

IN THE MATTER OF THE APPLICATION
OF MILLS BRANCH SOLAR, LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO CONSTRUCT A
60 MW SOLAR PHOTOVOLTAIC GENERAT-
ING FACILITY IN KENT COUNTY,
MARYLAND

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BEFORE THE
PUBLIC SERVICE COMMISSION
OF MARYLAND

CASE NO. 9411

Issued: January 10, 2017

PROPOSED ORDER OF PUBLIC UTILITY LAW JUDGE

Appearances:

F. William DuBois, Esquire, on behalf of Mills Branch Solar, LLC.

Sandra S. McLemore, Esquire, and Steven M. Talson, Esquire, on behalf of the Department of Natural Resources, Power Plant Research Program.

Lloyd J. Spivak, Esquire, on behalf of the Staff of the Maryland Public Service Commission.

Theresa V. Czarski, Esquire, on behalf of the Office of Maryland People's Counsel.

Christopher F. Drummond, Esquire, and Anthony Z. Roisman, Esquire, on behalf of Keep Kent Scenic, Inc.

G. Mitchell Mowell, Esquire, on behalf of The County Commissioners of Kent County.

I. PROCEDURAL HISTORY

On December 14, 2015, an Application ("the Application") was filed by Mills Branch Solar, LLC ("Mills Branch" or "MBS" or "the Applicant") requesting a Certificate of

January 10, 2017

In the matter of the application *
of Mills Branch Solar, LLC for a *
Certificate of Public Convenience *
and Necessity to construct a *
60 MW solar photovoltaic generat- *
ing facility in Kent County, *
Maryland *

Case No. 9411

To All Parties of Record:

Enclosed please find a copy of the Proposed Order of Public Utility Law Judge filed today in the above-entitled matter.

This Proposed Order will become a final order of the Commission on February 10, 2017, unless before that date an appeal is noted with the Commission by any party to this proceeding, or the Commission modifies or reverses the Proposed Order or initiates further proceedings into this matter. Any appeals noted must be filed with the Commission's Executive Secretary, David J. Collins, at 6 St. Paul Street, Baltimore, Maryland 21202-6806. No appeal received via the Commission's facsimile machine or by Email (except those that are E-filed using the Commission's electronic dropbox) will be considered.

Very truly yours,

Leatrice Williams
Administrative Aide

lw
Enclosure

Public Convenience and Necessity ("CPCN") to construct a 60.0 megawatts ("MW") solar photovoltaic ("PV") generating facility in Kent County, Maryland, which will be known as the Mills Branch Solar Project ("the Project"). The Application also included a request for a waiver of the two-year notice requirement in the Public Utilities Article ("PUA"), *Md. Code. Ann.*, § 7-208(c)(1). The Application included an explanation of the CPCN standard and addressed the filing requirements. Additionally, the Application included an Environmental Review Document ("ERD") and the direct testimony of its witnesses, Tyson J. Utt, Director of Development for Apex Clean Energy, Inc. ("Apex") and Lisa R. Walker, Senior Scientist for Environmental Consulting & Technology, Inc. ("ECT").

On December 16, 2015, the Commission docketed the application as Case No. 9411 and delegated it to the Public Utility Law Judge Division.¹ On December 18, 2015, the Applicant filed a Certificate of Service indicating that the respective members of the Maryland General Assembly were notified in accordance with PUA § 7-207(c)(1)(iv-v).

On January 12, 2016, a pre-hearing conference was held at which a procedural schedule was agreed upon and adopted. The Maryland Office of People's Counsel ("OPC"), the Commission's Technical Staff ("Staff"), and the Department of Natural Resource's Power Plant Research Program ("PPRP") entered their

¹ See ML 180293.

appearances. On January 28, 2016, a Petition to intervene was filed on behalf of the County Commissioners of Kent County ("Kent County" or "KC"). The petition was granted and KC was added as a party.

On March 30, 2016, MBS filed the supplemental testimony of Tyson J. Utt.

On March 31, 2016, Kent County filed a Motion ("the Motion") for a pre-hearing ruling on whether the County's Land Use Ordinance ("LUO") was preempted by the Commission's authority, and requested that the Application be denied as not complying with the LUO.

On April 6, 2016, a Notice of Modified Procedural Schedule was issued setting the date, time and location of both the evidentiary and public hearings. Additionally, pursuant to PUA § 7-207(d)(2), I sent William W. Pickrum, President of the Board of Kent County Commissioners, a letter inviting the Kent County Council to sit jointly with me at the public hearing.

On April 18, 2016, Kent County filed the Direct Testimony of Amy Moredock, the Director-Department of Planning, Housing and Zoning of Kent County.

On April 22, 2016, a Petition to Intervene was filed by Keep Kent Scenic, Inc. ("KKS"). On April 26, 2016, a hearing on pending motions was held, at which the Petition to Intervene of KKS was granted. In ruling on Kent County's Motion, I found that the authority of the Commission does preempt the application

of the KC land use ordinance. Therefore, KC's Motion for a denial of the Application was denied.

On May 26, 2016, KKS filed the Direct Testimony of Francis J. Hickman, owner of Francis J. Hickman Farm Management and Consultation; the Direct Testimony of Elizabeth Watson, AICP, Principal and President, Heritage Strategies, LLC., and the Direct Testimony of Janet Christensen-Lewis, member of the Renewable Energy Task Force ("RETF") of Kent County; and Staff filed the Direct Testimony of De Andre T. Wilson, Electrical Engineer in the Commission's Engineering Division, which testimony contained Staff's recommended licensing conditions.

On May 27, 2016, PPRP filed the Direct Testimony of Susan Gray, Program Manager; of Peter D. Hall, a consulting economist in regional economics and socioeconomic impact assessments; of Steven L. Estomin, Senior Economist and Principal with Exeter Associates, Inc.; of Diane Mountain, Senior Project Manager at Environmental Resources Management, Inc.; and of Steve Harriott, Ecologist and Professional Wetlands Scientist with Versar, Inc. It also filed its ERD and initial recommended licensing conditions for the Project. On June 3, 2016, PPRP filed the Supplemental Direct Testimony of Peter D. Hall.

On June 10, 2016, MBS filed an Archaeological Survey of an 8.0 acre parcel contained within the larger project site, which is a high probability area for archaeological resources. It also filed the Rebuttal Testimony of Ellen Brady, Senior Associate at Stantel Consulting Services, Inc. ("Stantel"); of

Jeffrey J. Meling, Senior Vice President of ECT; and of Tyson J. Utt, along with a study by Mangum Economics on the economic and fiscal benefits of the Project to Kent County and to the State of Maryland.

On June 17, 2016, KKS filed the Surrebuttal Testimony of Elizabeth Watson.

On June 17, 2016, PPRP filed the Surrebuttal Testimony of Susan T. Gray and of Steven L. Estomin. It also, on that same date, filed updated Recommended Licensing Conditions. On June 21, 2016, PPRP filed a copy of correspondence between it and the Eastern Shore Heritage, Inc., Stories of The Chesapeake Heritage Area.

On June 21, 2016, a hearing for public comment was held in Chestertown, Maryland, at which the Commissioners of Kent County jointly sat with this writer, and at which a large number of the public appeared. Evidentiary hearings were held in Chestertown on June 22-23, 2016, at which all pre-filed testimony was entered into the record of this case.

PPRP also filed, on July 7, 2016, its Final Recommended Licensing Conditions and a copy of a letter dated July 6, 2016 to it from the Director of the Maryland Heritage Trust ("MHT"). In response to this filing, on July 18, 2016, KKS filed a Petition to Reopen the Record to allow the last filing by PPRP to be admitted into the record and to allow cross-examination of the witness who supported that filing. OPC supported the KKS's request to reopen the record; while MBS,

Staff, and PPRP opposed the reopening of the record. A hearing on the motion was held on August 2, 2016, and the motion was granted in part. The ruling allowed for only limited cross-examination of the witnesses supporting the evidence to be admitted.

On August 25, 2016, PPRP filed the Supplemental Testimony of Susan Gray. A hearing was held on August 29, 2016, for the limited purpose of accepting PPRP's filings subject to limited cross-examination.

Post-hearing briefs were filed by the Parties and the arguments therein will be discussed below.

II. Summary of the Application and Testimony

A. Mills Branch Solar

Witnesses Utt and Walker sponsored the Applicant's ERD. The ERD contained a Project Overview which described the Applicant, the Project and the permits and approvals needed (Section 1); a site review and description of the Project's potential effect on air resources, geohydrology, surficial hydrology, ecology, noise, cultural resources, land use and visual quality (Section 2); a facility description of The Project's operational features, its impact on State economics, its effect on the State's electrical system, and a construction schedule (Section 3); the impacts and mitigation measures related to: air quality, geohydrology, surface water, ecological resources (*i.e.*, vegetation; wetlands and streams; wildlife; and

endangered species); impacts caused by noise; and cultural resources, socioeconomic, and land use impacts (Section 4), as well as attached supporting appendices.

According to the Applicant's ERD, the Project will be located on two parcels that total 370 acres, located 1.6 miles north of the town of Chesterville and 2.5 miles south of Galena in Kent County, Maryland.² Once completed, the Project will sell energy into the PJM Interconnection, LLC ("PJM") wholesale market³ by an interconnection with the Delmarva Power & Light Company ("DPL") system at the Kennedyville-Massey 69 KV circuit.⁴ The Project will consist of approximately 250,776 320-watt solar PV panels.⁵ MBS estimated that the Project will cost approximately \$130 million to \$150 million.⁶ MBS indicated that approximately 200 personnel will work on the construction of the Project, which will use many local workers.⁷

MBS asserts that the Project site consists of agricultural fields.⁸ Further, MBS states that the Project will not impact upon any water resources or wetlands on the site, according to the ERD.⁹

² The Application at 3.

³ ERD Sec. 3.1 at 3-1.

⁴ The Application at 5.

⁵ *Id.* at 2.

⁶ ERD Sec. 4.7.1.1.

⁷ *Id.*

⁸ The Application at 3.

⁹ ERD Sec. 3.2.3 at 3-9.

MBS further states that the Project will not have any permanent sources of air pollutants and only very limited impacts during construction. There are no required air emissions-related permits which MBS says that it needs to obtain.

MBS represents that there are no known animal species or vegetation on site that are endangered or threatened by the Project, as it consists of cleared agriculture fields that are not suitable habitat.

In terms of noise, MBS indicated that based upon the existing noise levels in the area and the limited potential for the Project to result in noise levels beyond those already present; no measurements of background noise were taken.¹⁰

No known archaeological resources or areas which would be eligible for listing as a cultural resource were found on the site, as stated in the ERD.¹¹

MBS asserts that the site it selected is ideally located for this type of power plant. It is not in the Chesapeake Bay Critical Area; it is undeveloped and unforested. It is in a region of high power demand, has ideal conditions for solar generation, and has the necessary infrastructure. Further, the site is without any negative factors that cannot be mitigated. MBS asserts that the impact on the local and State economies will be positive and the Project will enhance the stability and

¹⁰ ERD Sec. 2.2.5 at 2-43.

¹¹ ERD Sec. 2.3.2 at 2-48.

reliability of the electric system in this region, as well as help Maryland reach its goals for renewable energy levels.

MBS acknowledges that the site is in a location that is zoned for solar installations that are much smaller than the proposed Project,¹² but asserts that in all other respects it does comply with the zoning requirements or it can mitigate any negatives that zoning seeks to avoid.¹³ In addition, MBS claims that the Project is only a temporary use of the land which will be returned to its existing state when the Project is decommissioned.¹⁴

Mr. Utt stated that the zoning in Kent County that would allow a project of this size consists of very small areas that are already developed or broken into small parcels and subject to other negative features.¹⁵ Therefore, he represented that the site selected for the Project is one of the limited appropriate parcels in the County.

MBS also disputes that the Maryland Heritage Areas Program Law ("Heritage Law" or "Law") is applicable to the entire Stories of the Chesapeake Heritage Area ("SCHA") as they assert that the Law only applies to impacts on individual properties,

¹² Moredock Direct at 3: 6-7., Utt Suppl. Direct., at 1: 19-20.

¹³ Utt Suppl. Direct at 8.

¹⁴ *Id.* at 11, 19-20.

¹⁵ *Id.* at 7: 10-11.

and none are present here.¹⁶ MBS asserts it carefully planned the Project to be compatible with the goals of the SCHA.¹⁷

Witness Utt in his Rebuttal Testimony took issue with the application of the Forest Conservation Act as referenced in PPRP's Proposed Condition 3. He testified that there is minimal tree clearing which is more than mitigated by the planned visual screening afforestation. MBS also disputes PPRP Condition 13, as it would give Kent County open-ended authority, and essentially veto power, over the Project's landscaping plan; therefore, Mr. Utt stated, "this condition should not be part of a CPCN."

In addition, Witness Utt wants the salvage value of the Project incorporated into PPRP Condition 21(a).¹⁸ This amount would contribute to reducing the total of the decommissioning costs for which PPRP wants MBS to be responsible. He also wants PPRP to clarify that either a performance/surety bond or letter of credit is acceptable as compliance. MBS further disputes the ability of MBS to comply with the requirement of Proposed Condition 21(b), which obligates MBS place the site into an agricultural easement program. MBS argues that the requirements to do so are beyond MBS's control. Further, Mr. Utt questions the appropriateness of the requirement in PPRP Condition 21 that land

¹⁶ Brady Rebuttal at 6: 7-11.

¹⁷ *Id.* at 8.

¹⁸ Utt Rebuttal at 10-16.

be set aside for agricultural use as it serves no appropriate purpose.¹⁹

Witness Utt also states that PPRP Condition 23 should be rejected as it requires compliance with the entire Kent County LUO which is not possible, as full compliance would prevent the Project from being built. He further states that this Condition's parameters are unspecific, as the LUO is under review for revisions.²⁰

B. Kent County

Kent County's position is that the authority of the Commission does not preempt Kent County's Land Use Ordinance requirements for this size utility solar project. The Project is sited in an Agricultural Zoning District ("AZD") that requires a special exception for a solar array, for which the Project does not qualify.²¹ As witness Moredock²² stated, a project over five acres in size is allowed in other zoning categories, but not in areas zoned as AZD. The AZD is designed to encourage agriculture and to limit other uses. Lands zoned as AZD are principally composed of Class I, II and III soils, which are the top quality of soils for agricultural production, according to witness Moredock.²³

¹⁹ *Id.* at 12

²⁰ *Id.* at 3.

²¹ Moredock Direct at 3. See LUO Article V, Section 1.1.

²² Moredock Direct at 3

²³ *Id.* at 4: 18.

In November 2010, the Kent County Renewable Energy Task Force ("RETF") submitted a report to the County recommending that the County allow any sized solar installations to be built, subject to reasonable limits on the location.²⁴ This report was adopted by the County as part of its Land Use Ordinance.

KC asserts that there is no express or implied state pre-emption of its Land Use Ordinance. KC opines that this case does not involve a prohibition of utility-sized solar projects but only requires that they be sited in certain zoned areas of the county. This requirement is designed to allow for all sized solar systems in the County, subject to its reasonable limitations as to their location.²⁵ Nor is it a ban by the County but only the exercise of a reasonable County interest. KC asserts that the exercise of the County's power to create zoning districts does not conflict with the powers of the Commission to regulate utilities in Maryland.

KC asserts this Project is not proposed by a regulated utility, there is no consideration the public interest as part of MBS's analysis, and MBS is not subject to the Commission's regulation and oversight. KC offers that the Project is proposed by a private business that is no different from any other for-profit-enterprise. Kent County states no other location was even considered by MBS; therefore, KC opposes the granting of a CPCN

²⁴ *Id.* at 6: 7-8.

²⁵ *Id.* at 6: 11-15.

for a solar project of this size at this location. KC opines that the opposition by the local government should be the deciding factor as to where this size project should be sited in KC, as it is the local government that has the duty and the judgment to determine the correct character of the County. All of the local elected officials (Public Comment section below) who have expressed an opinion are in opposition to this Project at the selected location chosen by MBS.

C. Keep Kent Scenic, Inc.

KKS witness Watson asserted the site selected by MBS is in the Chesterville/Morgan Creek District of the Heritage area, which area has large viewsheds of working farm landscapes that could be compromised by the Project, and which impairment could not be mitigated by landscaping.²⁶ The impairment to the viewshed may also harm the County's tourist industry due to the change it would make to the natural setting currently in place. The unnatural screening, proposed to mitigate the industrial look of the Project, would also alter and damage the viewshed by adding an artificial-looking feature to the natural setting. KKS witness Christensen-Lewis asserts there are other locations in KC that are zoned for this size project, which are in areas that would not cause harm to the integrity of the Heritage area or to the County's tourism industry.

²⁶ Watson Direct at 29: 8-18.

KKS also posits that the statutory and case law does not support a finding that the authority of the Commission preempts the KC Land Use Ordinance. KKS points out that MBS is not a public service company and does not distribute electricity to retail electric customers. KKS opines, in its briefs, the facts and case law support its position that there is no express preemption,²⁷ no conflict preemption,²⁸ and no preemption by implication²⁹ of local zoning requirements. KKS urges that a finding of preemption by the Commission would also conflict with the Maryland Heritage Area Law ("MHAL") and with the Agricultural Land Preservation Law ("ALPL").

Ms. Christensen-Lewis testified the site selected does not comply with the KC comprehensive plan, which was based upon the finding of its RETF. The RETF was committed to supporting agriculture and preserving cultural, historic, and archeological resources while still allowing for all sized solar facilities.³⁰ The final RETF plan, as KC claims, was a compromise between renewable-energy development and preservation of the culture and rural character of KC. KKS states it would be wrong to ignore these efforts which found the correct balance for KC.

KKS opines that the MHAL requires the activities of State agencies must have no adverse effect on the resources of a

²⁷ Citing *Ad + Soil, Inc. v. Queen Anne's County Commissioners*, 307 Md. 307, 324 (1986).

²⁸ Citing *Talbot County v. Skipper*, 329 Md. 481, 487 (1993).

²⁹ Citing *Board v. Harker*, 316 Md.683, 697 (1989).

³⁰ Christensen-Lewis Direct at.5-8.

certified heritage area unless there is no prudent and feasible alternative.³¹ KKS states that the licensing by state agencies of this project is state action as defined by this provision of the law.³² This finding would require alternate locations be considered as a test of whether feasible alternative sites exist.³³

KKS witness Watson testifies the Stories of the Chesapeake Heritage Area qualify as a "Historic Vernacular Landscape."³⁴ Ms. Watson states the Chesterville/Morgan Creek District was certified by the MHAL in April 2005: it is one of the oldest working landscapes which is still intact and which demonstrates colonial and early American landscapes. According to Ms. Watson, this unique landscape would be damaged by placing the Project in the middle of this heritage area. Further, the tourism economy of KC would be harmed by placing the Project in the middle of an historic landscape, according to Ms. Watson. Ms. Watson further claims the Project would be a major change to the area, threatening the very reason this area was given a heritage designation.³⁵ Ms. Watson further states that none of the proposed licensing conditions can mitigate the damage that would occur if the Project is sited where it is proposed. She asserts there are other feasible locations in KC that would avoid all the negative

³¹ Watson Direct at 13: 12-15.

³² COMAR.14.29.05.01(2)B and Annotated Code of Maryland, Maryland Administrative Procedure Act, State Government Article, Sec. 10-201, et seq.

³³ Watson Surrebuttal at 2:20 through 4:12.

³⁴ Watson Direct at 6:18-19.

³⁵ Id. at 29: 13-18.

impacts of the proposed site, while still providing all the benefit MBS asserts will result from the Project.

KKS witness Hickman's testimony disputes the findings of the economic analysis submitted by MBS as to the minor value of the loss of prime farm land to the economy of KC,³⁶ and as to the loss to farm-related businesses by the subtraction of 370 acres of prime farm land from agricultural use.³⁷ He states the MBS economic impact analysis is understated and inaccurate.

D. PPRP

Witness Susan Gray is a Program Manager for PPRP and is responsible for the management, oversight, and analysis of environmental impacts. Her Direct Testimony provided a summary of the findings of PPRP and she introduced the testimony of its expert witnesses.

PPRP addressed the statutory issues required after review of MBS's filings. After PPRP conducted an independent assessment, it developed licensing conditions it believes will allow the Project to be granted a CPCN and which will allow it to operate in compliance with all legal requirements.

PPRP took no position on the issue of the applicability of KC's zoning restrictions, but did include in its

³⁶ Hickman Direct at 3 (asserting that prime farm land in KC is valued at \$7500-\$9000 per acre).

³⁷ Hickman Direct at 4.

own conditions the KC requirements for erosion and sediment control and Forest Conservation Act compliance.³⁸

PPRP found the Project would help meet the State's Renewable Portfolio Standards and does not harm the agricultural interest of KC. PPRP did amend the language of its proposed conditions³⁹ to clarify questions raised by MBS and KKS on the Forest Conservation requirements, the value of decommissioned materials, and requirements for consultation with MHAP and Eastern Shore Heritage, Inc. ("ESHI"). PPRP asserts this consultation will allow the Project to go forward while mitigating the alleged negatives as to its location and viewshed impacts.⁴⁰

Witness Dr. Hall did the study of socioeconomic impacts for PPRP. His findings included a positive economic impact⁴¹ with a very small impact upon agricultural land uses in KC. ⁴² He found no negative impacts upon transportation⁴³ or cultural resources. In addition, he found only small impacts upon safety issues⁴⁴ or property values.⁴⁵

³⁸ Gray Direct at 6-7.

³⁹ PPRP Ex.14, Final Proposed Licensing Conditions.

⁴⁰ Gray Supplemental at 1-3.

⁴¹ Hall Direct at 3.

⁴² *Id.* at 5.

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 11.

⁴⁵ *Id.* at 14.

Witness Mountain found no negative impacts caused by noise pollution,⁴⁶ or by electromagnetic fields, or on water assets.⁴⁷

Witness Harriott testified on ecological and wetland issues. He found no adverse impact on vegetation resources,⁴⁸ on wildlife resources,⁴⁹ or to wetlands or streams.⁵⁰

Witness Estomin's Surrebuttal Testimony addressed the loss of the "critical mass" issue (the negative impact on farm related businesses due to the loss of farm acreage caused by the Project) which he found to be of such small impact as to have no effect on PPRP's conclusions.

E. Office of People's Counsel

OPC did not sponsor any testimony, but did agree with Staff's position that the authority of the Commission did preempt the local zoning restrictions of KC for the site selected by MBS.

F. Staff

Mr. Wilson described the typical CPCN approval process, the Project, and the interconnection process, which include several studies performed by PJM. The required PJM studies include a Combined Feasibility/ System Impact Study and a Facilities Study Report. MBS is also required to enter into an

⁴⁶ Hall Direct at 2.

⁴⁷ *Id.* at 3.

⁴⁸ Hall Direct at 4.

⁴⁹ *Id.* at 6.

⁵⁰ *Id.* at 8.

Interconnection Service Agreement and Interconnection Construction Service Agreement⁵¹ with DPL. Mr. Wilson also explained MBS had an option of entering into a Wholesale Market Participant Agreement ("WMPA"), which is an option "available to those generation projects that are seeking to interconnect with the PJM transmission system through a state-regulated local electric distribution system prior to commercial operation."⁵² Mr. Wilson stated the Project has a PJM generator interconnection queue number of AB1-183. He explained how MBS would connect to the PJM transmission system through DPL's distribution facilities at the Kennedyville-Massey 69 kV circuit. Mr. Wilson testified MBS is required to cover the costs of all facilities necessary to interconnect to DPL's system.⁵³

He testified he took both reliability and stability of the electric system into consideration in his analysis.⁵⁴ Mr. Wilson stated prior to operation, the Project must comply with both DPL and PJM's interconnection requirements and complete any necessary facility upgrades and milestones specified in the Interconnection Service Agreement ("ISA") and WMPA, all of which will ensure there will be no adverse impact on the reliability and stability of the transmission system.⁵⁵

⁵¹ Wilson Direct at 6: 18-29.

⁵² *Id.* at 10: 20.

⁵³ *Id.* at 11.

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 13.

Therefore, Mr. Wilson recommended a CPCN be issued for the Project, consistent with the licensing conditions proposed by both Staff and the other State agencies.⁵⁶ Mr. Wilson specifically recommended the Project comply with the WMPA and ISA, and both documents be filed with the Commission prior to commencement of construction.⁵⁷ He also recommended that MBS, its successors and assigns, be required to provide notice of any non-wholesale electricity sale to a Maryland retail customer and comply with the applicable regulations regarding such sale, including obtaining approval from the Commission to conduct business as an electric retail supplier prior to the start of any retail electric sale in Maryland.⁵⁸

III. Public and Written Comments

A hearing for public comment was held in Chestertown on June 21, 2016, at which the Commissioners of Kent County jointly sat with this Public Utility Law Judge. In excess of 70 people attended the hearing and over 25 oral comments were made to the presiding panel.

A representative for Senator Stephen S. Hershey, Jr., offered the Senator's position in opposition to the granting of a CPCN. His position was that the General Assembly did not intend

⁵⁶ *Id.* at 14-15.

⁵⁷ *Id.*

⁵⁸ *Id.*

for the Commission to expand its authority over local interests, in granting CPCNs, by use of the State's renewal energy policies as the source of and power for the expanded authority. He asserted that it was not the Legislature's intent to allow the bypassing of County approvals in order to meet renewable energy policy goals. He stated the ability of County Commissioners to regulate land use is undermined by the CPCN procedures, which removes local control and which, therefore, makes local planning impossible. This unwelcome outcome is an intrusion on the powers of the County Commissioners and on the rights of the citizens who elected them.

Two Delegates from the Legislature who represent the area also spoke against granting the CPCN. They assert local leaders should have a say in land use decisions and over the control of the types of development to be approved in the various parts of the county.

Two members of the Kent County Farm Bureau, who spoke, are in favor of solar, but not this Project due to the location on prime agricultural lands. They stated agriculture is the base of the local economy and this Project should be located on land zoned for industry and not zoned for agriculture.

One local resident, who identified himself as a land-use attorney, stated it is bad public policy to allow for-profit companies to misuse the intent of the law deregulating utilities. He said to allow the bypassing of local authority is harmful to the local government's efforts to control growth in the County.

He opined there is no social contract between this company and the County's best interest and no greater good is done by granting the CPCN for this location, as there is other land better suited for it.

Another local resident also pointed out the small benefit claimed for the Project was not the driving force behind it. The government subsidies, which produce the profits for the Project developers, are the driver here and not the need for new power generation. He stated when vertically integrated utilities were the project's sponsor, there was no windfall profit in projects, but they were instead driven by need and required at the direction of expert authorities. This is not now the case, and the Commission is obligated to understand this change when finding the balance between the overlapping governmental interests. He also opined the site selected, which is near land zoned for this type project and which is readily available for use, is an attempt to use State power to break the local zoning in the counties. Since this project is proposed on land zoned for agriculture, if so broken, there would be no barriers to placing future projects wherever a developer wanted. Finally he said that, since land zoned for this type of development is nearby and available, this land should be the location for this Project. He opined that a proper location does not present the negatives created by the chosen location. He requested this CPCN be denied.

A Kent County employee pointed out that the County is comprised of 57% prime farm land as compared to 23% statewide.

Agriculture is the county's preferred land use and farming is the industry upon which the local economy is based. The County is always fine-tuning its laws to keep current and its Renewable Energy Taskforce still meets for this purpose. She stated Kent County is the smallest county in Maryland, but it has the largest per-capita solar energy production in the State. She submitted since the County is small, all changes have a large impact.

Numerous others spoke in opposition. The points which they raised can be summarized as follows:

1. It's all about the money and greed, not about common sense land usage over the lifetime of the project.
2. County zoning should control power plant locations. The County's power to stop sprawl and other unwanted intrusions upon agricultural lands will be compromised or eliminated entirely, if the control is not local in nature.
3. Zoning is a well thought out process to prevent land fragmentation and to help young farmers find land to work. The land for agriculture produces food and the land zoned for industry does not; thus, they are not equivalents.
4. The land is scenic with historical usage patterns. The usage patterns are tourist draws which promotes the tourism industry in the County. This industry would be damaged by the Project's appearance, and no amount of screening will limit the damage.
5. MBS made a bad business decision to lease this property knowing that it was zoned for agriculture. Nothing is unique about this site other than MBS's financial commitment to it. Other locations are just as good for solar production without the negative impacts associated with this location.

6. All of the economic benefits are to MBS and not the County or local economy. The power produced won't be used locally and the same benefits can be had at another location in the County.

7. Many local residents have made economic sacrifices by way of easements or downzoning to protect the integrity of the atmosphere of the County. Proper siting of this Project will not undo those sacrifices, but granting a CPCN as requested will cause unfair harm without any concurrent benefits.

Three speakers commented in favor of granting the CPCN. They are in favor of solar projects which have environmental benefits and, as adjacent landowners who are most affected by the site selected, they have no objection to the altered viewscape. They consider the Project a good neighbor. They noted it is only a temporary use of the land, which will be put back in its current form when the Project is decommissioned. One of these speakers disputed the characterization that the site was "prime farmland".

Written comments were also numerous and divided in opinion. The written comments against the granting of the CPCN fell into two groups. The first group is from individuals who expressed the same concerns as expressed in the oral comments at the public hearing, which contents need not be repeated here: the second type of written comments opposing the project were from organizations of two types: governmental entities and non-governmental sources. One letter was from Senator Hershey. His

letter expressed his concerns, which were also expressed at the public comment hearing. The second governmental entity was the County Commissioners of Queen Anne's County, who stated that local autonomy in zoning matters is best handled at the county level whose elected officials should determine the land use in each county. They request the CPCN be denied.

Written comments against the granting of the CPCN also came from the Kent County Farm Bureau. Those comments were centered upon the County's interest in protecting its agricultural lands and in support of the County's Comprehensive Plan. Comments were filed by the Maryland Farm Bureau which stated support for solar power facilities, but not those sited upon agricultural land. It fears that the heritage of rural communities is at risk from the fragmentation of agricultural lands by renewable energy sprawl. Opposition was expressed by 1000 Friends of Maryland (a self-described smart-growth advocacy organization), which advocates for encouraging growth in areas planned for development and protecting forests, open spaces and farmland from development.

The Maryland Association of Counties raised two points in opposition to the Project. The first was that local land use requirements should apply due to the changed nature of energy generation technology. This change has made the traditional form of regulation out of date as the types of projects are no longer large scale, but now can be smaller and dispersed in a more widespread configuration. The wide spread dispersion has a cumulative

and greater impact upon counties than does a single large project. The second point it raised was that the dispersion of smaller power plants increases the difficulty of preserving scenic and agricultural resources. The Association suggests better communication between all stakeholders in the future is needed to address these issues.

Eastern Shore Heritage, Inc.--Stories of the Chesapeake Heritage Area filed comments in opposition to the Project. They stated this Project could undermine the integrity of the Heritage area by altering the viewscape. They further stated landscaping around the Project cannot mitigate this negative outcome. They support the work of local zoning and the County's Renewable Energy Task Force's efforts to site solar projects without harm to the Heritage area.

Numerous written comments in support of the Project were also received. One was from the Chesapeake Climate Action Network ("CCAN"). The CCAN letter stated the benefits of solar power in general and the particular benefits of this Project in producing clean solar power. It cited the jobs to be created, the tax revenues, and the clean power to be produced. Numerous form letters in support of the Project were received with live signatures from all over the State. A large number were from Kent County residents as well as a large number from Anne Arundel and Montgomery County residents. The text of those letters stated in part:

As a local resident, I care deeply about making sure that our community can continue to be a welcoming place to live and visit . . . Additionally, this project fits the character and aesthetic of our community, allowing us to maintain the rural and small town environment that we love. Please allow Kent County to continue to be a leader in solar energy by supporting Mills Branch Solar.

The form letters also state that only 0.3% of farmland in Kent County is being used by this Project but it will provide power for 10,000 homes, proving it is a valuable opportunity for Kent County. They further tout the fact that the energy will be locally produced and for the local communities' use without causing any noticeable negative impacts.

IV. Applicable Law

The Application was filed pursuant to PUA § 7-207. Pursuant to PUA § 7-207(e), the Commission shall take action on an application for a CPCN only after due consideration of the following factors:

- (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 lead line is proposed to be located; and
- (2) the effect of the generating station, overhead transmission line, or qualified 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 and water pollution; and
- (vii) the availability and means for the required timely disposal of wastes produced by any generating station.

V. DISCUSSION and FINDINGS

A. Two-Year Notice Waiver

The first issue to be resolved is the applicability of the two-year notice requirement under PUA § 7-208. This section applies to an application for the joint construction of generating stations and associated transmission lines. The requested CPCN in this case does not include a request for authority to construct an associated transmission line; therefore, the section requiring the two-year notice does not apply to this case. I therefore find the requested waiver is moot and the motion to waive the notice requirement is dismissed.

B. Preemption of Local Zoning Ordinances

The second issue to be resolved is the preemption issue, which was raised again on brief. The in-hearing ruling on

the issue of preemption of local zoning requirements by the Commission found the powers delegated to the Commission fully preempted the local government's authority over zoning and land use requirements.

The Commission is an independent unit in the Executive Branch of State government. It carries out the functions assigned to it by law.⁵⁹ Those powers shall be construed liberally.⁶⁰ The powers and duties listed in the PUA do not limit the scope of the general powers and duties of the Commission.⁶¹ The requirements under State law prior to beginning the construction of a generating station are found in PUA § 7-207-(b) (1) (i). This section requires that a person (not just a public service company) may not begin construction of a generating station without first obtaining a CPCN from the Commission. This section empowers the Commission with exclusive authority over the issue of generating station siting.

The Commission is required to give due consideration to the factors listed under PUA § 7-207(e). That consideration includes the requirement the Commission give due consideration to the recommendations of the governing body of each county or municipal corporation in which any portion of the construction of the generating station is to be located. The requirement that due consideration be given to the recommendations of the lower level

⁵⁹ PUA. § 2-101(b) and (c).

⁶⁰ PUC. § 2-112 (c).

⁶¹ PUC. § 2-113(2) (b).

governmental entities would not be listed first under the requirements if it had no meaning or purpose. The purpose is to require consideration of local issues such as zoning, land use, local tourism, and all other local concerns not covered under the other considerations, which must be addressed before taking final action on a CPCN request. This requirement allows for the consideration of issues that the preemption places solely within the Commission's exclusive jurisdiction.

Since deregulation of the State's electric industry, the State Legislature has had ample time to amend the CPCN requirements to allow non-utilities to construct generating stations in Maryland. It has also had ample time to consider the findings in the case of *Howard County V. Potomac Electric Power Co.*, 319 Md. 511 (1990), which case is cited as the Court of Appeals last ruling on the preemption issue. The fact that the State Legislature has not chosen to restrict or eliminate Commission authority confirms the long standing precedent of total Commission preemption was to remain unaltered.

OPC, in its brief, noted the change in the regulatory framework since 1999 and opined it may be time for less reliance upon the old framework's precedents, which considered the public interest in having adequate regulated utility supply over the local concerns expressed by its land use and zoning. If this change is to be made, it is for the Legislature to address, and not for this Commission to consider here, as it is beyond the four-corners of the Application.

The local zoning and related concerns of the County will be address and discussed below under the discussion of the factors to be considered prior to taking final action on this CPCN request. The in-hearing ruling that the Commission's authority preempts local land use and zoning restrictions remains unaltered.

C. Section 7-207(e) Factors

Several of the factors to be considered under PUA Sec. 7-207(e) are not disputed: the stability and reliability of the electric system, aviation safety, air and water pollution, and the disposal of waste produced. The evidence, considered by this PULJ on the issues listed above, is consistent with my conclusion that the above mentioned factors are in compliance with the requirements of § 7-207(e).

The other factors that must be given due consideration are all disputed. Since they are significantly inter-related, the discussion of them will be consolidated in order to avoid duplication of the points discussed.

1. The Recommendation of the County

The recommendation of the local governing body (Kent County) is to deny the Application. The County's recommendation is based upon its conclusion the Project fails to meet the burden of proof that the considerations of economics, esthetics, and historic sites are in the Public Convenience and Necessity. As discussed below, I have given the recommendation significant weight in reaching my decision.

2. Economics

a. Parties' Positions

(1) MBS

MBS asserts numerous economic benefits will occur if the CPCN is granted. According to MBS, these benefits come with no negative impacts on the County or State economies. MBS states these benefits include creating jobs, growing the tax base, and creating new clean electric generating capacity. MBS asserts all of the benefits will contribute to economic growth in Kent County.

The economy will also grow through the duration of construction which will be five to seven months in length. Two hundred construction jobs will be created. In addition, local materials, labor, subcontractors, supplies, and services will be used to construct the Project.

MBS notes that adding a solar plant will diversify the economy of Kent County and protect against KC's seasonal swings in employment associated with seasonal farm labor.

MBS states that the loss of farmland, by converting the site to solar energy production, is so minor as to have no effect on the farming economy. MBS says that it will also have no effect on the industries that support the agricultural sector of the local economy. Further, to offset the loss of this site the remaining unused farmland in the County can be put into production. In addition, MBS states, if this Project were sited

elsewhere in the County, the volume of land used would be the same so as to render the loss of this acreage irrelevant.

MBS maintains this property is ideally suited for the Project, both in its physical properties and its available infrastructure. Further, MBS attests other viable potential solar sites from which to choose in KC are extremely limited, and the economic benefits the Project brings will only be had if the site it selected is approved. This Project will also guarantee that 349 acres of land will be permanently protected from industrial development after the Project's useful life is over.

MBS further asserts the benefits of the Project will aid the economy of the entire state of Maryland by increasing the supply of locally generated electricity.

(2) PPRP

PPRP witness Dr. Estomin rebutted the claim that the loss of the farm land due to this Project would have a negative effect on the other businesses in Kent County. He maintained the Project's use of the land will have no effect on the farm related economy.

PPRP has amended its initial Licensing condition concerning visual impacts. The amendment is designed to mitigate the change to the viewscape.⁶² PPRP believes the amendment will eliminate the negative effect on tourism, which KC and KKS assert will occur. PPRP considers the granting of the Application

⁶² See PPRP Proposed Condition # 13.

subject to its Proposed Conditions with the proper mitigation measures they contain, produces no negative economic impacts.

Dr. Hall's testimony found a positive economic effect. His analysis found the land if used for solar production would have a higher value than the land would have if it were used for agriculture.

(3) KC-KKS

KC-KKS strongly oppose the granting of the CPCN. KC-KKS state solar generating stations of the size proposed are permitted in certain zoning districts in the County (Crossroads Commercial, Commercial, Commercial Critical Area by special exception, and in Employment Center and Industrial as principal uses) but not in the Agriculture Zone. The zoning districts are based upon local considerations of the proper location for all sized solar projects. The AZD areas are set aside for agricultural uses which KC determined to be the best economic use for the prime farm lands in KC. KC-KKS state that MBS considered no property other than that selected by MBS, due to MBS's previously obtained economic ties to the site. KC-KKS expresses if the Project were sited where the zoning permits, all the economic benefits of it would still occur. KC-KKS state the proper siting of the Project would not have harmful consequences upon the viewshed, the tourism industry, or the farming economy. Further, the proper siting would not have the County's opposition.

KC states it created its Renewable Energy Task Force to study where it is best for the County to site large solar projects. The Task Force gave careful consideration to the zoning districts of Kent County. KC states part of the conclusions reached was in an effort to preserve large contiguous areas of prime agricultural land; agriculture is the county's permanent and preferred land use.⁶³

KC-KKS asserts MBS witness Dr. Mangum grossly understated the economic values of keeping the selected site in farm production. In addition, MBS fails to consider the effect on the viewshed from Route 213 as an economic harm to the character of the historic and cultural landscape. Dr. Mangum also did not take into account the value of the damage to tourism that KC-KKS asserts will occur. Further, KC-KKS claim that Dr. Mangum failed to consider the economic loss to other farm related businesses by the loss of a farming operation on 370 acres of prime farm-land. KC-KKS does point out Dr. Mangum did acknowledge the major economic benefit of the Project was to the investors who would receive tax credits and not to KC or Maryland. KKS asserts the only witness testimony of real proof concerning the economic issues was that of the KC and KKS witnesses.

KC-KKS contend the wrong site was selected by MBS and no licensing conditions would change that fact or adequately mitigate the harm caused by that mistake. KC-KKS asserts

⁶³ KC Exhibit 4, at 5 (Comprehensive Plan).

agriculture is the highest and best use for this location with its prime soil. KC-KKS asserts less quality soil would be lost from agricultural production if the Project were sited on land zoned for large scale solar projects, and would also lessen the economic damage.

KKS witness Watson⁶⁴ outlined the special nature of SCHAs and its efforts to preserve and enhance the area for its agricultural-heritage tourism value. Witness Watson also pointed out the Heritage area program was designed to help the economic development of the heritage-tourism industry.

(4) OPC

OPC asserts this Project is not need-based. The Project only results from the profit motive of the Applicant. The output of the Project is intended to be sold into the PJM wholesale market for the benefit of MBS. OPC opines there is no direct public interest benefit to Maryland. OPC does acknowledge there will be the potential benefit of improving the level of renewable energy production in Maryland. OPC notes the County opposes the Project. OPC further notes the record contains Public Comments which support the County's position.

OPC notes the "Secretarial Letter"⁶⁵ took no position on whether or not this project is in the public interest. The "Secretarial Letter" included the admission the State Agencies

⁶⁴ Watson Direct at 2-4.

⁶⁵ PPRP Ex. 6.

defer to the County to determine whether the Project is the best use of agricultural land. The admission by the Secretaries is consistent with OPC's position in opposition to the location selected by MBS.

(5) Staff

Staff supports granting the CPCN subject to all proposed Licensing Conditions. Staff opines there will be no adverse economic effects on the Heritage Area and found that positive economic benefits will be gained. Staff based its support for granting the Application on economic issues upon the evidence of MBS's and of PPRP's witnesses.

b. Decision

I find the Project does have certain economic benefits. It will add solar electric generation which will help Maryland toward its goal of renewable energy production. However, I find the same goal would be met if this Project were sited at another location in Kent County. This finding is therefore a factor in the computation of the total benefit of this Project. I note the authority of the Commission is limited to approving or denying the CPCN at the location selected in the Application. The Commission does not have the authority to order the Project be built elsewhere in Kent County.

I further find any economic benefits obtained beyond the additional clean energy production are much harder to quantify. Undisputed evidence indicates a net reduction in

permanent jobs from four farmworkers to two energy workers; this is a net loss in economic value.

The tax revenues to the County are dependent on factors that cannot be fully known.⁶⁶ The record contains evidence of the level of revenue from farm production; it does not contain evidence as to the level of revenue solar production would create. The level of revenue produced determines the amount of tax proceeds KC receives from the use of the land. Therefore, a finding on the economic valuation of the revenues from the alternatives land uses and from the corresponding tax revenue to the County would be based upon speculation. I therefore do not assign a definite economic benefit to the tax revenues the Project would generate. I find the evidence is unpersuasive that the economic benefit of additional tax revenues will actually occur if a CPCN were granted for the Project.

The hotly disputed major economic issues are the values of the loss of prime farmland production, the loss to farm related local businesses, and most significantly, the loss of potential rural tourism revenues.

I find the more persuasive evidence, as to the value of the loss from production of prime farmland, is that of the testimony of KKS witness Hickman. His testimony is based upon his

⁶⁶ Revenues from farming are dependent upon the crops planted and the price obtained, and revenues from energy generation are dependent upon the volume of the energy produced and the revenues when sold.

experience in managing more than 17,000 acres on over 50 farms in the area. This personal knowledge is a major factor in my giving his testimony far greater weight than that of the non-local witnesses of MBS and PRRP. His calculations compute the loss of income caused by removing the site from agricultural production to be \$3,960,000 over a 20 year period.⁶⁷ He further computed a loss to KC's economy of \$3.33 million over that same timeframe. The evidence supports a finding the economic negatives outweigh any economic benefits claimed by MBS. Therefore, the economic evidence in favor of granting of the CPCN on solar production versus farm production is not persuasive.

The other major economic factor is the disputed effect the Project would have on the tourism industry. There is no testimony in the record that places a dollar figure on the effect to the tourism industry if the viewshed were impacted by the Project. The testimony is also sharply divided on the question of the effect screening would have on the viewshed and the impact that would have on tourism. I find that the lack of concrete economic testimony on the impact upon tourism requires me to give it less weight as compared to the more supported economic impact testimony.

⁶⁷ Hickman Direct at 4.

3. Esthetics and Historic Sites

a. Parties' Positions

(1) MBS

MBS states there is no negative esthetic impact which militates against the Project being granted a CPCN. The property has minimal vertical scale, large setbacks, and ample planned vegetative screening. There are also no impacts on any historic sites, as there are no properties within one mile that are listed in the National Register of Historic Places. MBS acknowledges a railroad track borders the site, but states the line is not currently under any historic designation. In total, MBS states that the Project at the chosen location meets or exceeds all the requirements for a CPCN on esthetic and historic impact considerations. MBS asserts that the proposed licensing conditions will ensure that any mitigation or requirements to avoid adverse impacts to esthetics and historic sites are met. Therefore, MBS submits that it should be granted its requested CPCN.

(2) PPRP

PPRP also supports the granting of a CPCN provided it is subject to the Licensing Conditions which it proposes. The Licensing Conditions, according to PPRP, assure that MBS complies in every way with the requirements of the law concerning esthetic and historic site impacts. PPRP has provided technical witnesses whose testimony and expertise supports the inclusion of PPRP's

proposed Licensing Conditions on the esthetic and historic site considerations.

PPRP witness Dr. Hall reviewed the filings, did site visits, and consulted with the State agencies (State Highway Administration, Maryland Historic Trust, Department of Planning and others) in his efforts to prepare his testimony. The Licensing Conditions he helped develop cover the concerns about impacts to cultural resources, and visual impacts.

PPRP, under its Proposed Conditions 15 and 16, requires consultation with the Maryland Historic Trust be done to mitigate any negative effects to cultural resources.

PPRP is confident its Licensing Conditions are comprehensive and fully ensure that historic and esthetic factors are included in the lawful operation of the Project.

PPRP further maintains The Maryland Historic Trust has found, after its extensive analysis, no adverse effects on historic and cultural resources.

PPRP also asserts no State action is present under the Financial Institutions Article, cited by KC and KKS. If there were State action, then PPRP would be required to study alternative sites. Per PPRP, the requirement to study alternative sites to determine if no adverse impact to cultural resources can be obtained, does not apply.

(3) Staff

Staff stated the requirements of the Financial Institutions Art. § 13-1112 do not apply to the Application.

Staff's position is based upon the fact no State bonds are involved and no Historic properties are affected. Staff asserts without State bonds or Historic properties involved, no State action occurs; therefore, § 13-1112 does not apply. With no State action involved, Staff's position is that alternative sites need not be considered, as opined by KC and KKS.

Staff opines the licensing conditions it and PPRP propose eliminate the speculative harmful effects to the viewshed which the opposing parties assert are present. In conclusion, looking at the evidence as a whole and subject to licensing conditions, Staff argued the Project will have no negative effects upon esthetics and historic resources.

(4) OPC

If the CPCN is granted, OPC asks the landscaping plan⁶⁸ be approved by Kent County in consultation with the MAHP and ESHI, instead of PPRP keeping this responsibility. This request is designed to allow KC to have a voice in the look of the vegetative screening of the Project.

(5) KC-KKS

KC-KKS are in lockstep with their opposition to this Project at the site selected by MBS due, in part, to the negative effect that the project will have on cultural resources.

KKS witness Christensen-Lewis explained why the County Comprehensive Plan set aside the Chesterville/Morgan Creek

⁶⁸ PPRP Proposed Licensing Condition # 13.

District as a critical resource to be protected. The 2010 amendment to the Comprehensive Plan added Appendix D as an Agricultural Priority Preservation Area Element. The amendment was added in order to comply with the Agricultural Stewardship Act of 2006. The County added the amendment as an effort to find the correct balance between development and preservation. The County's design concept was to avoid fragmentation of the AZD by industrial developments such as that proposed by MBS.

KKS pointed out the letter from ESHI⁶⁹ stated the Project has the potential to undermine the integrity of the Heritage area and the damage cannot be mitigated by landscaping.

KKS asserts this is a special place which needs to be protected from the drastic damage the Project will inflict upon the very nature of the place and upon heritage-tourism. KS pointed out the State agencies letter⁷⁰ stated the State Agencies defer to the local authority as to what is the best use of the location chosen by MBS. KKS opines the same benefit can be obtained by moving the Project to an area zoned for it. This would remove the negatives which have caused the opposition to what otherwise is a worthy project. KKS opines the Proposed Licensing Conditions of PPRP and of the Staff are inadequate to prevent the harm to the viewscape. The Licensing Conditions would only substitute a different and equally harmful eyesore. KKS

⁶⁹ KC exhibit 1.

⁷⁰ PPRP exhibit 6.

asserts that the special character of the area is at risk because of the Project. KKS stresses no unique benefit exists at the site selected by MBS as compared to a site in an area zoned for an industrial sized solar plant.

KKS pointed out the PPRP witnesses, in some cases, did not have expertise in the subject area of their testimony. For example, Dr. Hall did not address the damage to the long range vistas. Further, witness Walker had no expertise in evaluating visual impacts as she is only expert in other areas such as wetland ecology, endangered plants, and wildlife.

B. Decision

I find there would be substantial damage to the viewshed if the Project were built. I further find that screening would not adequately mitigate the damage. This finding is based upon the testimony from KKS witness Watson who has expertise in the field of regional planning and environmental design.⁷¹ I find her testimony was far more credible and persuasive than those of the MBS and PPRP witnesses. Ms. Watson's testimony as to the Heritage Area's certification was compelling on the issue of the esthetic damage the Project would have upon the Heritage Area. I further find the damage which would be inflicted upon the viewshed, as seen from Route 213 (A National Scenic Byway), was not addressed by any witness who testified in support of the Project.

⁷¹ Watson Direct at 3.

Although no registered historic properties are within one mile of the site, due to the wide vista of the viewshed, the effect on Historic Sites is far wider than just one mile. I find the Project is an addition which is out of character with the theme of the Historic designation, and would negatively impact the esthetics of the entire Chesterville/Morgan Creek district by altering the viewshed. I find that the viewscape would be significantly impacted in a negative way if the Project were sited where it is proposed, and the economic damage to the tourism industry would be significant.

4. Other

A. KC-KKS

KC-KKS made several legal arguments as to the lack of jurisdiction of the Commission to decide this case exclusively. All of the other Parties opine the Commission has exclusive jurisdiction over the granting of CPCN's.

KKS further noted the Project must be evaluated and a determination made by the Commission as to its acceptability based upon the unique circumstances present.

KC-KKC concludes MBS has failed to meet its burden of proof as its evidence is not persuasive and does not satisfy the requirements of proof of Public Convenience and Necessity.

B. OPC

OPC states that the Applicant has an "admirable" renewable energy project, but chose a location in a historically important area. The choice of location has evoked serious local

opposition. OPC'S brief outlines the effort the County has made to control the placement and size of solar projects in KC. OPC points out MBS knew for at least four years the location it had chosen was not zoned for a generating station of this size.

OPC notes the changes in the regulatory framework of power plant siting. The changes no longer give the State power to direct the siting of, and or the building of, generating stations. With the different regulatory paradigm now in place, the routine granting of CPCNs, opposed by the local government, makes less logical sense. OPC suggests the Project, if sited in an area zoned for it, would be beneficial and unopposed by the County. OPC recommends that the Application be denied without prejudice to give MBS the chance to find a better location or to justify why no better location exists.

C. Decision

I find no merit in the KC-KKS argument that only Public Service Companies are subject to Commission jurisdiction. The law clearly states that a "person" must obtain a CPCN before beginning construction of a generating station.⁷² "Person"⁷³ is a broad term which encompasses more than Public Service Companies.

I further find no conflict between the Commission preemption, discussed above, and the MHAL or the Agricultural Stewardship Act of 2006. The finding is based upon the fact there

⁷² PUA § 7-207(b) (1) (i) 1.

⁷³ PUA § 1-101(u)

is no "State action" in a CPCN proceeding as contemplated under the Act. The Commission will consider all the factors involved when weighing the evidence so as to ensure its actions do not conflict with other State interests or policies. By considering the position of the local governing bodies, the policy considerations contained within those statutes can be reconciled with the Commission's responsibilities and with the Commission's exclusive jurisdiction.

VI. CONCLUSIONS

I find not all the factors which must be considered pursuant to PUA § 7-207 are in dispute. I find if the Project were operated subject to the proposed Licensing Conditions of PPRP and Staff, it may operate with no impact upon the reliability and stability of the electric system. This finding is undisputed by any Party.

I further find no evidence in the record indicating the Project will have any negative effect upon aviation safety, air and water pollution, or upon timely disposal of wastes produced.

I further find the recommendation of KC (the governing body)⁷⁴ is that the application should be denied. The County's opposition is based upon several positions it holds: The Project is contrary to the zoning requirements in its LUO, the loss of

⁷⁴ PUA § 7-207(e)(1).

prime farm soil from crop production, the negative impact upon the viewscape, the harm to the tourist industry, the negative effect on historic sites and the Heritage Area, as well as the loss of local control over the type and location of industrial sized solar farm development in the County.

The remaining factors: economics, esthetics and historic sites,⁷⁵ are hotly disputed as to whether or not the evidence supports a finding that the Project is in the Public Convenience and Necessity.

I find the evidence in support of the granting of a CPCN falls short of proving that the Project meets the standard of Public Convenience and Necessity. I find that the weight of the evidence pertaining to the location of the Project is more negative than positive in its persuasive value of creating benefits to KC and Maryland. The testimony of the KC-KKS witnesses on the issue of the location of the Project and the effects caused by this location is more persuasive than those of MBS. I further find the Proposed Licensing Conditions of PPRP and of Staff are inadequate to mitigate the negatives created by the location selected by MBS for the Project.

Both the Staff and PPRP made appropriate evaluations of the factors they are required to undertake, but both failed to give adequate weight to the position of KC in its opposition to the Project. I find that Staff and PPRP over-valued the evidence

⁷⁵ PUA §7-201(e) (2) (ii) (iii) (iv).

of need and the value of adding solar generation in their support of granting a CPCN, but under-valued the importance of the opposition of the local government. Local opposition was based upon a reasonable application of land use policies that are based upon the local knowledge of what is the best policy for the citizens of KC. Local control over the amount, location, and type of development must be respected by the Commission when there is no weight of evidence of need or benefit to outweigh the local opposition. The weight of the evidence of harm being caused, if the Project is built, was significant and was a major factor in my decision to deny the Application.

I find the request of OPC for a denial of the CPCN without prejudice has no practical value. If MBS proposes another location for the Project, MBS would still have to undertake all of the same groundwork for the new site. In the alternative, if MBS were to determine that no better location is available; I find that the current location is still unacceptable.

A discussion of the Proposed Licensing Conditions, offered by both the Staff and of PPRP, will not be undertaken herein. The need for Licensing Conditions only exists if a CPCN, to which the Conditions would apply, were granted. The CPCN is denied which makes the Proposed Licensing Conditions a moot issue.

I therefore find that the Application for the CPCN requested by Mills Branch Solar, LLC. is denied as it fails to

satisfy the Public Convenience and Necessity requirement of PUA § 7-207.

IT IS, THEREFORE, this 10th day of January, in the year Two Thousand Seventeen,

ORDERED: (1) That the Application filed by Mills Branch Solar, LLC. for a Certificate of Public Convenience and Necessity to construct a 60.0 MW solar photovoltaic generating facility in Kent County, Maryland is hereby denied in accordance with the findings and decisions rendered herein.

(2) That all motions not granted herein are denied.

(3) That this Proposed Order will become a final order of the Commission on February 10, 2017, unless before that date an appeal is noted with the Commission by any party to this proceeding as provided in Section 3-113(d)(2) of the Public Utilities Article, or the Commission modifies or reverses the Proposed Order or initiates further proceedings in this matter as provided in Section 3-114(c)(2) of the Public Utilities Article.

Dennis H. Sober
Public Utility Law Judge
Public Service Commission of Maryland