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PUBLIC SERVICE COMMISSION

March 5, 2020

Chair Dereck E. Davis
Economic Matters Committee
House Office Building, Room 231
Annapolis, Maryland 21401

RE: INFORMATION – HB1390 – Certificate of Public Convenience and Necessity – Electric Facilities – Study and Procedures

Dear Chair Davis and Committee Members:

House Bill 1390 introduces several procedural and study requirements to the Public Service Commission's Certificate of Public Convenience and Necessity (CPCN) process as well as prohibitions aimed at limiting the effect of local government planning and zoning approvals on the CPCN approval process. Many of the bill's proposed requirements are already part of the CPCN review process, at least functionally, and the stated prohibitions appear to reinforce the Commission's final siting authority for generating stations and transmission lines as affirmed recently by the Maryland Court of Appeals in *Board of County Commissioners of Washington County v. Perennial Solar, LLC*. If enacted, the Commission would be required to adopt regulations to implement certain HB1390 requirements on or before October 1, 2020, which as discussed below would be a difficult time frame to meet.

CPCN Procedural and Study Requirements

HB1390 requires the Department of Natural Resources (DNR) to complete an independent environmental and socioeconomic project assessment report, in addition to any other required study, and submit it jointly with the Department of the Environment (MDE) in accordance with the Commission's procedural schedule for a CPCN application. The joint submission must include the results of the independent study and investigation, a recommendation concerning the CPCN application, and proposed licensing conditions for the construction, operation, and decommissioning of the proposed facility. HB1390 further requires the Commission to send notice and a copy of the CPCN application to the Offices of Planning and Zoning for each county or municipal corporation in which the facilities defined in the CPCN application are proposed to be located. The Commission would also be required to add those Offices to the service list for the CPCN proceeding.

The Commission's CPCN process already incorporates several of these proposed requirements as a matter of Maryland law, Commission regulation, and Commission practice.

For example, once a CPCN application is filed, § 7-207 of the Public Utilities Article requires that notice be given to the governing body of each county and municipal corporation in which any portion of the CPCN facility is proposed to be constructed, and COMAR 20.79.02.02 specifically requires the applicant to provide copies of its application to the local governing body and planning and zoning commission(s) in which the project will be located, among others. Notice is also required to be provided to the governing bodies and members of the Legislature for the counties or municipalities in which portion of the facility is proposed to be located, as well as to all other interested persons. Any interested person can petition the Commission to intervene in the CPCN proceeding. Those who do not wish to participate as a formal party may, instead, request to be added to the Commission's service list to receive copies of documents filed with, or issued by, the Commission.

Under § 7-207(e), the Commission is required to give due consideration to specified statutory factors prior to taking final action on a CPCN application. These factors include the effect of the generating station or transmission line on "economics" and, where applicable, "air and water pollution." The Commission evaluates these factors based on the evidentiary record established by the parties to a CPCN proceeding. Most of the record is established prior to the evidentiary hearing, and the evidentiary record typically closes upon conclusion of the evidentiary hearings. Included in the record in every CPCN proceeding is an independent assessment of the proposed project's environmental and socioeconomic impacts—completed by the Department of Natural Resources, the Department of the Environment, and other State agencies—as well as the State agencies' recommendation for approval (or denial) and any attendant licensing conditions for granting a CPCN.

Solar Photovoltaic Facility-Specific Requirements

HB1390 requires the Commission to incorporate licensing conditions that are specific to solar photovoltaic facilities. These conditions include reasonable setbacks and visual buffering requirements, adherence to storm-water management guidelines, and solar photovoltaic facility decommissioning requirements—conditions that are typically addressed in a Commission order granting a CPCN to a solar facility. Historically, these types of conditions have been recommended by DNR's Power Plant Research Program (PPRP) for solar facilities and adopted by the Commission as part of the issued CPCN.

Specifically, HB1390 requires that commercially reasonable setbacks and visual buffering requirements must use predetermined setback distances and screening plans applicable to all solar facilities in the State, as the Commission adopts by regulation. Commercially reasonable from a business viewpoint is likely to conflict with community viewpoints. Also, it may not be feasible to adopt a regulation with predetermined setback distances and screening plans applicable to all solar photovoltaic facilities in the State, as the Commission currently considers many factors in the evidence before it, on a case-by-case basis.

Regarding storm-water management, HB1390 requires storm-water management guidelines adopted by MDE for solar facilities to be included in licensing conditions. MDE is one of the reviewing State agencies coordinated through PPRP and is able to recommend licensing conditions in accordance with Maryland storm-water management requirements. To that end, compliance with erosion, sediment and storm-water control regulations have become a standard CPCN licensing condition for solar projects.

Where HB1390 requires the use of salvage value in calculating solar decommissioning costs in decommissioning plans, there is a continuous evolution of decommissioning recommendations as the solar power industry grows and experience is gained. The use of salvage value in calculating decommissioning costs as far as thirty or more years into the future may prove challenging. The current market for solar panel recycling is not sufficiently mature to support reliable estimates of salvage value. As for the use of a surety bond, letter of credit or any corporate guarantee to secure the costs of decommissioning, it is worth noting that the purpose of a decommissioning requirement for solar facilities in the State is to ensure that the State, county, and municipal corporation do not bear any financial burden in the event of abandonment. Moreover, the creditworthiness of an applicant may evolve over time after a CPCN is issued, and, in many cases after a CPCN is issued, the project is often sold by the developer to another party. Therefore, corporate guarantees may prove insufficient as decommissioning liability protection instruments, and a surety bond or letter of credit may be needed.

Final Siting Authority for Generating Stations and Transmission Lines

On July 15, 2019, the Maryland Court of Appeals ruled in *Board of County Commissioners of Washington County v. Perennial Solar, LLC* that the Commission is the "ultimate decision-maker" for the siting and location of generating stations that require a CPCN. In that case, which concerned the construction of a large solar facility on agriculturally-zoned land, the Court of Appeals held that PUA § 7-207 "preempts by implication local zoning authority approval for the siting and location of generating stations which require a CPCN. The statute is comprehensive and grants the PSC broad authority to determine whether and where SEGS [Solar Energy Generating Systems] may be constructed." The Court recognized that while the local government is a significant participant in the CPCN process, and local planning and zoning concerns are important in the approval process, "the ultimate decision-maker is the PSC, not the local government or local zoning board. * * * [Local zoning laws] are nevertheless a statutory factor requiring due consideration by the PSC in rendering its ultimate decision."

HB1390 provides that the Offices of Planning and Zoning for each county or municipal corporation in which the CPCN facility is proposed to be located may submit a written report on the consistency of the CPCN application with the local government's comprehensive plan and zoning. However, HB1390 prohibits the Commission from requiring an applicant to obtain a special exemption, conditional use permit, floating zone or other discretionary zoning approval; the Commission cannot deny a CPCN application where the applicant has not received a special exemption, conditional use permit, floating zone[1] or other discretionary zoning approval. Furthermore, HB1390 prohibits counties or municipal corporations from implementing a site plan approval (or other permit or approval) that is inconsistent with or more stringent than the requirements of a CPCN, or delaying issuance of a site plans or any other permits or approvals.

On the surface, the provisions discussed above appear to be consistent with the Court of Appeals' decision in *Perennial Solar*. In effect, a local authority would not be able to unwind the issuance of a CPCN, thereby preserving the Commission's final decision-making authority. However, HB1390 could under certain circumstances create tension with PUA § 7-207(e)(3), which requires the Commission to give due consideration to the consistency of the CPCN

[1] A floating zone is a zoning district that delineates conditions which must be met before that zoning district can be approved for an existing piece of land.

application with the local government's comprehensive plan and zoning. For instance, where a county's comprehensive plan and zoning would require an applicant to obtain a special exception and variance, HB1390 would allow the Commission to issue the CPCN (in the public interest) without requiring that approval. Indeed, the Commission could not deny the CPCN for failure to obtain that approval or condition the CPCN on receiving the approval. In this regard, HB1390 could undermine the legislative intent behind § 7-207(e)(3) if the Commission is not permitted to prescribe action that would align the application with the local comprehensive plan.

Rulemaking Requirement

HB1390 requires the Commission to adopt regulations to implement HB1390 on or before October 1, 2020, which is also the bill's effective date. To implement this requirement, the Commission must observe rulemaking protocol and state procedures. Commission Staff will need to develop and socialize draft regulations with affected stakeholders, including state agencies such DNR and MDE, the solar development community, interested counties and municipal corporations, and others. Consequently, the regulation adoption date should be extended to at least 2021 in order to allow sufficient time for the Commission to solicit stakeholder input and promulgate applicable regulations.

Conclusion

Many of the procedural and notice requirements under House Bill 1390 appear to overlap with existing provisions of the PUA and COMAR. Consequently, as a matter of Commission practice, those requirements are already captured by the existing CPCN application and review process. Except for the prohibitions related to county and municipal corporation approvals, the proposed legislation will not likely have a significant impact on the CPCN process and may not be necessary. The Commission requests that any rulemaking requirement be extended to 2021 to allow sufficient time for the Commission to promulgate any applicable regulations.

Thank you for your consideration of this information. Please contact Lisa Smith, Director of Legislative Affairs, at 410-336-6288 if you have any questions.

Sincerely,

Jason M. Stanek
Chairman