

ORDER NO. 89938

In the Matter of the Application of Perennial
Solar LLC For A Certificate of Public
Convenience and Necessity to Construct an 8.0
MW Solar Photovoltaic Generating Facility in
Washington County, Maryland

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9408

Date Issued: September 17, 2021

**ORDER DENYING APPEALS OF
PROPOSED ORDER OF PUBLIC UTILITY LAW JUDGE**

1. On May 21, 2021, the Board of County Commissioners of Washington County, Maryland (“the County”) and Hilda Canfield, *et al.* (“Opponents”)¹ (collectively, “the Appellants”), each filed a Notice of Appeal of the April 21, 2021 Proposed Order of the Public Utility Law Judge (“PULJ”), which granted the Application for a Certificate of Public Convenience and Necessity (“CPCN”) filed by Perennial Solar, LLC (“Perennial”) to construct an 8.0 MW solar photovoltaic generating facility in Washington County, Maryland, subject to conditions. For the reasons discussed below, those Appeals are denied.

¹ The Opponents are Hilda Canfield, Brent Feight, Mary Lou Feight, Samuel Fiery, Judith P. Fiery, Mary Hawbecker, H. Lynn Keller, Trudy Keller, Jeffrey Kendall, Debra Kendall, Daris Kendle, Ronald Kendle, Kendra Reese, Rick Reese, Lori Robinson, Keith Robinson, and Betty Wasson.

I. PROCEDURAL HISTORY

2. The present CPCN proceeding has a lengthy and contentious procedural history. The case began on December 1, 2015, when Perennial filed an application, with accompanying environmental review document, and related appendices (“the Application”) requesting a CPCN to construct an 8.0 MW solar photovoltaic generating facility on approximately 70 acres of land on two contiguous privately-owned agricultural properties near the community of Cearfoss, in Washington County, Maryland (“the Project”). The Commission docketed the Application as Case No. 9408 and delegated the matter to the Public Utility Law Judge Division.²

3. On December 21, 2015, several landowners near the location of the proposed Project filed a Petition for Judicial Review in the Circuit Court for Washington County, Maryland appealing the County’s Board of Zoning Appeals (“BZA”) decision that granted Perennial a special exception and a variance. The County subsequently intervened in that appeal. Perennial filed a motion for pre-appeal determination that the state law CPCN process preempted local zoning laws.

4. On December 22, 2015, the PULJ held a prehearing conference and adopted a procedural schedule, which included timelines for filing direct and rebuttal testimony, and the initial schedule for public comment and evidentiary hearings. Then-Chief PULJ Terry Romine set a proposed target date of May 31, 2016, for issuing a proposed order.³

5. On January 26, 2016, Perennial filed the Direct Testimony and Exhibits of Thomas Anderson, Project Manager with Perennial, and Timothy Kellerman, Senior Environmental Scientist with Triad Engineering, Inc.

² See Maillog No. 178929.

³ December 23, 2015 Notice of Procedural Schedule, Maillog No. 181181 at 2.

6. On March 15, 2016, the parties filed a Consent Motion to Suspend Procedural Schedule, in order for the Commission to rule on certain issues related to the Forest Conservation Act that had been raised in two other CPCN proceedings. On March 16, 2016, the PULJ granted the motion.⁴

7. On June 20, 2016, the Circuit Court for Washington County found that the Commission's CPCN authority preempted the County's local zoning authority, dismissed the appeal, and remanded the matter to the BZA with instructions to vacate its opinion and the grant of a special exception and variance. On July 20, 2016, the County appealed the Circuit Court's decision to the Maryland Court of Special Appeals.

8. On July 29, 2016, Chief PULJ Romine filed a Notice of Assignment of PULJ, assigning the case to Judge Ryan C. McLean.

9. On August 28, 2018, the Maryland Court of Special Appeals affirmed the Circuit Court's decision and held that the Commission "preempts, by implication, local zoning regulation."⁵

10. On August 30, 2018, the current Chief PULJ McLean filed a Notice of Substitution of PULJ, reassigning the case to Judge Janice M. Flynn.

11. On November 14, 2018, the County filed a petition for a writ of certiorari with the Maryland Court of Appeals, which the Court granted on February 4, 2019.

12. On March 6, 2019, Perennial requested that this CPCN matter continue to be held in abeyance until the Maryland Court of Appeals resolved the pending certiorari petition. The PULJ granted that request on March 11, 2019.⁶

⁴ Notice of Suspension of Procedural Schedule, Maillog No. 186139.

⁵ *Bd. of Cty. Comm'rs v. Perennial Solar*, 239 Md. App. 380, 392 (2018).

⁶ PULJ Notice Granting Motion to Hold Case in Abeyance, Maillog No. 224266.

13. On July 15, 2019, the Court of Appeals affirmed the Court of Special Appeals' decision and held that Public Utilities Article ("PUA"), *Annotated Code of Maryland*, § 7-207 "preempts by implication local zoning authority approval for the siting and location of generating stations which require a CPCN."⁷

14. On September 11, 2019, the PULJ adopted a new procedural schedule.⁸ Pursuant to the schedule, on October 16, 2019, Perennial filed supplemental information in support of its Application, including a revised construction schedule and revised cost estimates, and an executed Interconnection Agreement between PJM Interconnection, L.L.C., Perennial, and The Potomac Edison Company.⁹

15. On November 4, 2019, the Maryland Department of Natural Resources' Power Plant Research Program ("PPRP") filed a notice that Perennial's Application was incomplete because it lacked the required Environmental Site Design ("ESD"), a Stormwater Management Concept Plan, and a Forest Stand Delineation Report, and there was insufficient information related to the Project's consistency with the County's Comprehensive Plan and zoning.¹⁰

16. On November 26, 2019, Perennial filed supplemental information, including: Appendix B to the ESD Stormwater Management Concept Plan; Appendix G, Phase I of the Environmental Site Assessment; and a revised concept site plan, which included a buffer plan and distances to neighboring homes.¹¹ Perennial also noted it would re-run a glare analysis and, while a Forest Stand Delineation Report had not been provided,

⁷ *Bd. of Cty. Comm'rs v. Perennial Solar*, 464 Md. 610, 644 (2019) (hereinafter, "*Perennial Solar*.")

⁸ PULJ Notice of Renewed Procedural Schedule, Maillog No. 226760.

⁹ Maillog No. 227154.

¹⁰ PPRP Administrative Completeness Review of Perennial's CPCN Application, Maillog No. 227369.

¹¹ Maillog No. 227674.

Perennial indicated that it would comply with the County's Forest Conservation Ordinance. Perennial acknowledged that it did not provide the recommendation of the County or a statement of consistency with the County's Comprehensive Plan and zoning.

17. On December 5, 2019, this proceeding was reassigned to now Chief PULJ Ryan C. McLean.

18. On January 3, 2020, Perennial filed the Supplemental Direct Testimony of Mr. Anderson, and copies of notices required to be sent in accordance with PUA § 7-207(c).

19. On January 7, 2020, a revised procedural schedule was issued.

20. On February 14, 2020, the County filed a Petition to Intervene.

21. On February 18, 2020, the Honorable Jeffrey A. Cline, President of the Board of County Commissioners of Washington County, Maryland, submitted a letter requesting that any public hearings conducted in this matter be conducted jointly with the Board of County Commissioners.

22. On February 24, 2020, a Petition to Intervene was filed by Lori and Keith Robinson; Samuel and Judith Fiery; Daris and Ron Kendle; Hilda Canfield; Kendra and Rick Reese; Trudy and Lynn Keller; Betty Wasson; Debra and Jeff Kendall; and Mary Lou and Brent Feight.¹² On March 5, 2020, the Petitions to Intervene were granted without opposition.

23. On March 13, 2020, a Public Comment Hearing previously scheduled for March 26, 2020, was cancelled as a result of the emergence of COVID-19.¹³ On April 8, 2020,

¹² Each of these individuals also signed the Notice of Appeal filed by the Opponents. Ms. Mary Hawbecker, who also signed the Opponents' Notice of Appeal, did not sign the February 24, 2020 Petition to Intervene.

¹³ See PULJ Notice of Cancellation of Public Comment Hearing, Maillog No. 229093.

Perennial and PPRP requested that the procedural schedule be suspended for the same reason. That request was granted.¹⁴

24. On May 27, 2020, the PULJ held a virtual status conference, and on June 26, 2020, he established a new procedural schedule.¹⁵

25. On August 13, 2020, the PULJ issued a letter to the Board of County Commissioners notifying them that the first public comment hearing was rescheduled for September 16, 2020, in virtual format, due to the pandemic, and advising the County Commissioners of their right, pursuant to PUA § 7-207(d), to sit jointly with the PULJ to hold the public comment hearing. That notice requested a response by September 14, 2020.

26. On August 31, 2020, PPRP submitted the Direct Testimony of Mr. Shawn Seaman, Program Manager with PPRP; Dr. Peter D. Hall, President of Metametrics, Inc.; and Mr. Donald E. Strebel, Senior Environmental Consultant with Environmental Research Group, LLC. PPRP also submitted an executed State Secretarial Letter, Initial Recommended License Conditions, a Draft Project Assessment Report, the Applicant's responses to certain PPRP data requests, and a glare analysis.

27. Also on August 31, 2020, the County filed the testimony of Jill Baker, the Director of the County's Department of Planning. William C. Wantz, Esquire, who entered his appearance on behalf of the Opponents, filed his Reply Testimony and Argument in Opposition to Perennial's Application.

28. On September 1, 2020, Staff filed the Direct Testimony and Exhibits of Kevin Zhong and Appendix B to the Project Assessment Report.

¹⁴ PULJ Notice of Suspension of Procedural Schedule, Maillog No. 229661.

¹⁵ PULJ Notice of Procedural Schedule, Maillog No. 230902.

29. On September 15, 2020, the Board of County Commissioners filed a letter unanimously opposing the Project, and Commissioner Wayne K. Keefer filed a letter individually expressing his opposition.¹⁶

30. On September 16, 2020, the PULJ held a virtual public comment hearing, where six individuals offered comments. Also on September 16, 2020, the PULJ issued a letter to the Board of County Commissioners notifying them of a second public comment hearing scheduled for October 22, 2020, advising them of their right to sit jointly with the PULJ at the hearing, and requesting a response regarding co-participation by October 19, 2020.

31. On October 2, 2020, Perennial filed the Rebuttal Testimony of witness Anderson. PPRP filed the Supplemental Testimonies of witnesses Seaman and Hall, and Revised License Conditions. Staff filed the Rebuttal Testimony and Exhibits of witness Zhong.

32. On October 13, 2020, Ms. Elizabeth Shatto, the Executive Director of the Heart of the Civil War Heritage Area (“HCWHA”), filed comments on the Project’s impact on a historic site and on heritage tourism.¹⁷

33. On October 22, 2020, the PULJ held a second virtual public comment hearing, where five individuals offered comments.

34. On October 26, 2020, an evidentiary hearing was held during which the testimony was admitted and the witnesses were cross-examined. At the conclusion of the evidentiary hearing, the PULJ determined additional information was necessary, related to PPRP’s proposed license conditions and certain photographs offered by Perennial.

¹⁶ These documents were initially filed as public comments, but were subsequently officially filed in the docket on October 23, 2020. *See* Maillog Nos. 232286 and 232287.

¹⁷ *See* PPRP Ex. 13 – Appx. A. Ms. Shatto filed her letter as a public comment.

35. On October 29, 2020, PPRP and Ms. Shatto held a teleconference to discuss specific mitigation proposals. That same day, Ms. Shatto filed a letter confirming that the HCWHA stood by its initial comments and would not propose mitigation beyond PPRP's recommended conditions.¹⁸

36. On November 17, 2020, the PULJ issued a procedural schedule setting dates for the submission of supplemental and reply testimony,¹⁹ and on November 18, 2020, the PULJ issued a Notice of Evidentiary Hearing.²⁰

37. On November 20, 2020, PPRP submitted the Second Supplemental Testimony of Dr. Hall. On November 30, 2020, the Opponents submitted the Supplemental Testimony of Mr. Wantz in Opposition to the Application of Perennial Solar, LLC.²¹

38. On December 14, 2020, Perennial submitted the Supplemental Rebuttal Testimony of Mr. Anderson.

39. On January 4, 2021, the PULJ held a second evidentiary hearing.

40. On February 1, 2021, Perennial, the Opponents, and Staff filed briefs, and the County filed a letter in lieu of a brief. Neither PPRP nor OPC filed briefs.

41. On February 26, 2021, Perennial, PPRP, the Opponents, and Staff filed reply briefs, and the County filed comments in lieu of a reply brief. OPC did not file a reply brief.

42. On April 21, 2021, the PULJ issued a Proposed Order granting the Application, subject to numerous conditions. The PULJ discussed the issues raised by the County and

¹⁸ PPRP Ex. 13 – Appx. C.

¹⁹ PULJ Notice of Further Procedural Dates, Maillog No. 232629.

²⁰ PULJ Notice of Evidentiary Hearing, Maillog No. 232649.

²¹ The Opponents referred to themselves as “the Neighbors” in the underlying adjudicatory proceeding, before filing the Notice of Appeal and renaming themselves “the Opponents.” Hereinafter, this Order will refer to this party as the Opponents.

the Opponents, including zoning and consistency with the County’s Comprehensive Plan, as well as the Project’s potential negative impacts on property values, esthetics, and historic sites. Nevertheless, the PULJ found that “the benefits of the Project and its contribution to the State’s RPS outweigh the County’s recommendation and the objections about the Project’s potential negative impacts...”²²

43. On May 21, 2021, the Opponents and the County each timely filed a Notice of Appeal of the Proposed Order, and on May 28, 2021, they each filed a Memorandum on Appeal. Staff and Perennial each filed a Reply Memorandum in opposition to the Appeals on June 17 and June 18, 2021, respectively.

II. ISSUES ON APPEAL

44. Appellants raise several issues on appeal. First, they argue that the PULJ failed to properly consider the input of the local government, arguing that the County was accorded “a diminished role ... inconsistent with statewide land use policy and statutory law.”²³ Second, Appellants claim that the PULJ failed to give due consideration to the historic significance of the selected site. Third, the Appellants claim that the Project is inconsistent with the County’s Comprehensive Plan as a matter of law. Fourth, given advancements in solar panel technology, the Appellants argue that Perennial will not need the entire area requested in the Application, and that it would be “an abuse of discretion for the Public Service Commission to issue a [CPCN] for more land than is necessary to support the generation of 8 MW of electricity...”²⁴ Fifth, the Appellants claim that the Commission violated the statutory requirement to conduct the CPCN

²² Proposed Order at 2.

²³ Opponents Memorandum on Appeal at 2.

²⁴ *Id.* at 7-8.

hearing in Washington County jointly with the Board of County Commissioners, as required by PUA § 7-207(d)(2). Sixth, Appellants claim that the Proposed Order improperly requires, as a mitigating condition of approving the Project, subsequent site plan approval by the County under a preempted local ordinance. Finally, Appellants argue that the Proposed Order failed to give due consideration to statutorily required categories such as aesthetics, impacts to historic sites, site compatibility and consistency with the local comprehensive plan.

45. In addition to the issues raised by Appellants jointly, the County raised on appeal the argument that the PULJ mischaracterized the statutorily and judicially prescribed role of the County's recommendation and erroneously discounted the weight of the County's recommendation.²⁵ Finally, the County claims that the PULJ improperly discounted the weight of public comments from certain realtors and the testimony of their counsel regarding property values.

III. DISCUSSION

A. Input of Local Government on CPCN Application

1. Appellants

46. The Appellants argue that the PULJ failed to consider the role and importance of local control of planning and zoning regulation, citing Md. Ann. Code, Local Gov. Article, § 10-324(a)(2) ("It is the policy of the State that planning and zoning controls shall be implemented by local government.")²⁶ The Appellants argue that the Proposed Order "all but jettisons local legislative body input. Local government was accorded a diminished role by the PULJ inconsistent with statewide land use policy and statutory

²⁵ County Memorandum on Appeal at 2.

²⁶ Opponents Memorandum on Appeal at 1-2.

law.”²⁷ Appellants further argue that in *Perennial Solar*, the Court of Appeals “contemplated the inclusion of State land use policy applicable to local government.”²⁸ Appellants contend that Washington County adopted a special exception approach to solar energy land use regulation, which is premised on a finding of consistency with the local comprehensive land use plan. In order to be consistent, the proposed use must “further, and not be contrary to, the policies, development patterns, land uses and intensities in the plan.”²⁹ Appellants conclude that the PULJ failed to consider the statutory role of local government in planning and zoning regulation.

2. Perennial

47. Perennial claims that the Appellants’ arguments run counter to the Maryland Court of Appeal’s decision in *Perennial Solar*.³⁰ Perennial claims that Maryland law is clear that the Commission makes the final determination on whether to grant a CPCN application and that the only requirement is that the Commission give due consideration to the County’s recommendation. Perennial contends that the record demonstrates the PULJ gave due consideration to the County’s Comprehensive Plan, local zoning, the County’s recommendation opposing the Project, and effects of the Project, including historic sites.

3. Staff

48. Staff characterizes the Appellants’ argument as “essentially that Washington County planning and zoning is not preempted,” contrary to the clear holding by the

²⁷ *Id.* at 2.

²⁸ *Id.* at 3.

²⁹ *Id.*, citing Md. Ann. Code, Land Use Article, § 1-303.

³⁰ Perennial Reply Memorandum at 3.

Maryland Court of Appeals in *Perennial Solar*.³¹ Staff asserts that the Proposed Order did not disregard the County’s Comprehensive Plan and zoning; “it just did not give them complete deference.”³² Staff concludes that the PULJ gave due consideration to the County’s Comprehensive Plan and zoning as required by the *Perennial* case.

4. Commission Decision

49. The Appellants’ first argument in this proceeding is remarkably similar to its position in *Perennial Solar*, despite the clear decision in that case. In the instant proceeding, Appellants reference Washington County’s “special exception approach to solar energy land use regulation” which “is premised on a finding of consistency with the local comprehensive land use plan.”³³ Appellants argue that the proposed use must further, and not be contrary to, the policies and land uses in the comprehensive land use plan, and conclude that “[t]his statutory policy has not been preempted, but is wholly disregarded in the Proposed Order.”³⁴ Similarly, in *Perennial Solar*, the Court of Appeals described Appellants’ argument as follows: “Because the General Assembly has prescribed a role for local government in the CPCN process under PUA § 7-207, including the consideration of local planning and zoning, the County argues that the General Assembly has not evidenced an unequivocal intent to preempt the ‘entire field’ or to preclude local legislative bodies from enacting any ordinances and laws pertaining to the location of SEGs [Solar Energy Generating Systems] in their respective jurisdictions.”³⁵

³¹ Staff Reply Memorandum at 1-2.

³² *Id.* at 2.

³³ Opponents Memorandum on Appeal at 3.

³⁴ *Id.*, citing Md. Ann. Code, Land Use Article, § 1-303.

³⁵ *Perennial Solar* at 618-19.

50. Nevertheless, the Court of Appeals rejected the County’s argument in *Perennial Solar* and held unequivocally that “the General Assembly firmly intended that PUA § 7-207 preempt by implication local zoning approval authority over SEGS” and that the CPCN statute “grants the PSC [Public Service Commission] broad authority to determine whether and where SEGS may be constructed.”³⁶ The Court denied the argument that local ordinances and zoning laws controlled, finding that “under the plain language of PUA § 7-207, the PSC is the ultimate decision-maker and approving authority of generating stations.”³⁷

51. The Court recognized that the General Assembly’s mandate to transition the State’s energy market toward renewable energy sources would create “conflicts ... particularly in rural areas where land historically zoned for agricultural use is proposed as a site for large scale solar projects;” and the Court observed that “counties such as Washington, Kent and Queen Anne’s ... have adopted specific solar regulations as part of their planning and zoning authority.”³⁸ However, the Court held “it is clear that the General Assembly intended to vest final authority with the PSC for the siting and location of generating stations requiring a CPCN.”³⁹ Any argument that local law retains supremacy in CPCN proceedings therefore lacks merit. In particular, Appellants’ contention that the County’s special exception approach to solar energy land use regulation demands a rejection of the Application is contrary to the holding in *Perennial*

³⁶ *Id.* at 637-38, 644.

³⁷ *Id.* at 643.

³⁸ *Id.* at 626-27.

³⁹ *Id.* at 631.

Solar.⁴⁰ There, the Court emphasized that “the [CPCN] statute does not ‘expressly provide concurrent legislative authority to the local jurisdiction or require compliance with local planning and zoning ordinances.’... Nor does the statute require that the applicant receive zoning approval in connection with the CPCN application.”⁴¹ Instead, the General Assembly expressly limited local government to an advisory role. “[T]he statute expressly identifies the local governing body’s role as a participant in a public hearing process, with the ability to make a ‘recommendation,’ which the PSC is required to give ‘due consideration’ before taking ‘final action.’”⁴²

52. In affirming the supremacy of the State CPCN law, the Court recognized that the Commission is required to coordinate with and include the local governing body of the county or municipality in the CPCN public hearing process, and establish a public hearing framework to ensure input and public comment from interested persons in the geographic area within which the generating station would be located.⁴³ For example, PUA § 7-207(e) directs that the Commission take final action on an application for a CPCN only after due consideration of the recommendation of the governing body of each county or municipal corporation in which the planned generating station is proposed to be located. The Commission must also give due consideration to (i) the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where the project is to be located, and (ii) the efforts to resolve any issues presented by the county or municipal corporation. Additionally, the Commission is

⁴⁰ In fact, Local Gov. Article § 10-324(c) precludes Appellants’ argument by its express terms. It provides that local planning and zoning controls do not “preempt or supersede the regulatory authority of any unit of State government under any public general law.”

⁴¹ *Perennial Solar* at 633, citing *Allied Vending, Inc. v. City of Bowie*, 332 Md. 279, 299-300 (1993).

⁴² *Id.*, citing PUA § 7-207(a) and (b).

⁴³ *Id.* at 624.

required to provide an opportunity for public comment and to hold a public hearing in each such county and municipal corporation. Finally, the CPCN statute requires that the public hearing be held jointly with the county or municipal corporation, at their election. As evidenced by the 101-page Proposed Order and attachments, however, the PULJ complied with the CPCN statute in every respect. The record is replete with examples of the PULJ providing due consideration to the County's position, the consistency of the Application with the County's Comprehensive Plan and zoning laws, and efforts to resolve the issues presented by the County.⁴⁴

53. The Proposed Order contains a comprehensive discussion of the County's recommendation. For example, the Proposed Order discusses the County Commissioners' unanimous opposition to the Project based upon the alleged impact on surrounding landowners, disruption to the scenic area, inconsistency with both the scale and character of the surrounding rural landscape, and inconsistency with the Comprehensive Plan.⁴⁵ The PULJ found that the County's recommendation was consistent with the opposition expressed at the public comment hearings, including aesthetic concerns and potential diminution of property values. The PULJ also discussed the County's argument in the alternative, that in the event the PULJ grants Perennial a CPCN, he should require certain conditions as provided in Ms. Baker's testimony.⁴⁶ For example, the PULJ discussed Ms. Baker's recommendation that if granted, the CPCN require that Perennial post a decommissioning bond in conjunction with its

⁴⁴ This Order discusses the due consideration provided by the PULJ relating to historic sites in Section III.B., local zoning in Section III.C., and the Project's consistency with the County's Comprehensive Plan in Section III.C.

⁴⁵ Proposed Order at 70, citing County's Comments at 1-2.

⁴⁶ *Id.* at 70, 80 citing County's Comments at 1-2; County's Reply Comments at 2.

decommission plan;⁴⁷ that the SEGS not be constructed in environmentally sensitive areas;⁴⁸ and that in consideration of the County's tourism economy and to protect historic sites, the Project not be permitted in key viewshed areas, such as the Scenic Byways.⁴⁹

54. The PULJ determined that the County's concerns, expressed through Ms. Baker, were largely addressed through Perennial's amended plan and PPRP's recommended Licensing Conditions.⁵⁰ For example, the PULJ found that the Project will not impact environmentally sensitive areas; historic and cultural resources will be protected via the proposed buffer; and the decommissioning plan includes financial assurances.⁵¹

55. Ultimately, the PULJ did not accept the County's recommendation to deny the CPCN to Perennial. He found that "the benefits of the Project and its contribution to the State's RPS outweigh the County's recommendation and objections about the Project's potential negative impacts, many of which were not supported by the record."⁵² The Commission does not agree, however, with Appellants' argument that the grant of the CPCN indicates the PULJ "jettison[ed] local legislative body input" or provided the County with a "diminished role." To the contrary, the Commission finds that the PULJ gave due consideration to the many issues raised by Appellants. As the PULJ correctly stated, the recommendations of the County "are entitled to due consideration, but the Commission is not required to defer to those recommendations," because the County's recommendation is just "one of many factors that must be considered in CPCN cases."⁵³

⁴⁷ *Id.* at 38, citing County Ex. 1 at 3.

⁴⁸ *Id.*, citing County Ex. 1 at 2-3.

⁴⁹ *Id.*, citing County Ex. 1 at 3.

⁵⁰ *Id.* at 96-97.

⁵¹ *Id.* at 96-97.

⁵² *Id.* at 2.

⁵³ *Id.* at 83-84.

B. Historic Site Considerations

1. Appellants

56. Appellants argue that the PULJ failed to give due consideration to the historic significance of the Project site. In particular, Appellants claim that the PULJ neglected to consider “the July, 1863 retreat from Gettysburg of the wounded survivors of General Robert E. Lee’s Army of Northern Virginia, a seventeen-mile long caravan passing through Cearfoss and along the site chosen by the Applicant, or the well-documented history of the Union ambush which occurred at the site selected by Perennial at Cunningham’s Crossroads.”⁵⁴ Appellants also criticize Perennial for failing to disclose the historic importance of the Project’s location in their original Application. Appellants observe that PUA § 7-207(e)(2)(iv) specifically requires the Commission to consider the effects of the proposed generating station on historic sites. Additionally, due consideration is required because of the historic preservation goals and policies contained in the County’s Comprehensive Plan. Finally, although Appellants acknowledge that the PULJ discussed the view of the HCWHA that PPRP’s conditions reference, Appellants discount that position as the second-hand account of “the administrator of a private, non-profit, non-governmental historic preservation advocacy group.”⁵⁵

2. Perennial

57. Perennial disputes that it should have alerted the Commission more quickly to the historical significance of the Project site. First, Perennial observes that the Project site was designated as a Heart of the Civil War Heritage Area only in 2017—two years after

⁵⁴ Opponents Memorandum on Appeal at 3.

⁵⁵ *Id.* at 5, n. 3.

Perennial's Application was filed.⁵⁶ Second, Perennial asserts that it consulted with the Maryland Historical Trust prior to submitting its CPCN Application, and that as soon as the designation was made, Perennial consulted with HCWHA management and PPRP to address the issue, including by agreeing to conditions that have been applied to the Project. Perennial states that after the consultation, HCWHA agreed that no additional conditions were necessary. Perennial further asserts that Appellants did not offer any contrary evidence to demonstrate why the proposed conditions would be inadequate.

3. Staff

58. Staff contends that the PULJ gave due consideration to the historic sites of the County.⁵⁷ For example, the Proposed Order references testimony indicating that no properties on the National Register of Historic Places were within one mile of the Project. The Proposed Order also notes that the HCWHA management unit was consulted regarding the Civil War historic sites, and it agreed to Licensing Condition No. 32, which required the Applicant to consult with the HCWHA management unit and to address any concerns through mitigation strategies negotiated with the HCWHA. Staff further asserts that the Appellants' characterization of the HCWHA is inaccurate, because the HCWHA management unit "is the organization chosen under State law to administer, protect, and maintain the State's historic areas associated with those Civil War actions, as designated by the Maryland Heritage Areas Authority and Maryland Historical Trust."⁵⁸ Staff

⁵⁶ Perennial Reply Memorandum at 11.

⁵⁷ Staff Reply Memorandum at 4.

⁵⁸ *Id.* at 4, n. 8, citing COMAR 14.29.01, Designation of Recognized Heritage Areas.

concluded that “the [HCWHA] management unit is the best entity to determine the adequacy of the proposed licensing condition for the Project.”⁵⁹

4. Commission Decision

59. The Commission finds that the PULJ gave due consideration to the effect of the generating station on historic sites in the vicinity of the Project site, in accordance with PUA § 7-207(e)(iv), as evidenced by the substantial discussion of the matter in the Proposed Order. For example, the PULJ noted that PPRP found no properties on the National Register of Historic Places within one mile of the Project site, but that several properties, mostly working farms, were listed on the Maryland Inventory of Historic Properties (“MIHP”).⁶⁰ The PULJ discussed that the Village of Cearfoss (also known as Cunningham’s Crossroads) is on the MIHP but does not meet the National Register criteria. He weighed the Maryland Historical Trust’s (“MHT”) conclusion that the Project will not adversely affect any historic properties, but observed that PPRP nevertheless included a condition that directed Perennial to consult with the MHT if any unforeseen archeological deposits are discovered during construction.⁶¹

60. The PULJ also discussed Dr. Hall’s testimony that the Project site now falls within the HCWHA, based upon the Maryland Heritage Areas Authority’s April 13, 2017 adjustment of that area.⁶² The PULJ specifically addressed the Civil War battle raised by Appellants on appeal, finding that the Project site “now includes an area where the Battle of Cunningham’s Crossroads (Battle of Cearfoss) took place on July 5, 1863 at the intersection of what is now known as Greencastle Pike and Cearfoss, where Union

⁵⁹ *Id.* at 4, n. 8.

⁶⁰ Proposed Order at 31.

⁶¹ *Id.* at 32.

⁶² *Id.* at 54, citing PPRP Ex. 12 at 1-2.

cavalrymen attacked a Confederate wagon train retreating from Gettysburg.”⁶³ Indeed, the PULJ considered each of the Appellants’ arguments on the historical sites issue, including their claim that: “One may not effectively mitigate the adverse effect on a battlefield by concealing or buffering it from public appreciation, or so altering its character to the extent that it no longer resembles its appearance at the time of the associated historic event.”⁶⁴

61. In his decision, the PULJ acknowledged that “a Civil War battle occurred near the Site which, as of 2017, lies within the HCWHA.”⁶⁵ However, the PULJ found sufficient PPRP’s proposed condition that requires Perennial to consult with the HCWHA to address any concerns through additional strategies to mitigate any adverse effects. The PULJ found that the HCWHA is “the organization in the best position to make such recommendations” and highlighted its determination that “no further mitigation was necessary.”⁶⁶ The PULJ also determined that Perennial was not at fault for the delay in analyzing the Project’s impact on the HCWHA, given that “the Site was not within the HCWHA and no party was even aware of the HCWHA’s expansion until it was raised during the First Public Comment Hearing.”⁶⁷ The PULJ concluded that the record lacked any definitive evidence that the HCWHA would be impacted by the Project and, in conjunction with the conditions recommended by PPRP (and required by the Proposed Order), he found that “there will be no negative impacts on nearby historical sites.”⁶⁸ The Commission agrees with that determination.

⁶³ *Id.* at 54-55. *See also* PPRP Ex. 12 at 2.

⁶⁴ Proposed Order at 78, citing Opponents’ Reply Memorandum at 2.

⁶⁵ *Id.* at 89.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 91-92.

62. The record clearly demonstrates that the PULJ gave due consideration to the effects of the Project on historic sites. In reviewing the Appellants’ concerns regarding historic sites and the record of this proceeding, the Commission also agrees with the PULJ that the required conditions will mitigate any adverse effects on historic sites. In particular, Licensing Condition No. 32 requires Perennial to consult with the HCWHA management unit and to address any concerns through mitigation strategies negotiated with the HCWHA management unit. Ms. Shatto, Executive Director of HCWHA, confirmed that HCWHA would not propose mitigation beyond the conditions recommended by PPRP.⁶⁹ Thomas Anderson, Project Manager for Perennial, also committed that Perennial will “be able to find a way to mitigate and satisfy” any concerns raised by the HCWHA.⁷⁰ Additionally, PPRP witness Hall testified that PPRP’s recommended condition to increase the landscape buffer height from 10 feet to 20 feet, and to maintain the buffer “in perpetuity,” will provide “visual relief” from the Project, and that once the buffer matures, the Project will not be visible from highways.⁷¹ No party—including the Appellants—recommended either enhanced conditions to mitigate the effects of the Project on historic sites, or evidence to demonstrate why PPRP’s recommended conditions were inadequate. The Commission therefore finds no error in the PULJ’s determination on this issue.

⁶⁹ PPRP Ex. 13 at 2 and Appx. C.

⁷⁰ Oct. 26, 2020 Hr’g. Tr. at 86 (Anderson).

⁷¹ *Id.* at 111 (Dr. Hall).

C. **The County's Comprehensive Plan**

1. **Appellants**

63. Appellants claim that the Project is inconsistent with the County's Comprehensive Plan as a matter of law, and that the required comparison of the Project with the Comprehensive Plan was not undertaken by the PULJ.⁷² Appellants contend that "[t]he applicant's proposed use is not amenable to dispute," and the Comprehensive Plan speaks for itself, such that "[a]s a question of law, the comparison requires no evidentiary analysis."⁷³ In particular, Appellants claim that the Project is inconsistent with the Comprehensive Plan because "it would impair a significant historic site, is incompatible with the surrounding low-density residential development, and does not provide the compatible adjacency contemplated in the comprehensive plan between an existing rural village and the surrounding agricultural land."⁷⁴ Appellants argue that the Comprehensive Plan is designed to prevent further sprawl development, while encouraging and redirecting rural population growth to rural villages. However, that objective is thwarted by the Project's location at the edge of a designated rural village, which hinders rural village growth. Appellants conclude that: "A proposed use which is not designed to extend the fabric of the existing development is inconsistent with the local plan and repugnant thereto, as a matter of law."⁷⁵

2. **Perennial**

64. Perennial argues that the PULJ gave due consideration to the issue of Project consistency with the County's Comprehensive Plan, and that such consideration is all that

⁷² Opponents Memorandum on Appeal at 5.

⁷³ *Id.*

⁷⁴ *Id.* at 6.

⁷⁵ *Id.* at 7.

is required under the CPCN statute.⁷⁶ Perennial asserts that the PULJ provided analysis on the absence of any specific prohibition on solar projects in the Comprehensive Plan, as well as County witness Baker's testimony that the Project did not impact the County's maintained infrastructure. Perennial also notes that the Proposed Order addresses Ms. Baker's testimony that she could not say whether the Project was consistent or inconsistent with the Comprehensive Plan.⁷⁷

65. Perennial further contends that the PULJ gave due consideration to the Appellants' claim that the Project is contrary to the intent of the Comprehensive Plan to protect the adjacent rural village. Perennial notes that the PULJ found that the Project was not located in a rural village and that he credited Ms. Baker's testimony that Perennial's intended buffering would mitigate any potential impacts on rural villages.⁷⁸

3. Staff

66. Staff contends that the Proposed Order gave due consideration to the Project's consistency with the Comprehensive Plan, thereby satisfying the requirements of PUA § 7-207(e).⁷⁹ Staff also asserts that the adoption of the Licensing Conditions proposed by PPRP "would mitigate any adverse impacts of the Project."⁸⁰

4. Commission Decision

67. PUA § 7-207(e)(3) requires that the Commission give due consideration to the effects of the Project on "the consistency of the application with the comprehensive plan and zoning of each county or municipal corporation where any portion of the generating

⁷⁶ Perennial Reply Memorandum at 7.

⁷⁷ *Id.* at 8, citing Proposed Order at 94-95.

⁷⁸ Proposed Order at 268-269.

⁷⁹ Staff Reply Memorandum at 3.

⁸⁰ *Id.* at 4.

station is proposed to be located.” It does not require a finding that a proposed generating station be consistent with the local county’s plan. To do so would provide a veto right to local government planning, in contravention of State preemption analysis, as discussed in Section III.A., *supra*. The PULJ correctly held that “the Commission is required to give due consideration, not deference, to the applicable [Comprehensive Plan] and zoning pursuant to PUA § 7-207(e)(3)(i).”⁸¹ Appellants’ argument that the Project is inconsistent with the County’s Comprehensive Plan as a matter of law, even if correct, is nonetheless unavailing because of preemption.

68. Additionally, the Commission does not agree that the consistency of the Project with the Comprehensive Plan is a question of law. The visual impact of the Project, its effect on development and County growth, its compatibility with historic sites, and the likely success of the Licensing Conditions in mitigating any adverse effects are questions of fact to which witnesses testified and the PULJ made a determination. The Commission finds that those determinations are supported by the record.

69. The record in this proceeding demonstrates that the PULJ gave due consideration to the issue of the Project’s consistency with the County’s Comprehensive Plan. For example, the PULJ discussed that the issue of consistency with the Comprehensive Plan is complicated by the fact that the current Comprehensive Plan, adopted in 2002, does not contain any reference to SEGS. Additionally, Ms. Baker, the County’s Director of Planning and Zoning, repeatedly stated it was difficult to determine whether the Project

⁸¹ Proposed Order at 93.

was or was not consistent with the Comprehensive Plan.⁸² She did testify, however, that “it doesn’t have any real impact on county-maintained infrastructure such as schools or roads. It doesn’t have an impact ...on county utilities such as water or sewer. Where it does have an impact is on public utilities, which has been shown in case law to be outside of our purview.”⁸³

70. Ms. Baker also provided testimony regarding the issue of the effects the Project could have on the Comprehensive Plan’s goal of ensuring the natural edge of the rural village and maintaining agricultural open space. Ms. Baker testified:

I think for the most part that the Applicant has attempted to do that through the buffering that they are proposing, that is something that is common when we look at trying to resolve our land use differences between these types of uses. I think when we wrote that, that was really designed more toward at that point in time our issues between residential and agricultural compatibility. Again, these types of uses simply weren’t contemplated at that point in time when that section was written so it’s kind of difficult to narrow it down to this specific use, whether or not it would conflict with the comprehensive plan. Again, I think the buffering is a big thing. We talk about that throughout the comprehensive plan and between any uses that people may or may not deem compatible or incompatible.

71. In addition to Ms. Baker’s testimony that the Comprehensive Plan did not contemplate SEGS and that buffering could mitigate Project effects, the PULJ found that there is no indication the County intended to prohibit SEGS from being located on parcels abutting a rural village.⁸⁴ Considering all of the record evidence, the PULJ found

⁸² Proposed Order at 94. Ms. Baker testified that “in terms of scale and compatibility...it’s difficult to say whether this truly conforms with or is in disagreement with the comprehensive plan because it really wasn’t contemplated at that time.” Oct. 26, 2020 Hr’g. Tr. at 153 (Baker).

⁸³ Oct. 26, 2020 Hr’g. Tr. at 153-54 (Baker).

⁸⁴ Proposed Order at 94-95. The PULJ observed, for example, that no specific design standards were enacted by the County protecting rural villages from incompatible uses and new development. Oct. 26, 2020 Hr’g. Tr. at 190-91 (Wantz).

that “the Project is neither consistent nor inconsistent” with the County’s Comprehensive Plan.⁸⁵ On review, the Commission agrees with that finding. The Commission does not believe any additional conditions are necessary to address Appellants’ argument that the Project may hinder the Comprehensive Plan’s goal of ensuring the natural edge of the village.

72. Regarding zoning, the PULJ discussed Ms. Baker’s acknowledgment that the County’s zoning ordinance allows for solar projects to be sited on land zoned in the A(R) district, as is the Project.⁸⁶ Ms. Baker also responded affirmatively to the question of whether the Project conformed to the County’s local zoning ordinance. She stated: “To my knowledge, yes, I believe they would, they would conform to the zoning ordinance based upon what small regulatory requirements we did include.”⁸⁷ Considering Ms. Baker’s testimony and position with the County as Director of Department of Planning, the PULJ found the Project to be consistent with the County’s zoning.⁸⁸

73. The Commission finds that the PULJ has fully considered and addressed the issue of consistency of the Project with the Comprehensive Plan. In reviewing the record, the Commission agrees with the PULJ that the existing Licensing Conditions will mitigate any adverse effects related to the Project’s impact on the Comprehensive Plan and the County’s zoning.

⁸⁵ Proposed Order at 95.

⁸⁶ *Id.* at 270-71.

⁸⁷ Oct. 26, 2020 Hr’g. Tr. at 163-64 (Baker).

⁸⁸ Proposed Order at 96. Consistency with the County’s zoning is not required under the CPCN statute—only due consideration of the Project’s consistency with the County’s zoning, which was clearly given by the PULJ.

D. Land Area Included in Grant of Perennial CPCN

1. Appellants

74. Appellants argue that Perennial will not need all of the land proposed in the Application for its Project and that it is an abuse of discretion for the PULJ to issue a CPCN for more land than is necessary to support the generation of 8 MW of electricity.⁸⁹ Appellants assert that as a result of advances in solar panel technology, Perennial will not need the number of panels or the entire area requested in its Application. Appellants further claim that “[t]here is nothing in the record to indicate how an appropriate reduction in approved land area would be accomplished...”⁹⁰

2. Perennial

75. Perennial argues that the Appellants never raised the issue of the land required for the Project in the underlying proceeding. Regardless of whether Appellants waived the issue, however, Perennial states that Mr. Anderson’s testimony about solar panel technology involved the number of solar panels used, not the Project’s land use footprint. Finally, Perennial asserts that the issue is moot because it “does not plan to reduce the approved project land area.”⁹¹

3. Staff

76. Staff argues that it would not be an abuse of discretion to approve the actual Application for a CPCN, including the land area of the Project, because the Project was fully evaluated under the CPCN statute and its approval was supported by substantial evidence in the record.⁹² Staff also opined that the decrease in the number of solar panels

⁸⁹ Opponents Memorandum on Appeal at 7-8.

⁹⁰ *Id.* at 8.

⁹¹ Perennial Reply Memorandum at 13.

⁹² Staff Reply Memorandum at 5.

required (from approximately 34,000 to 30,000) is minimal and will not materially change the Project. Finally, Staff asserts “there is no evidence in the administrative record that defines the change in land area resulting from the change in number of solar panels.”⁹³

4. Commission Decision

77. The Commission agrees with Staff that there is no record evidence discussing how advances in solar panel technology could reduce the land area required for the Project. Appellants provided no witness on this subject and did not cross examine Perennial witness Anderson on this topic. Instead, testimony focused on the number of solar panels that would be required to create the 8 MW of generation capacity of the Project. On that topic, Mr. Anderson testified that because of evolving technology, the number of solar panels required for the Project would be reduced from approximately 34,000 to approximately 30,000.⁹⁴ In its Reply Memorandum, Perennial asserts that it does not plan to reduce the amount of land to be used in the Project.⁹⁵

78. The Commission observes that evolving technology, especially for renewable energy projects, is a recurring theme in CPCN cases, given the rapid technological advancements in the industry. It is often not practical for an applicant to specify the exact technology that it will use for a given generating station, given that the relevant technology may have improved since the filing of the application. For this Project, the Commission finds no error in the PULJ’s approval of the Application as submitted. The

⁹³ *Id.* at 6.

⁹⁴ Jan. 4, 2021 Hr’g. Tr. at 26-27 (Anderson). PPRP witness Seaman also indicated the Project will consist of approximately 28,000 to 30,000 solar photovoltaic panels that will be installed on a fixed-tilt racking system, and will include inverters, transformers, and equipment necessary to interconnect to Potomac Edison’s distribution system. PPRP Ex. 1 at 3.

⁹⁵ Perennial Reply Memorandum at 13.

Proposed Order approves the 8 MW requested in the CPCN Application subject to certain Licensing Conditions. Appendix B, Staff Condition 1, requires Perennial to file a request for CPCN amendment with the Commission for any generation capacity in excess of 8 MW. Additionally, Appendix A, PPRP Condition 2 defines the Project scope and requires that Project modifications be reviewed by PPRP and approved by the Commission. However, to the extent Perennial is able to achieve the 8 MW generating capacity with slightly fewer solar panels, as was discussed in the proceeding by Mr. Anderson and Mr. Seaman, that adjustment should lead to reduced Project impact and would not require a request for modification.

E. Hearing Requirements

1. Appellants

79. Appellants allege several violations of their rights to a hearing under the PUA. Appellants first argue that delegation of the CPCN hearing to the PULJ was unlawful because PUA § 7-207 requires the *Commission* to hold the hearing.⁹⁶ Appellants also cite the public hearing requirements of PUA § 7-207(d)(1)(i) for the proposition that the Commission must jointly conduct the CPCN evidentiary hearing with the Board of County Commissioners.⁹⁷ Appellants state that the County requested to jointly hold such a hearing, and that Appellants “have been patiently waiting for the promised joint hearing in Washington County, where they can testify under oath, call witnesses, present expert opinions, cross-examine, submit documentary evidence, present their arguments and grievances, and generally avail themselves of every right to which participants are

⁹⁶ Opponents Memorandum on Appeal at 8

⁹⁷ *Id.* at 8-9.

entitled under the applicable statute.”⁹⁸ Appellants acknowledge that some Project opponents have participated in the evidentiary hearings held before the PULJ, but assert that they still have a statutory right to the jointly-held evidentiary hearing before a final decision on the CPCN is issued, stating: “In the absence of a compliant statutory hearing, the application cannot be considered.”⁹⁹ Appellants further assert that the Commission must work with the County Commissioners to cooperatively formulate the hearing procedures and standards to which the proceeding will be governed. Appellants argue that “all procedural rulings must be made with the concurrence of each body.”¹⁰⁰

80. Appellants further assert that PUA § 7-207 imposes a geographical hearing requirement—namely, that the hearing be conducted in Washington County—and that the PULJ’s decision to hold the hearings remotely was unlawful.¹⁰¹ Although Appellants acknowledge that emergency legislation was introduced in the Maryland General Assembly (SB430 and HB556 of 2021) to authorize the Commission to conduct CPCN hearings remotely, they assert that the effective date of the bill in March 2021 occurred well after the hearings were conducted in the Perennial proceeding. Additionally, regardless of any retroactive effect the emergency legislation may have, Appellants argue that certain requirements regarding the posting of an information sign at the local venue were not followed.¹⁰²

⁹⁸ *Id.* at 9.

⁹⁹ *Id.* at 10.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 10-11.

¹⁰² *Id.* at 11.

2. Perennial

81. Perennial argues that the Commission clearly has authority under the PUA to delegate to a Commissioner or to a hearing examiner the authority to conduct a public hearing.¹⁰³ Although Perennial concedes that the County requested to jointly conduct a hearing, it asserts that the PULJ subsequently issued a letter of invitation to the County to jointly conduct upcoming public hearings, to which the County never responded.¹⁰⁴ Perennial states that the County and the Opponents participated in the hearings that ensued without raising again their request for a joint hearing.

82. Perennial further claims that the Appellants “confuse the term ‘public hearing’ referenced in Section 7-207 with an evidentiary hearing.”¹⁰⁵ Perennial asserts that the Appellants would not have been entitled to the rights they claim (such as offering witnesses and cross examining opposing witnesses under oath) at the public hearing that is referenced under this statute. Additionally, Perennial states that at the evidentiary hearings conducted by the PULJ, where the Opponents had the rights they claim they were denied, they did not submit pre-filed testimony or proffer witnesses, other than their attorney. Perennial concludes: “It is disingenuous for Appellants to attempt to reverse a certificate because they claim to have been deprived of rights that they chose not to avail themselves of to begin with.”¹⁰⁶

83. Finally, Perennial argues that the Commission had authority to conduct the hearings virtually pursuant to its COVID-19 Continuity of Operations Plan, which was issued in accordance with the Governor’s declaration of a state of emergency to confront

¹⁰³ Perennial Reply Memorandum at 4, citing PUA § 3-104(d).

¹⁰⁴ *Id.* at 4-5.

¹⁰⁵ *Id.* at 6, n. 3.

¹⁰⁶ *Id.* at 6.

the COVID-19 pandemic (hereinafter the “Emergency Order”).¹⁰⁷ Perennial asserts that the Commission had additional authority to hold the hearings remotely through PUA § 2-112(b), which grants the Commission all power “needed or proper” to carry out its functions.

3. Staff

84. Staff asserts that there is no merit to Appellants’ objection that the public hearings were not held jointly with the County. Staff states that the County failed to provide notice that it intended to participate in the two virtual public comment hearings, and waived its right to jointly conduct the public comment hearings by failing to respond to the PULJ’s invitation.¹⁰⁸ Staff further claims that the Commission acted within its authority, pursuant to the Governor’s Emergency Order, to hold the public hearings virtually, stating: “Staff considers that the use of virtual public comment hearings in this proceeding was consistent with the requirements of the CPCN statute and with the Governor’s order issued to mitigate the effects of the COVID-19 pandemic.”¹⁰⁹

4. Commission Decision

85. The Commission denies Appellants’ objection that delegation of the CPCN hearing to the PULJ was unlawful. PUA § 3-104(d) provides that the Commission “may delegate to a commissioner or to a hearing examiner the authority to conduct a proceeding that is within the Commission’s jurisdiction.” Conducting a public hearing is clearly within the jurisdiction of the Commission and is therefore a delegable authority. There is no error in the delegation of this proceeding to the PULJ.

¹⁰⁷ *Id.*

¹⁰⁸ Staff Reply Memorandum at 8.

¹⁰⁹ *Id.* at 9.

86. The Commission also finds no merit in Appellants' contention that the Proposed Order is unlawful because these proceedings were not held jointly with the County. PUA § 7-207(d)(2) requires the Commission to "hold the public hearing jointly with the governing body of the county or municipal corporation in which any portion of the construction of the generating station... is proposed to be located, unless the governing body declines to participate in the hearing." By letter dated February 13, 2020, the County requested "that any public hearing(s) conducted in this matter be conducted jointly with the Board..."¹¹⁰ On August 13, 2020, and again on September 16, 2020, the PULJ sent letters to the County inviting its participation in two virtual public hearings. For example, the August 13 letter stated as follows:

I request that you advise me no later than September 14, 2020,¹¹¹ whether you and/or any County Commissioner wish to sit jointly with me at the public hearing. If I do not hear from you on or before September 14, 2020, I will assume that neither you nor any Commissioner wish to sit jointly with me; however, you or any Commissioner may, of course, participate in the hearing and present whatever relevant statement deemed appropriate.¹¹²

87. The County did not respond to the PULJ's letter. Instead, on September 15, 2020, the County filed a letter opposing the Project, but did not address the PULJ's request for a joint hearing.¹¹³ Subsequently, the County participated in the two evidentiary hearings before the PULJ, were represented by counsel, and presented a witness, but did not object to the lack of a joint public hearing. Given the PULJ's two invitations to jointly conduct

¹¹⁰ Feb. 13, 2020 correspondence of the Washington County Board of Commissioners, Maillog No. 228651.

¹¹¹ The September 16, 2020 letter contained a similar reply-by date of October 19, 2020. *See* Sept. 16, 2020 correspondence of the PULJ to Washington County Board of County Commissioners, Maillog No. 231864.

¹¹² Aug. 13, 2020 correspondence of the PULJ to Washington County Board of County Commissioners, Maillog No. 231446.

¹¹³ Also on September 15, 2020, County Commissioner Keefer submitted comments to the Commission that criticized the Project, but did not request a joint hearing.

the public hearings and the County's silence in response thereto and subsequent conduct, the Commission finds that the County waived its right to jointly conduct the public hearing pursuant to PUA § 7-207(d)(2).¹¹⁴

88. The Commission agrees with Perennial that Appellants have conflated the public hearings required by PUA § 7-207(d) with evidentiary hearings, where witnesses are permitted to present testimony under oath and are subject to cross-examination. Appellants had access to all of those rights in the evidentiary hearings conducted by the PULJ, where they offered County witness Baker and Opponent witness Wantz and cross-examined opposing party witnesses. However, the public hearings required by PUA § 7-207(d) that may, at the County's election, be held jointly with the County, are not evidentiary hearings, but rather hearings for public comment.

89. The Commission finds that the PULJ lawfully held the hearings virtually pursuant to the Governor's Emergency Order, which was issued to mitigate the public health emergency caused by the COVID-19 pandemic. Appellants are correct that PUA § 7-207(d)(1) requires that a single public comment hearing be held in each county in which the proposed generating station is located. However, as a result of the COVID-19 pandemic, the PULJ cancelled the in-person hearing for public comment that had been scheduled for March 26, 2020, in Hagerstown, Maryland.¹¹⁵ Governor Hogan issued Order No. 21-03-09-03—the Emergency Order—which suspended certain State agency

¹¹⁴ The Commission cannot allow the County's failure to respond to the Commission's invitations to indefinitely suspend the procedural schedule. The Commission has a duty to ensure that CPCN proceedings are resolved within a reasonable period of time. *See, e.g.*, PUA § 7-208(f), which requires the Commission to enter a final order resolving the CPCN application within 90 days of the conclusion of the hearing.

¹¹⁵ *See* PULJ's Notice of Cancellation of Public Comment Hearing (Mar. 13, 2020), Maillog No. 229093. A new procedural schedule was issued on June 16, 2020, and on August 12, 2020, the PULJ issued a notice rescheduling the first evening public comment hearing as a virtual meeting held on September 16, 2020.

requirements.¹¹⁶ Specifically, Section IV of that Order (Virtual Hearings and Meetings), provides that “[t]o the extent any statute or rule ... requires a hearing or meeting to be conducted in-person or at a particular physical location, such statute...is suspended to the extent necessary to permit [the agency] to conduct such hearing or meeting, in whole or in part, using videoconferencing, teleconferencing, or other communication technology...”

90. Additionally, pursuant to the Governor’s Emergency Order, the Commission adopted a COVID-19 Continuity of Operations Plan that allowed it to hold public hearings virtually. Pursuant to that Plan, the Commission has held hearings remotely via video teleconference, including weekly administrative meetings, rulemaking hearings, and trial-type evidentiary hearings.¹¹⁷ In a recent offshore wind proceeding, the Commission upheld the adequacy of virtual hearings, finding “[they] have protected the public and Commission staff from the current COVID-19 pandemic, while still affording parties the same rights they would have had at an in-person hearing.”¹¹⁸ Similarly, in the present case, the Commission finds that the virtual public hearings have enabled an

¹¹⁶ Md. Governor Order No. 21-03-09-03 (Mar. 9, 2020, amended Jun. 9, 2020), Section IV. Available at <https://governor.maryland.gov/wp-content/uploads/2021/03/Licenses-Timeframes-2d-AMENDED-03.09.21.pdf>.

¹¹⁷ Case No. 9630, *Application of Delmarva Power & Light Company for an Increase in its Retail Rates for the Distribution of Electric Energy*; Case No. 9645, *Application of Baltimore Gas and Electric Company for an Electric and Gas Multi-Year Plan*; Case No. 9655, *Potomac Electric Power Company’s Application for an Electric Multi-Year Plan*.

¹¹⁸ The Commission previously addressed the issue of the adequacy of virtual hearings during the COVID-19 pandemic. See Order No. 89561, Case No. 9629, *Skipjack Offshore Energy, LLC’s Qualified Offshore Wind Project’s Compliance with Conditions Approved in 2017*, (May 29, 2020), (holding that virtual hearings can accommodate exhibits during an evidentiary hearing for an offshore wind project).

exchange of information among the participants that is substantially equivalent to the exchange that would have otherwise occurred.¹¹⁹

F. Site Plan Approval

1. Appellants

91. Appellants challenge the legality of Licensing Condition 19, which requires that Perennial certify to the Commission and to PPRP that it has designed the Project in substantial conformity to Washington County’s site plan requirements, and that it has received site plan approval from the Washington County Planning Commission prior to the commencement of construction. Appellants note that in *Perennial Solar*, the Maryland Court of Appeals held that local zoning laws are preempted.¹²⁰ Appellants conclude: “It follows that the authority of the Public Service Commission may not be made to depend on site plan approval under a preempted land use regulation.”¹²¹ However, Appellants also cite the PULJ’s statement that “the Commission lacks the subject-matter expertise to determine whether a particular project’s site plan substantially conforms to a jurisdiction’s ordinances.”¹²² Appellants argue that the PULJ has thereby “painted himself into a corner,” by conceding the Commission lacks the expertise to make a final site plan determination, while relying on a preempted County site plan process to meet a necessary CPCN condition.

¹¹⁹ The notices of virtual public hearings in this case *see, e.g.*, August 12, 2020 PULJ Notice of Public Comment Hearing at Maillog No. 231430) provided that members of the public would be able to speak at the hearing through videoconference, and could observe the live stream of the public hearing through the PULJ Division’s YouTube channel. The notices also provided the public with a mechanism for asking questions and for submitting written comments electronically.

¹²⁰ Opponents Memorandum of Appeal at 12.

¹²¹ *Id.* at 13.

¹²² Proposed Order at 98.

2. Perennial

92. Perennial argues that the issue articulated by Appellants is not yet ripe for decision, given that Perennial has not yet submitted a final site plan to the Washington County Planning Commission, and the Planning Commission has not yet opined on the submission.¹²³ Perennial also claims that Section 4.11 of the County's Zoning Code provides that "[a] site plan shall be submitted for review by the Planning Commission for new development ... in all zoning districts," and does not differentiate between new developments initiated specifically under Washington County code, and projects like Perennial's, that are initiated elsewhere.

3. Staff

93. Staff similarly argues that the issue is not ripe for decision, noting that the PULJ fully considered whether a regulatory gap had been created by the *Perennial Solar* decision, but ultimately found the issue was not ripe.¹²⁴

4. Commission Decision

94. The PULJ gave careful consideration to the regulatory gap issue raised by Appellants in his Proposed Order.¹²⁵ He observed, correctly, that *Perennial Solar* clearly enunciated the Commission's authority to preempt local zoning for siting and locating generating stations, but the Court did not address subsequent compliance issues, such as forest conservation, floodplain management, sediment and erosion control, and stormwater management, which are typically addressed by a jurisdiction's planning

¹²³ Perennial Reply Memorandum at 9.

¹²⁴ Staff Reply Memorandum at 10.

¹²⁵ See *Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 47 S. Ct. 294 (1927).

commission.¹²⁶ Historically, once the Commission has authorized the siting of a power plant by granting a CPCN, the respective local jurisdictions have addressed local approvals, compliance, and permits required by local ordinances that were not resolved in the CPCN proceeding and preempted under *Perennial Solar*. For that reason, the language of Condition 19 has been adopted in numerous other solar CPCN proceedings.

95. Both the Applicant and PPRP proposed amending License Condition 19 in an effort to address the Opponents' regulatory gap argument. Perennial proposed to amend the Condition to require that it has submitted its site plan for "review and *comment*" by the County's Planning Commission and Zoning Department.¹²⁷ PPRP asserted that the Commission's broad discretion as the final siting authority would allow it to review and approve a project's final site plan during an administrative meeting in the event the County could not or would not review and approve the site plan.¹²⁸ However, the PULJ found that decisions related to site planning "are best left to those with both the requisite familiarity and expertise."¹²⁹ Additionally, he held that the Project is consistent with the County's zoning ordinance. He therefore concluded that "exercise of the Commission's preemption authority is not a consideration" with regard to Perennial's future site plan submission, and the issue of whether *Perennial Solar* created a regulatory gap is not ripe for decision.¹³⁰

96. The Commission agrees with the PULJ that the issue of whether the Washington County Planning Commission has authority to approve and/or require modification of the

¹²⁶ Proposed Order at 97-98.

¹²⁷ Perennial Post-Hearing Reply Brief at 14. Given the conclusion that this issue is not ripe for decision, the Commission makes no finding on whether it possesses the expertise to approve the site plan that will be submitted by at Perennial at a later time.

¹²⁸ PPRP Post-Hearing Reply Brief at 6-7.

¹²⁹ Proposed Order at 98.

¹³⁰ *Id.*

site plan to be submitted by Perennial at some future date is not ripe for decision. Neither would it be appropriate for the Commission at this time to modify Condition 19 to avoid a hypothetical future where the Washington County Planning Commission refuses to address Perennial’s site plan. There is nothing in the record to indicate that the Washington County Planning Commission will not review the site plan to be submitted by Perennial in good faith and consistent with this Order granting the CPCN.

G. Due Consideration

1. Appellants

97. Appellants’ last contention on appeal is that the Proposed Order fails “to give due consideration to the factors enumerated in the CPCN statute.”¹³¹ Appellants observe that: “Aesthetics, impact on historic sites, site compatibility and consistency with the local comprehensive plan tend to dominate CPCN review,”¹³² but they do not in this section of their appeal enumerate or further explain which factors they contend the PULJ failed to consider.

2. Perennial

98. Perennial argues that the PULJ gave due consideration to the factors enumerated in PUA § 7-207, including the County’s recommendation against the Project, as well as the Project’s effects on the Comprehensive Plan, zoning, historic sites, and property values.¹³³ Perennial further observes that the PULJ found that the Project’s benefits, including its contribution to Maryland’s Renewable Portfolio Standard, outweigh any possible adverse impacts.

¹³¹ Opponents Memorandum on Appeal at 14.

¹³² *Id.*

¹³³ Perennial Reply Memorandum at 2, 7-9, and 11-12.

3. Staff

99. Staff likewise asserts that the PULJ gave due consideration to all of the factors required pursuant to PUA § 7-207.

4. Commission Decision

100. The PULJ gave due consideration to all statutorily required elements enumerated in PUA §7-207. This Order has already discussed the consideration given to the County's recommendation in Section III.A., local zoning in Section III.C., historic sites in Section III.B., and the Project's consistency with County's Comprehensive Plan in Section III.C. The Proposed Order also contains a detailed analysis of the PULJ's consideration of the Project's impact on the stability and reliability of the electric system; economics; aviation safety; air and water pollution; disposal of waste; and efforts to resolve issues presented by the County.¹³⁴ There is no merit to Appellants' argument that the Proposed Order lacked due consideration.

H. Weight of the County's Recommendation

1. County

101. In addition to the issues on appeal collectively presented with the Opponents, the County raises the argument that the PULJ erroneously discounted the weight of the County's recommendation in its role as the governing body of the county in which the proposed generating station is located.¹³⁵ In particular, the County contends that the PULJ erred in concluding it was "appropriate to reduce the weight of the County's opposition based on Ms. Baker's testimony."¹³⁶ The County observes that it

¹³⁴ Proposed Order at 84-96.

¹³⁵ County Memorandum on Appeal at 2.

¹³⁶ *Id.* at 3, citing PULJ Proposed Order at 84.

recommended against the Project, pursuant to PUA § 7-207(c)(1), which requires the Commission to give due consideration to the recommendation of the governing body of the county in which the project is proposed. However, the County states that it also presented the testimony of Ms. Baker in accordance with § 7-207(c)(2) and (c)(3), which addresses the effects of the proposed project on the public and the consistency of the project with the county's comprehensive plan and zoning. The County argues that Ms. Baker did not take a position on the Project, but instead presented testimony on conditions that should be placed on the CPCN, in the event that the PULJ granted the Application. The County asserts that "the recommendation of the governing body in (c)(1) is [not] dependent upon an analysis of the factors of (c)(2)," nor does the statute permit the Commission to "reduce the weight" of the County's recommendation based on an analysis of (c)(2).¹³⁷ The County claims that such a reading would render (c)(1) entirely unnecessary, because "the Commission would be simply considering the second factor twice."¹³⁸

2. Perennial

102. Perennial contends that the PULJ gave due consideration to the County's recommendation, but discounted the weight of the County's recommendation because it was lacking in evidence to support it. In particular, Perennial states the PULJ minimized the weight of the County's opposition to the Project because he found the County's position was contradicted by its own witness. Perennial asserts that the weight to be accorded evidence is within the sound discretion of the PULJ, and that to "unquestioningly accept the County's opposition to a project without considering any

¹³⁷ *Id.* at 4.

¹³⁸ *Id.*

other factors [would] give the County veto power over the project, which is contrary to *Perennial*.”¹³⁹

3. Staff

103. Staff states that the Commission’s obligation pursuant to PUA § 7-207(e)(1) is to give due consideration to the County’s recommendation. In doing so, Staff asserts that the Commission should not “go behind” the County’s statement of its recommendation, but instead give it due consideration in accordance with § 7-207(e)(1).

4. Commission Decision

104. The Commission finds nothing in the record to support the Appellants’ contention that the County was “penalized” for recommending conditions through Ms. Baker. Nor did the PULJ minimize the County’s opposition to the Project based on Ms. Baker’s offering of an alternative position. The Proposed Order clearly provides that Ms. Baker’s testimony “should not be construed as advocating for or against the Project.”¹⁴⁰ Additionally, the PULJ clearly understood that Ms. Baker was offering testimony regarding conditions, assuming *arguendo* that the CPCN was granted. The PULJ stated: “In the event the Commission grants Perennial a CPCN, the County recommended the issues raised in Ms. Baker’s testimony were appropriate to be included as conditions.”¹⁴¹

105. Instead, the PULJ simply took into consideration the fact that Ms. Baker—a County witness—was not able to testify that the Project was consistent or inconsistent with the Comprehensive Plan. Additionally, she testified that the Project conforms to

¹³⁹ Perennial Reply Memorandum at 10.

¹⁴⁰ Proposed Order at 37.

¹⁴¹ *Id.* at 70 and 80, citing County’s Comments at 1-2; County’s Reply Comments at 2.

County zoning requirements.¹⁴² As those were material issues in the CPCN proceeding, the PULJ was not required to ignore them.

106. Irrespective of the PULJ's decision, in reviewing the County's appeal, the Commission understands that the County distinguished between (i) the recommendation of the County to deny the CPCN Application, which was made pursuant to PUA § 7-207(c)(1); and (ii) the argument in the alternative, presented by County witness Baker, regarding what conditions should be placed on the Project in the event that the PULJ granted the Application, which was presented pursuant to PUA § 7-207(c)(2) and (c)(3). It is perfectly permissible for the County to make these arguments in the alternative, and it is not being punished for making them. The Commission has fully considered the recommendation of the County to deny Perennial's CPCN Application, but finds that the benefits of the Project outweigh any negative effects, and that the Licensing Conditions (which were devised and approved in part as a result of Ms. Baker's testimony) further mitigate any impacts from the Project.

I. Project Impact on Property Values

1. The County

107. The County also raises on appeal the issue of the impact of the Project upon property values.¹⁴³ Specifically, the County argues that the PULJ improperly disregarded the opinion of a licensed realtor at the first public comment hearing, which was discounted by the PULJ because the realtor "was not under oath or cross-examined."¹⁴⁴ In response, the County asks rhetorically, "What is the purpose of the public comment

¹⁴² *Id.* at 84.

¹⁴³ County Memorandum on Appeal at 6.

¹⁴⁴ *Id.*, citing Proposed Order at 85.

hearing, since none of the participants of the public comment hearing were under oath or cross-examined?”¹⁴⁵ Similarly, the County protests that the PULJ discounted as “speculative” the testimony of the Opponent’s counsel concerning the Project’s effects on property values, noting that counsel is also a local licensed real estate broker whose testimony was based on personal knowledge and expertise.¹⁴⁶

2. Perennial

108. Perennial argues that the PULJ did not ignore the realtor’s comments. He simply found that the comments—which were verbal only and not accompanied by supporting data—were less persuasive than testimony by PPRP’s expert, which was backed by cited studies.¹⁴⁷

3. Staff

109. Staff asserts that including public comments as evidence in the record would be contrary to Maryland administrative law. Staff observes that pursuant to COMAR 20.07.02.02, testimony must be given under oath, and under PUA § 3-107, the other parties to the proceeding have a fundamental right to cross-examine witnesses. Finally, Staff contends that to be considered part of the record of the proceeding, testimony and documentary evidence must be offered and received into the administrative record, whereas “factual information or evidence not made part of the record may not be considered in the determination of a case.”¹⁴⁸

¹⁴⁵ *Id.* at 6.

¹⁴⁶ *Id.*, citing Proposed Order at 85.

¹⁴⁷ Perennial Reply Memorandum at 12.

¹⁴⁸ Staff Reply Memorandum at 11-12, citing PUA §§ 3-111(b) and 3-113(a)(1).

4. Commission Decision

110. Staff correctly observes that comments made at public hearings do not constitute evidence that can form the basis of a decision in a contested evidentiary hearing. Public comments are not taken under oath, and parties to the proceeding do not have a right to conduct cross-examination of the commenters. In contrast, admissible testimony in an evidentiary hearing must be sworn under oath pursuant to COMAR 20.07.02.02, under the penalty of perjury, and it must be subject to cross-examination pursuant to PUA § 3-107.

111. Nevertheless, the PULJ (and the Commission) still consider comments made at public hearings, and the comments can lead to the introduction of important testimony in the evidentiary proceeding. For example, the fact that the HCWHA was expanded in 2017 to include the Project site was disclosed at the first public hearing—an issue that all of the parties testified to during the evidentiary hearing.¹⁴⁹

112. The PULJ considered the public comments related to potential diminished property value in his analysis of economics. For example, the PULJ discussed public comments that the Project could have negative impacts on tourism if viewshed and scenic byways are not protected.¹⁵⁰ The PULJ also discussed the public comments of a realtor who expressed concern regarding diminished property values, and who “anticipated the property values would be reduced by 20-25% given the close proximity to the Site.”¹⁵¹ However, the PULJ observed that there was no basis provided as to how those percentages were derived, nor was there supporting documentation. He also noted that

¹⁴⁹ Proposed Order at 15, n. 51.

¹⁵⁰ *Id.* at 62.

¹⁵¹ *Id.*

the individual was not under oath or cross-examined.¹⁵² The PULJ did not err by discounting the comments for those reasons.

113. Regarding the testimony of Opponents’ counsel presented during the evidentiary hearing, the PULJ found his testimony “unsupported and largely speculative.”¹⁵³ The PULJ considered the County’s arguments, but ultimately did not find those arguments credible. The Commission finds no error in that conclusion. It is well settled that the PULJ has wide discretion to determine how much weight to accord the evidence.¹⁵⁴

IT IS THEREFORE, this 17th day of September, in the year of Two Thousand Twenty-One, by the Public Service Commission of Maryland,

ORDERED: That the Proposed Order of the Public Utility Law Judge is affirmed.

/s/ Jason M. Stanek _____

/s/ Michael T. Richard _____

/s/ Anthony J. O’Donnell _____

/s/ Odogwu Obi Linton _____

/s/ Mindy L. Herman _____

Commissioners

¹⁵² *Id.* at 85.

¹⁵³ *Id.*

¹⁵⁴ See *Accokeek et al. v. Md. PSC*, 227 Md.App. 265, 309 (2016), citing *People’s Counsel v. Md. PSC*, 52 Md.App. 715, 727 (1982).