



February 21, 2024

Chair Brian J. Feldman
Members of the Senate Education, Energy, and the Environment Committee

Re: Earthjustice **opposition** to SB 474:
Certificate of Public Convenience and Necessity and Related Approvals –
Definition of Generating Station
(Critical Infrastructure Streamlining Act of 2024)

Earthjustice¹ opposes the passage of SB 474, the Critical Infrastructure Streamlining Act of 2024. As discussed below, the Public Service Commission’s (“PSC”) Certificate of Public Convenience and Necessity (“CPCN”) and CPCN exemption processes provide important protections which will be lost if the bill is enacted. Moreover, the exception created by the bill is unnecessary for the vast majority of emergency backup generators, who can currently take advantage of the PSC’s CPCN exemption process. Thus, only high energy use facilities will have a need to take advantage of the new exception and impact of these facilities (including their use of hundreds of MW of diesel-powered emergency backup generation) warrants scrutiny from the PSC. The bill has significant unintended consequences, not the least of which is the possible violation of a federal settlement. Earthjustice recommends that rather than address the myriad of issues surrounding the operations of high energy using entities (such as data centers, cannabis facilities and cryptocurrency operations) in a piecemeal fashion, the General Assembly should determine best practices in a comprehensive, cohesive manner.

I. BACKGROUND

a. The CPCN Process

The CPCN process is a nationally recognized, comprehensive process established pursuant to the Power Plant Siting and Research Act of 1971 (and subsequent revisions) for evaluating the effects of proposed power generation facilities on surrounding communities, involving— among other things—the notification of specified stakeholders, the holding of public hearings, the consideration of recommendations by State and local government entities, and the consideration of the project’s effects on various aspects of the State infrastructure, economy, and environment.

¹ Earthjustice is a non-profit public interest environmental law organization that represents other non-profits free of charge.

Before taking final action on a CPCN application, the Commission must give due consideration to recommendations of the governing body of each county or municipality in which any portion of the project is proposed to be located and consider various aspects of the State infrastructure, economy, and environment. During the 2023 Legislative Session, the General Assembly enacted HB 692, granting counties and municipalities the authority to approve or deny any local permit required under a CPCN issued by the Commission, providing that a county or municipality must approve or deny such a permit within a reasonable time and in accordance with local laws, to the extent that local laws are not preempted by State law.

In the case of emergency backup generators, the CPCN process can be more streamlined, since the backup generators will not be grid-connected. However, that process still requires the applicant and the Power Plant Research Program (“PPRP”) to consider alternatives. Although the impact of the generators on the stability and reliability of the electric system need not be examined in the way that would apply to the construction of new base load capacity, diesel generator fuel storage, waste disposal, air and noise quality issues still warrant review.

b. Generation Station Exemptions

In 2001, PUA § 7-207.1 was added to the CPCN statutory scheme. Subject to an opportunity for public comment and public hearing requirements, pursuant to PUA § 7-207.1(a)(1), the Commission may exempt from the PUA § 7-207 CPCN requirements construction of a generating station designed to provide on-site generated electricity if (1) the capacity of the generating station does not exceed 70 megawatts, and (2) the electricity that may be exported for sale from the generating station to the electric system is sold only on the wholesale market pursuant to an interconnection, operation, and maintenance agreement with the local electric company. The purpose of this alternate process is to facilitate and simplify regulatory approvals for these smaller generators.² As long as the applicant submits a completed application, with all required documentations, the approval process should take approximately 30 to 60 days to complete.

II. The CPCN process provides important protections which will be lost under SB 474

At the outset, it is important for the Committee to bear in mind that the *vast* majority of proposed emergency backup generators are not subject to the CPCN process. Only generators over 70 MW are required to obtain a CPCN. Hospitals, other medical facilities and almost every other entity relying on an emergency backup generator will only need a small generator (3MW-10MW) and would never need to seek approval for a generator over 70 MW. Thus, these entities can use the current CPCN exemption process and obtain the necessary exemption in a matter of a few months. Moreover, if the emergency backup generator is 2 MW or less (as many are) the

² Under COMAR 20.79.01.02B(23)(b), a generating unit less than or equal to 2 MW is not considered a generating station, and no CPCN exemption is required.

entity desiring to construct that generator need not apply to the PSC at all. Therefore, as a practical matter, SB 474 is creating an exception from the review process for high electricity using facilities, who are the only entities needing emergency generators of 70 MW or more.

Among other things, the CPCN regulations offer important protections to those Maryland residents living and working near the proposed emergency backup generator construction site. Pursuant to PSC regulations, the applicant is required to do an Environmental Justice screening and must send a letter notice of the filing of the application to all residential and business addresses within a 1-mile radius of the proposed facility site for an urban area, and within a 3-mile radius of the proposed facility site for a rural area, and the letter notification must include a variety of specific information including:

- (1) A fact sheet on the filed application, including the applicant's name and website;
- (2) The type of project to be constructed and its nameplate capacity;
- (3) The project's location;
- (4) The assigned case number;
- (5) The location at which the public may physically review the application;
- (6) The applicant's designated community liaison officer;
- (8) The prehearing conference date;
- (9) The deadline for filing petitions to intervene;
- (10) A fact sheet concerning the Certificate of Public Convenience and Necessity process; and
- (11) Information on how to access the applicant's EJSCREEN Reports³

The applicant is also required to designate a community liaison officer and hold at least one public meeting regarding the project.⁴ These protections are lost for emergency backup generators under the bill. Importantly, the overall cumulative size of the high energy usage facilities backup generation will be equivalent to a utility scale generating station. Moreover, these emergency backup generators will not be limited to operating only during an "emergency".⁵ Emergency backup generators need to be tested on a monthly basis. If, for example, the facility has 120 3 MW emergency backup generators, 4 emergency generators would need to be operated for at least an hour each day in order to ensure that all are tested every 30 days, affecting the community through diminished air quality and noise. The loss of participation in PSC's consideration of these projects is a significant impediment to transparency and residents' participation rights.

³ See COMAR 20.79.02.02 D.

⁴ See COMAR 20.79.01.04 B.

⁵ Earthjustice notes that neither the term emergency nor critical infrastructure is defined in the bill.

The CPCN process is a one-stop shop. A variety of State agencies including Maryland Department of the Environment, Maryland Energy Administration, and Department of Natural Resources work together to present a comprehensive position on the applicant's request. As each agency considers whether to issue its permits separately, a holistic consideration of the project will be lost. Also lost will be the requirement that the applicant and the Power Plant Research Program ("PPRP") consider alternatives to the proposal. Not only will this comprehensive review be missing for large emergency backup generators, but interested stakeholders would be forced to participate in a number of proceedings before different state agencies rather than being able to conserve their time and resources through participation in the CPCN process.

Finally, the importance of an evidentiary process cannot be overstated. Applicants make a myriad of claims in their application which need to be examined by unbiased parties. For example, the applicant may claim that a diesel backup generator is the only type of emergency generation which will work for their facility. Given the impact of diesel generator use on air quality, and concerns regarding noise, diesel generator fuel storage, and waste disposal, the Commission and interested parties should be permitted to assess whether alternatives are available for some or all of the backup generation, as well as assess whether appropriate steps are being taken to protect the public during use of the backup generators.

III. SB 474 May Violate the Federal Settlement Reached Between the Commission, the U.S. Department of Transportation (DOT) and the U.S. Environmental Protection Agency (EPA)

As noted above, the CPCN process includes regulations designed to protect the residents in the surrounding community's right to participate in the CPCN proceeding. These regulations are the product of a complaint settlement. SB 474's circumvention of these rights may be viewed as violating the settlement agreement.

On June 14, 2016, the DOT and EPA received a complaint alleging that the public engagement process prior to the decision to issue a CPCN and the process to issue that CPCN was discriminatory under the Civil Rights Act of 1964 and Title VI of DOT's regulations. To resolve this complaint, the federal agencies, the PSC, MDE and DNR entered into a settlement agreement. The settlement required that for a fossil fuel generation facility over 70 MW, the PSC would adopt regulations providing for meaningful feedback from the community. These regulations are required to include a community liaison officer and at least one public meeting. The PSC codified the requirements at COMAR 20.79.02.02

Preventing surrounding communities from easily learning about the potential construction of hundreds of MW of diesel generation in their neighborhood as well as denying them a comprehensive process within which to voice their concerns certainly violates at least the spirit of the settlement agreement and raises significant environmental justice issues.

IV. The General Assembly Needs to Comprehensively Examine the Myriad of Issues Surrounding the Growth of High Energy Usage Facilities In Maryland

Maryland will potentially undergo a massive economic, technological, and environmental upheaval, all centered around the activities of a few high energy using facilities. The explosive growth of these facilities represents a major challenge to achieving the climate mandates set forth in Maryland law.

Virginia represents a cautionary tale regarding how **not** to introduce large-scale data centers into the State. As of late 2022, data centers in Virginia accounted for 20% of Dominion Energy's electricity sales and that demand growth is projected to more than double peak load by 2040. Disturbingly, Dominion is using this high load growth from data centers as the rationale for leaving in place existing fossil-fuel generation and to support its plans to construct a new gas-fired power plant. The sheer number and scale of Virginia data center proposals and the accumulation of so many data centers led to a severely constrained electric grid in Virginia and increased reliance on polluting backup diesel generators. Moreover, while many data centers make clean energy and sustainability commitments, there is no way to clearly evaluate these claims due to non-disclosure agreements and the general secrecy surrounding the industry.

On Dec. 11, 2023, Virginia authorized an extensive study into recent and expected trends within the data center industry and an assessment of impacts on Virginia's natural resources, historic and cultural resources, current and forecasted energy demand and supply, policies to transition from fossil fuels to renewable energy sources, and local residents (specifically noise pollution, decreasing property values, and adverse visual impact). The study would also estimate the impact of the data center industry on local revenue, identify siting considerations and guidance that state agencies could provide to local governments, and assess possible economic benefits of more geographically diverse data center industry growth. Sadly, for Virginia, this may be a case of closing the barn door after the horse has escaped. Maryland should not make the same mistake.

The General Assembly should resolve the issues concerning who is going to pay for the increased energy costs and what are the implications for Maryland's air quality, climate goals, water resources, health, and the environment prior to the construction of the high energy using facilities such as data centers, cannabis facilities and cryptocurrency operations. Like Virginia, Maryland should assess of impacts of these facilities on Maryland's natural resources, historic and cultural resources, current and forecasted energy demand and supply, policies to transition from fossil fuels to renewable energy sources, siting considerations and the impact on local residents (specifically noise pollution, decreasing property values, and adverse visual impact). Maryland must make a conscious decision regarding whether ratepayers will subsidize new transmission infrastructure and whether the public will be forced to compromise on Maryland's clean energy and conservation goals in order to meet the massive electricity demand caused by a few private industries.

Earthjustice strongly urges an **unfavorable** report for SB 474.

Thank you in advance for your support. Should you have any questions, please contact me at smiller@earthjustice.org.

Respectfully submitted,



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