initial order to remand this case in April 2018.¹¹

17. By dismissing the County’s floating zone ordinance and giving no weight to the County’s decision to deny Biggs Ford’s rezoning application, as detailed in Resolution 19-03,¹² the County contends that the Commission failed to give “due consideration” as required by PUA §7-207(e).

18. Second, the County claims that the Chief PULJ erred by considering the State’s RPS in evaluating the Application. Specifically, Frederick County contends that the factors the Commission must consider under PUA §7-207 are separate from the statutory provisions governing Maryland’s Renewable Energy Portfolio Standard (PUA §7-701 *et seq.*).¹³

19. Additionally, the County argues that the State’s RPS statutory provisions apply only to “electricity suppliers”,¹⁴ and Biggs Ford does not meet this definition. Therefore,

⁹ Frederick County Brief at 6-7.

¹⁰ *Id.* at 7.

¹¹ *Id.*

¹² Resolution 19-03 contains the findings of the Frederick County Council, which rejected Biggs Ford’s floating zone Application on April 2, 2019.

¹³ Frederick County Brief at 8-10.

¹⁴ PUA § 7-703(a)(1).

the County contends that the Chief PULJ erred by invoking RPS standards in this CPCN proceeding.

20. The County concludes that the Chief PULJ erred by allowing a factor not included within PUA § 7-207 (*i.e.*, RPS standards) to override a factor that exists within PUA § 7-207 (“due consideration” to local ordinances).¹⁵

21. Third, Frederick County disputes the Chief PULJ’s factual findings that Biggs Ford’s amended Application resolved the concerns raised in the December 5, 2017 Proposed Order, which denied Biggs Ford’s original Application.

22. Frederick County observes that the parties who recommended denying the initial Application also recommend denying the amended Application. Specifically, the State Secretaries, PPRP, Staff, the Office of People’s Counsel, as well as Frederick County all recommend denying the Application because it remains inconsistent with the County’s zoning regulation and the Town of Walkersville’s Comprehensive Plan.

23. Additionally, the County contends that the mitigation efforts included in the amended Application cannot completely eliminate the damage to the prime agricultural farmland within the Priority Preservation Area (“PPA”) where Biggs Ford seeks to develop its solar generating plant.

24. Fourth, the County contends that Biggs Ford has failed to meet its burden of proof that its proposed solar project is both convenient and necessary to the public. Essentially, the County contends that no significant additional facts have been added to the record upon which the Chief PULJ previously denied the Application. Finally, the County finds

¹⁵ Frederick County Brief at 9.

that the Chief PULJ inexplicably reversed the amount of weight he chose to give to the County's opposition to this project.

III. BIGGS FORD'S RESPONSE¹⁶

25. On October 26, 2020, Biggs Ford filed its responsive brief, asking the Commission to affirm the Chief PULJ's Proposed Order.

26. First, Biggs Ford argues that the Court of Appeals explicitly rejected the County's argument that its recommendations were binding on the Commission and the Applicant in *Bd. of County Commissioners v. Perennial Solar, LLC*, 464 Md. 610 (2019). In *Perennial*, the Court of Appeals held that the Commission's CPCN authority was the sole ultimate authority as to the siting of power plants, including solar facilities.

27. Specifically, Biggs Ford cites *Perennial* for the proposition that:

Under the plain language of the statute, local government is a significant participant in the process, and local planning and zoning concerns are an important factor in the PSC approval process. However, the ultimate decision-maker is the PSC, not the local government or zoning board.¹⁷

28. Biggs Ford further cites *Accokeek, Mattawoman, Piscataway Creeks Community Council, Inc. v. Pub. Serv. Comm'n*, 227 Md. App. 265, 288, *aff'd* 451 Md. 1 (2016) for the proposition that "due consideration" simply requires the Commission to "consider all relevant facts and exercise reasonable judgment."

29. Additionally, Biggs Ford points to the legislative history of PUA § 7-207(e)(3), which indicates that the General Assembly explicitly rejected language that would have

¹⁶ On October 23, 2020, PPRP submitted a letter to the Commission, indicating that it would not submit a brief on appeal but remained opposed to granting the requested CPCN.

¹⁷ 464 Md. at 645.

prohibited the Commission from granting a CPCN that was inconsistent with a local jurisdiction's comprehensive plan.¹⁸

30. Biggs Ford contends that the Chief PULJ was within his discretion to conclude that the inconsistency between the proposed project and that County Bill 17-07 was not due any consideration in light of the Bill's *de facto* ban on all utility-scale solar projects.

31. Biggs Ford also argues that the Chief PULJ appropriately considered the State's RPS in deciding to grant the requested CPCN. Although this factor is not specifically included in the list of factors that the Commission must consider pursuant to PUA § 7-207(e), Biggs Ford contends that the Commission is not limited to the factors in that statutory provision, but rather may consider any relevant factor in deciding whether to grant a CPCN.

32. In fact, Biggs Ford cites to *Perennial* for the proposition that “[c]onsistent with the PSC’s duties to ensure compliance with the RPS, including the specific targets for the share of electricity coming from solar electric generation, the General Assembly has also delegated to the PSC the exclusive authority to approve generating stations in Maryland.”¹⁹ Biggs Ford also notes that prior Commission CPCN cases have also analyzed the effect the requested CPCN might have on meeting Maryland’s RPS targets.

33. Addressing the County’s contention that the amended Application only slightly differs from the original rejected Application, Biggs Ford cites the Proposed Order for the finding that the footprint for the project was substantially reduced by 25%,²⁰ and the landscape buffer was increased “from 3,000 linear feet to approximately 12,000 linear

¹⁸ See rejected language of HB1227/SB997 (2019).

¹⁹ *Perennial*, 464 Md. at 624.

²⁰ Proposed Order at 66.

feet to completely surround the perimeter of the Project.”²¹ Biggs Ford cites the Chief PULJ’s conclusion that “[a]side from abandoning the Project entirely, I find there is nothing the Applicant could do to resolve the issues and concerns presented by the County...”²² Biggs Ford points out that the Commission has approved CPCNs for 30 solar projects located on farmland, including projects larger than the one at issue.

34. In response to the County’s contention that little has changed to justify the Chief PULJ’s reversal of the consideration given to the County’s Bill 17-07, Biggs Ford contends that the Chief PULJ discussed many significant differences between the two applications in his 93-page decision. Based upon these differences, Biggs Ford contends that the Chief PULJ was within his discretion to conclude that “the Applicant has remedied the deficiencies that served as bases to reject the Project as initially proposed in Phase 1.”²³

35. Finally, Biggs Ford notes that the CPCN “necessity” component was (essentially) rendered obsolete by deregulation of generation in 1999. Because the risk of sunken costs resulting from construction of an unnecessary generating station now rests with investors rather than ratepayers, the necessity portion of a CPCN is now “determined by the overall consideration of the benefits of a project that may accrue State-wide and locally to the burdens or adverse impacts that are not fully mitigated that may be experienced in the event of a grant.”²⁴

²¹ *Id.*

²² *Id.* at 67.

²³ *Id.* at 2.

²⁴ Case No. 9413, Proposed Order (January 25, 2017) at 122-123, *aff’d* Order No. 88260 (June 16, 2017).

IV. COMMISSION DECISION

36. The Commission affirms the factual findings and legal conclusions contained within the Chief PULJ's August 27, 2020 Proposed Order.

37. Contrary to the County's urging, the General Assembly has entrusted the Commission with sole authority to site generation stations pursuant to PUA § 7-207. In reaching a siting decision, the Commission must conduct a multi-faceted review, including giving "due consideration" to the recommendations of the local jurisdiction in which the generating station is to be developed. However, Maryland law is clear that the Commission is not bound by these recommendations, but must consider them alongside various other local and statewide factors.

38. For example, in *Howard County v. Potomac Elec. Power Co.*, 319 Md. 511 (1990), the Court of Appeals concluded that the Commission's CPCN process pre-empted Howard County's special exception zoning approval process. The Court ruled that the local government's recommendations were "advisory only and not controlling." *Id.* at 526.

39. Most recently, in *Perennial Solar*, the Court of Appeals explicitly stated that:

Under the plain language of the statute, local government is a significant participant in the process, and local planning and zoning concerns are an important factor in the PSC approval process. However, the ultimate decision-maker is the PSC, not the local government or zoning board. Although local zoning laws are pre-empted and therefore not directly enforceable by the local governments as applied to generating stations such as SEGS, they are nevertheless a statutory factor requiring due consideration by the PSC in rendering its ultimate decision.²⁵

²⁵ 464 Md. at 645.

40. The County's contention that its recommendations are binding upon the Commission is simply untrue. Moreover, the Chief PULJ clearly gave due consideration to the County's recommendations and analyzed the Applicant's efforts. The Chief PULJ also provided a lengthy discussion of the consistencies and inconsistencies of the Application with the County's Bill No. 17-07.²⁶

41. Following a weighing of the competing interests between the provision of clean, renewable energy and the County's interest in preserving farmland, the Chief PULJ concluded that:

Finally, in addition to verifying the Commission's preemption authority, the *Perennial* Decision specifically highlighted the Commission's duty to ensure compliance with the RPS. In order to meet the 14.5% solar carve-out by 2020, large solar facilities must continue to be part of the equation in order to meet the RPS's goal as rooftop solar installations alone are not sufficient. Allowing a jurisdiction to effectively ban utility-scale solar facilities through zoning ordinances would be both unreasonable and counter-productive.

Consistent with the Phase I Proposed Order, I find that the Project is not consistent with the County's zoning. However, I give no weight to this factor as Bill No. 17-07 is effectively a *de facto* ban on utility-scale projects, which is not in the overall public interest. In light of the facts and circumstances of this case, especially my finding related to the application of Bill No. 17-07, I find it appropriate to exercise the Commission's preemption authority over the County's zoning ordinance.²⁷

42. The Commission concludes that the Chief PULJ gave due consideration to the County's recommendations (as well as the Applicant's best efforts to comply with them) before correctly deciding to exercise the Commission's pre-emption authority.

²⁶ See August 27, 2020 Proposed Order at 81-87.

²⁷ Proposed Order at 87 (Internal citation omitted).

43. The Commission also affirms the Chief PULJ’s decision to rely upon the state-wide RPS targets in evaluating whether to approve the Application. Although the RPS is not listed as one of the factors in PUA § 7-207(e), these listed factors are not exclusive. As Biggs Ford notes, the RPS is intended to “recognize the economic, environmental, fuel diversity, and security benefits of renewable energy resources” and “reduce greenhouse gas emissions and eliminate carbon-fueled generation from the State’s electric grid by using these resources.”²⁸

44. Additionally, the General Assembly has concluded that “the benefits of electricity from renewable energy resources, including long-term decreased emissions, a healthier environment, increased energy security, and decreased reliance on and vulnerability from imported energy sources, accrue to the public at large.”²⁹ The County provides no compelling reason why the Commission should ignore this statewide statement of public policy when evaluating the public convenience and necessity of a proposed renewable energy facility.

45. In fact, in *Perennial*, the Court of Appeals recognized the link between the Commission’s CPCN process and the goals of the RPS, concluding that “consistent with the PSC’s duties to ensure compliance with the RPS, including the specific targets for the share of electricity coming from solar electric generation, the General Assembly has also delegated to the PSC the exclusive authority to approve generating stations in Maryland.”³⁰ As noted above, after giving “due consideration” to the County’s zoning

²⁸ PUA § 7-702(a)(1) & (2).

²⁹ PUA § 7-702(b)(1).

³⁰ 464 Md. at 624.

ordinance, the Commission concludes the Chief PULJ properly determined that the ordinance created an unacceptable hurdle to complying with Maryland's RPS.³¹

46. The Commission also affirms the Chief PULJ's conclusion that the amended Application sufficiently addressed the deficiencies in the original Application as to support a contrary result. The County does not propose how materially different factual findings must be to warrant a different outcome in this case, but such a determination is clearly within the discretion of the factfinder.

47. The Commission agrees with the Chief PULJ's discussion of the effect of the Commission's prior remand:

In its remand, the Commission did not render a decision on the merits of the Project and stated, 'the Commission always appreciates the input from PPRP in cases such as this, and would invite that input on remand, particularly after Biggs Ford goes through the County floating zone reclassification process.' Thus, it is clear the Commission anticipated, or at least hoped, that additional evidence would be submitted in the event Biggs Ford elected to continue to pursue a CPCN.³²

This is a correct interpretation of the Commission's remand order.

48. As the Chief PULJ discussed, the amended Application included the following improvements upon the original Application:

- a. A reduction in the Project's footprint from 135 acres to 100 acres;
- b. A reduction in the number of panels from 61,000 to 57,000;
- c. An increase in the 25-foot wide landscape buffer from 3,000 linear feet to 12,000 linear feet;

³¹ The County also contended that the RPS did not apply to Biggs Ford because Biggs Ford was not an "electricity supplier." However, as Biggs Ford notes, this is not the relevant analysis. The question is whether the existence of the proposed solar energy facility would facilitate Maryland's overall RPS targets, and the Chief PULJ correctly concluded that it would.

³² Proposed Order at 66.

- d. An agreement to plant a pollinator habitat on the Site as set forth in the PPRP's conditions;
 - e. An agreement that the remainder of the Site, approximately 50 acres, will continue to be farmed;
 - f. The distance from the closest solar panel to a residence now exceeds 500 feet;
 - g. The historic Baker Farm will now be visible to the public due to removal of all aspects of the Project might otherwise have hindered this view;
 - h. The PPRP concluded that the Project would provide a net fiscal benefit to the County.³³
49. Contrary to the County's claims, the Commission concludes the Chief PULJ properly considered the additional information provided in Phase II to determine that a CPCN should be issued.

50. Frederick County frames its fourth and final issue on appeal as "Biggs Ford Failed To Satisfy Its Burden of Proof To Establish That The Proposed Project Is a Public Convenience and Necessity."³⁴ This issue covers largely the same territory addressed above. Based upon the discussions above, the Commission concludes that the Chief PULJ correctly considered the amended Application in its entirety and determined that, in light of the additional information in the record, the public interest to be furthered by approving this amended Application outweighed the consideration due to the County's contrary recommendations.

IT IS, THEREFORE, this 24th day of November, in the year Two Thousand Twenty by the Public Service Commission of Maryland,

³³ *Id.* at 66-67.

³⁴ County Brief at 13.

ORDERED: That the August 27, 2020 Proposed Order by the Chief Public Utility Law Judge is hereby affirmed.³⁵

/s/ Jason M. Stanek

/s/ Michael T. Richard

/s/ Odogwu Obi Linton

/s/ Mindy L. Herman

Commissioners

³⁵ Commissioner Anthony J. O'Donnell dissents from the Majority Opinion in this case for the following reason. The Maryland Court of Appeals ruled in *Bd. of Cty. Comm'rs v. Perennial Solar, LLC*, 464 Md. 610 (2018) that the Commission has preemptive siting authority and the inherent discretion to decide, based on the evidence and after due consideration of certain factors, whether or not to issue a CPCN for location and construction of solar generating facilities in Maryland. In the instant case, Commissioner O'Donnell agrees with the position and recommendations of both the PPRP and Commission Technical Staff to deny the issuance of the CPCN for Biggs Ford Solar, LLC and would have exercised the authority and discretion, clearly affirmed in the *Perennial* decision, differently than the Majority based on a preponderance of the evidence in this case. For these reasons, and consistent with his dissent in Order No. 88644, Commissioner O'Donnell would have granted the relief sought—in this case—by Frederick County in its appeal.