



434 Fayetteville Street
Suite 2800
Raleigh, NC 27601
Tel (919) 755-8700 Fax (919) 755-8800
www.foxrothschild.com

BRAD M. RISINGER
Direct No: 919.755.8848
Email: BRisinger@Foxrothschild.com

February 7, 2022

Ms. A. Shonta Dunston
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Room 5063
Raleigh, NC 27603

RE: *Post-Argument Brief of Sunstone Energy Development LLC*
Docket No. SP-100, SUB 35

Dear Ms. Dunston:

On behalf of Sunstone Energy Development LLC, we hereby submit the Post-Argument Brief in the above referenced docket.

Please do not hesitate to contact me should you have any questions regarding this filing.

Thank you in advance for your assistance.

Sincerely,

A handwritten signature in blue ink that reads 'Brad Risinger'.

Brad M. Risinger

pbb
cc: All parties of record

A Pennsylvania Limited Liability Partnership

California Colorado Delaware District of Columbia Florida Georgia Illinois Minnesota
Nevada New Jersey New York North Carolina Pennsylvania South Carolina Texas Washington

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-100, SUB 35

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:)	
Request for Declaratory Ruling by)	POST-ARGUMENT BRIEF
Sunstone Energy Development, LLC)	OF
That the Jurisdiction of the North Carolina)	SUNSTONE ENERGY
Utilities Commission does not extend to)	DEVELOPMENT LLC
The Federal Enclave within Fort Bragg)	

Sunstone Energy Development LLC (“Sunstone”) provides this post-argument brief in response to Chair Mitchell’s request at oral argument, as well as the Commission’s Notice of Due Date for Proposed Orders and/or Briefs issued on January 6, 2022.

At oral argument, Commissioner Clodfelter raised the issue of whether the Utilities Commission has the same power as a North Carolina state court to determine the scope of its jurisdiction and resolve a matter before it that raises issues of federal law. (Tr. 122:16-20). In particular, he raised concern about whether the Commission “has the same broad jurisdiction [to] construe Federal law as does the General Court[s] of Justice.” (*Id.*, 117:13-15). The Chair called for briefing on that narrow issue. (*Id.*, 123:7-9).

By statute, the Commission has such authority. N.C.G.S. § 62-60 provides:

Commission acting in judicial capacity; administering oaths and hearing evidence; decisions; quorum.

For the purpose of conducting hearings, making decisions and issuing orders, and in formal investigations where a record is made of testimony under oath, the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.

...

The Commission shall render its decisions upon questions of law and of fact in the same manner as a court of record.

See e.g., North Carolina Utilities Comm'n v. Atl. Coast Line R. Co., 224 N.C. 283, 288, 29 S.E.2d 912, 915 (1944) (“The Utilities Commission is by statute . . . constituted a court of record with the powers of a court of general jurisdiction as to all matter properly before it.”); *State ex rel. Utilities Comm'n v. Town of Kill Devil Hills*, 194 N.C. App. 561, 564, 670 S.E.2d 341, 344, *writ allowed*, 636 N.C. 583, 681 S.E.2d 344 (2009), and *aff'd*, 363 N.C. 739, 686 S.E.2d 151 (2009) (“General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purposes for which the agencies were created”).

The Commission has exercised such authority in service of determining the reach of its jurisdiction, particularly in the face of questions about how that regulatory authority coexists or conflicts with federal jurisdiction. Indeed, in 2002, the Commission initiated a proceeding “*for the purpose of investigating [] NCUC’s jurisdiction with respect to wholesale contracts at native load priority and the extent to which that jurisdiction either complements or conflicts with FERC’s jurisdiction in that field[.]*” *State ex Rel. Utils. Comm’n v. Carolina Power Light*, 359 N.C. 516, 520, 614 S.E.2d 281, 284 (2005) (emphasis added). In Docket No. E-100, Sub 85A the Commission considered whether it had jurisdiction to review proposed contracts “involving sales of electricity by North Carolina utilities to wholesale customers in interstate commerce.” *Id.* at 517, 614 S.E.2d at 283.

In its E-100, Sub 85A order, the Commission determined that it had the regulatory authority under State law to review such wholesale contracts before they are signed, and also “determined that this jurisdiction and authority is not preempted by federal law.” *Id.* at 521, 614 S.E.2d at 284.

In *CP&L*, the North Carolina Supreme Court approved of the Commission’s analysis in determining its allowable jurisdiction in a field where the Federal Energy Regulatory Commission (“FERC”) had sole jurisdiction over the wholesale sale in interstate commerce of electricity. The Court noted that Congress had left considerable room for “the states and their utilities commissions” in utilities regulation, and in service of its responsibilities under State law to ensure “an adequate and reliable supply of electric power” the Commission was permitted to determine its regulatory ambit over the proposed contracts in light of FERC’s existing authority. *Id.* at 521, 524, 614 S.E.2d at 285, 287. *See e.g., In the Matter of Designation of Carriers Eligible for Universal Carrier Support*, Docket No. P-100, Sub 133c, 2003 WL 21638308 (where Commission’s decision of whether it possessed jurisdiction to designate a commercial mobile radio service as an eligible telecommunications carrier was a required precursor to exercise of jurisdiction by FCC); *State ex rel. Utilities Comm'n v. Friesian Holdings, LLC*, --- S.E.2d ---, 2022 WL 151346, *7 (2022) (affirming “Commission's authority to make siting decisions” for energy generating facility is unaffected by FERC’s jurisdiction over its wholesale rates).

The *CP&L* decision rejected the argument that the Commission’s order in E-100, Sub 85A was, itself, preempted by FERC’s jurisdiction over wholesale sales in interstate commerce. It held that the “intrastate” consequences of the proposed contracts on “local energy service” regulated by State law could operate cooperatively with federal law. 359

N.C. at 527, 614 S.E.2d at 289. *Cf. Pac. Gas Elec. Co. v. State Energy Res. Conservation Dev. Comm'n*, 461 U.S. 190, 204 (1983) (“conflict arises when ‘compliance with both federal and state regulations is a physical impossibility,’ or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”) (citations omitted).

Here, a dynamic exists that is even more suitable to Commission analysis and determination than in *CP&L*. Section 8093 expressly sets forth an avenue for application of “state law governing the provision of electric utility service” *when* the “Federal Government” purchases electricity using appropriated funds. 40 U.S.C. § 591(a). Under N.C.G.S. § 62-60, the Commission is empowered (similarly to a state trial or appellate court) to determine *whether* the appropriate conditions exist under which the statutory exception of Section 8093 applies to allow for application of state utility laws inside the Fort Bragg enclave.

In *CP&L*, the state supreme court found the Commission was not preempted by FERC’s regulatory regime over wholesale sales in interstate commerce based on the policies underlying regulation of local utility service under state law. Here, Congress crafted a specific, but narrow waiver of its sovereign immunity that expressly contemplates, under the appropriate conditions, that federal and state regulation can co-exist in the field. The United States Supreme Court has long held that preemption is particularly disfavored in *exactly* this kind of setting, “where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them.” *CTS Corp. v. Waldburger*, 573 U.S. 1, 18 (2014) (citations omitted).

Sunstone respectfully submits that statutory and case law confirm the suggestion by Duke Energy Progress at oral argument that “this Commission can interpret its own jurisdiction under” Section 8093. (Tr. 122:6-9). Thus, the Commission is empowered to enter an order based on its analysis of whether or not Section 8093 affords, on these facts, an avenue for application of state utility law to prohibit Sunstone’s federally approved, proposed project inside the Fort Bragg enclave.

Respectfully submitted this the 7th day of February 2022.

FOX ROTHSCHILD LLP

/s/ Bradley M. Risinger

Bradley M. Risinger

M. Gray Styers, Jr.

Jessica L. Green

FOX ROTHSCHILD LLP

434 Fayetteville Street, Suite 2800

Raleigh, NC 27601

(919) 755-8848

brisinger@foxrothschild.com

*Attorneys for Sunstone Energy
Development LLC*

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing POST-ARGUMENT BRIEF OF SUNSTONE ENERGY DEVELOPMENT LLC upon all parties of record by electronic mail as follows:

E. Brett Breitschwerdt
Nick A. Dantonio
Tracy S. DeMarco
McGuireWoods, LLP
501 Fayetteville Street, Suite 500
Raleigh, NC 27601
919.755.6563 (EBB phone)
919.775.6605 (NAD phone)
E-Mail: bbreitschwerdt@mcguirewoods.com
E-Mail: ndantonio@mcguirewoods.com
E-Mail: tdmarco@mcguirewoods.com

Jack E. Jirak
Deputy General Counsel
Duke Energy Corporation
P.O. Box 1551 / NCRH 20
Raleigh, North Carolina 27601
Telephone: 919.546.6257
E-Mail: Jack.Jirak@Duke-Energy.com

Counsel for Duke Energy Progress, LLC

Christopher J. Ayers, Esq.
Executive Director, NC Public Staff
Layla Cummings, Esq.
NC Public Staff – Legal
4326 Mail Service Center
Raleigh, NC 27699
E-Mail: Chris.Ayers@psncuc.nc.gov
E-Mail: Layla.Cummings@psncuc.nc.gov

This the 7th day of February 2022.

/s/ Bradley M. Risinger
Bradley M. Risinger