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January 7, 2020

The Honorable Brian J. Feldman
Senate of Maryland
James Senate Office Building, Room 104
Annapolis, Maryland 21401

Dear Senator Feldman:

You asked a series of questions relating to the Certificate of Public Convenience and Necessity ("CPCN") application process for solar energy generating systems ("SEGS") – in particular, the role that local land use interests play in the application process in light of the Court of Appeals' holding in *Bd. of Cty. Commissioners of Washington Cty. v. Perennial Solar, LLC*, 464 Md. 610 (2019) ("*Perennial*"). Your specific questions and my answers appear below.

1. Can the Power Plant Research Program, as part of the CPCN process, require that SEGS go through a separate local siting and zoning process?

It is my view that the Maryland Department of Natural Resources' Power Plant Research Program ("PPRP") may request that a SEGS developer submit a proposed project to local zoning authorities for the purpose of evaluating its consistency with local zoning regulations and identifying local planning and zoning concerns.

Except as provided in Public Utilities Article ("PU") § 7-207.1, a person may not begin construction of a generating station in the State without first obtaining a CPCN from the Public Service Commission ("PSC"). PU § 7-207(b)(1). The PSC may grant a CPCN only after reviewing State agencies and local government have an opportunity to review, evaluate, and comment on the application and after the PSC holds a public hearing in which local government may participate. PU § 7-207(c)(2)(i) and (d).

For generating stations that require a CPCN, "the final decision regarding whether to approve a generating station lies exclusively with the PSC." *Perennial*, 464 Md. at 632. State law provides that the PSC shall take final action on a CPCN application only after "due consideration" of the following:

- (1) the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of

the generating station, overhead transmission line, or qualified generator lead line is proposed to be located;

(2) the effect of the generating station, overhead transmission line, or qualified generator lead line on:

- (i) the stability and reliability of the electric system;
- (ii) economics;
- (iii) esthetics;
- (iv) historic sites;
- (v) aviation safety as determined by the Maryland Aviation Administration and the administrator of the Federal Aviation Administration;
- (vi) when applicable, air quality and water pollution; and
- (vii) the availability of means for the required timely disposal of wastes produced by any generating station; and

(3) for a generating station:

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

PU § 7-207(e).

As part of the CPCN application process, PPRP coordinates with reviewing State agencies to evaluate a proposed generating station's potential impacts on environmental, cultural, and socioeconomic resources in Maryland, pursuant to Natural Resources Article § 3-304. That evaluation, which includes a review of the proposed generating station's consistency with local land use regulations, is included in a Project Assessment Report, which is submitted to the PSC along with the reviewing State agencies' recommendation to grant or deny the CPCN and, if the recommendation is to grant the CPCN, proposed recommended conditions of approval.

In *Perennial*, the Court of Appeals held that PU § 7-207 preempts by implication local zoning authority over the siting and location of generating stations that require a CPCN.

[PU § 7-207] is comprehensive and grants the PSC broad authority to determine whether and where SEGS may be constructed. Local land use interests are specifically designated by statute as requiring

“due consideration” by the PSC. This includes the recommendation of the governing body of each county or municipal corporation in which any portion of the construction of the generating station is proposed to be located, as well as due consideration by the PSC of the consistency of the application with the comprehensive plan and zoning for the respective local jurisdiction.

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

464 Md. 610, 644-45.

It is my view that, for the purpose of evaluating a CPCN application, PPRP may request that a SEGS developer submit a proposed project to local zoning authorities as a part of the CPCN application in order to evaluate the project’s consistency with local zoning regulations and to identify local planning and zoning concerns. As the PSC remains the “the ultimate decision-maker” – with the power to grant a CPCN for a SEGS even when opposed by local authorities – such a request by PPRP is consistent with PU § 7-207 and the Court of Appeals’ *Perennial* decision. In fact, given the recent enactment of PU § 7-207(e)(3),¹ PPRP has adopted this approach in its more recent “completeness” reviews of CPCN applications for generating stations, which are required before the CPCN review process begins. *See e.g., PSC Case No. 9499, In the Matter of the Application of Morgnec Road Solar, LLC for a CPCN to Construct a 45.0 MW Solar Photovoltaic Generation Facility in Kent County, Maryland*, Docket Entry 15 (PPRP indicating deficiency in CPCN application) (Jan. 15, 2019).

2. Can PPRP delay or refuse to carry out its duties under the CPCN process, including providing a recommendation and proposed licensing conditions to the PSC, in deference to any local permit process?

See my response to Question #1. PPRP may delay its review of a CPCN application pending local zoning authority’s initial consideration of the project’s consistency with local zoning regulations.

¹ Ch. 392 *Laws of Maryland* 2017.

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3. Can local governments delay or decline to process or review elements of SEGS that have been approved by the PSC, such as conditioning site plan review or providing discretionary permits required to construct or operate an approved SEGS?

Generally, the PSC adopts conditions to a CPCN that require local site plan approval or permitting. In the event that local authorities do not act, the developer could request that the PSC revisit and revise or modify those conditions, whichever is appropriate. Revisions or modification to initial CPCN conditions are consistent with PSC practice. *See, e.g., Case Number: 9380, In the Matter of the Application of Great Bay Solar I, LLC for a CPCN to Construct a 150.0 MW Solar Photovoltaic Generating Facility in Somerset County, Maryland* (revising approved licensing conditions for a SEGS), Maillog No. 226783 (Sept. 12, 2019); *In the Matter of the Application of Dominion Cove Point, LNG, LP for a CPCN to Construct a Generating Station at the Dominion Cove Point Liquefied Nat. Gas Terminal in Calvert Cty., Maryland, Modification to CPCN, No. 88565, 2018 WL 805669* (Feb. 6, 2018) (approving amendments to the licensing conditions of a previously granted CPCN).

Sincerely

A handwritten signature in black ink, appearing to read "David W. Stamper", with a long horizontal flourish extending to the right.

David W. Stamper
Assistant Attorney General