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June 8, 2021

VIA Electronic Filing

Ms. Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: Initial Comments of Duke Energy Progress, LLC
Docket No. SP-100, Sub 35

Dear Ms. Campbell:

Enclosed for filing in the above-referenced proceeding on behalf of Duke Energy Progress, LLC are its *Initial Comments of Duke Energy Progress, LLC* ("Initial Comments").

Certain exhibits to the Initial Comments contain information designated by Sunstone Energy Development LLC as confidential and, therefore, are being filed under separate cover and under seal.

Please do not hesitate to contact me should you have any questions. Thank you for your assistance with this matter.

Sincerely,

/s/Jack E. Jirak
Jack E. Jirak
Deputy General Counsel

Enclosures

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 Sunstone Energy Development LLC Regarding the Provision of Solar Energy and Energy Efficiency Service Within Fort Bragg	)))))	**INITIAL COMMENTS OF DUKE ENERGY PROGRESS, LLC**

NOW COMES Duke Energy Progress, LLC ("DEP" or the "Company"), by and through the undersigned counsel, pursuant to the North Carolina Utilities Commission's ("NCUC" or "Commission") *Order Denying Motion to Dismiss*[1] and submits its initial comments regarding Sunstone Energy Development LLC's ("Sunstone") Request for Declaratory Judgment ("Petition") submitted under the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* ("Declaratory Judgement Act").

In response to the Petition, the Company requests that the Commission issue a declaratory judgment finding that (1) Sunstone's proposed arrangement to generate and sell electricity from a solar project planned to be constructed and owned by Sunstone within Fort Bragg to a retail customer for compensation would constitute public utility activity; (2) the Commission would have jurisdiction over Sunstone as a public utility; and (3) that such activity would violate DEP's exclusive franchise rights to provide retail electric service within its assigned service area.

[1] *Order Denying Motion to Dismiss,* Docket No. SP-100, Sub 35 (May 4, 2021).

PROCEDURAL BACKGROUND

On December 9, 2020, Sunstone filed its corrected Petition with the Commission seeking a declaratory judgment under North Carolina's Declaratory Judgment Act holding that Sunstone may construct and operate facilities to generate and furnish electricity to retail customers within Fort Bragg, a federal enclave, without subjecting itself to Commission regulation as a public utility under the Public Utilities Act.

On January 12, 2021, the Commission issued its Order Requesting Comments on the Petition.

On January 13, 2021, DEP filed a Petition to Intervene. The Commission granted DEP's petition on January 21, 2021.

On February 5, 2021, DEP filed a Motion for Extension of Time to file initial comments up to and including February 26, 2021, and a commensurate extension of time up to and including March 12, 2021, to file reply comments. On February 9, 2021, the Commission granted the extensions.

On February 25, 2021, DEP filed a Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgment Act ("Motion to Dismiss").

On February 26, 2021, the Public Staff filed a Letter Regarding Comments.

On March 12, 2021, Sunstone filed its Response to DEP's Motion to Dismiss.

On May 4, 2021, the Commission issued its Order Denying Motion to Dismiss ("Order Denying Motion").

FACTUAL BACKGROUND

Much of the pertinent background information regarding Fort Bragg and Sunstone's Proposed Project were described in the Petition and DEP's Motion to Dismiss. Some of the facts, however, bear repeating for the purpose of these Initial Comments.

Fort Bragg is an Army installation located near Fayetteville, North Carolina, and is a federal enclave under Article I, Section 8, Clause 17 of the U.S. Constitution because the federal government purchased the land from the state of North Carolina in 1918. As is the case with all federal enclaves, the federal government has exclusive jurisdiction within Fort Bragg except in limited circumstances detailed later in these comments.[2]

Fort Bragg is also entirely located within DEP's franchised service territory assigned by the Commission to DEP's predecessor utility under North Carolina's Territorial Assignment Act.[3] DEP currently generates 100% of the electricity required to serve Fort Bragg and it has now been providing reliable electric service to this important customer for over a century. DEP transmits electricity to six DEP transmission substations and four distribution-to-distribution deliveries located at the edge of Fort Bragg. The electricity is then distributed throughout the base by Sandhills Utility Services, LLC ("Sandhills Utility"), which owns the federally-regulated privatized distribution system within Fort Bragg.

According to the Petition, Sunstone plans to construct a combination of ground-mount and rooftop solar facilities that will generate up to 25 megawatts ("MW") of electricity ("Proposed Project").[4] The approximately 27,000,000 kWh of electricity that

[2] *See infra* at Section II.
[3] *See* N.C. Gen. Stat. § 62-110.2.
[4] Petition at ¶ 2; *see also* Exhibit 1 Response to DEP Data Request 1-2.

could be generated annually by the planned solar generating facilities—approximately 8.75% of Fort Bragg's estimated annual electricity demand according to the Petition—would partially meet the electricity needs of on-base privatized housing owned by Sunstone's affiliate, Bragg Communities LLC ("BCL"), within the federal enclave area of Fort Bragg.[5]

The Petition asserts that Sunstone is "seeking to enter into an energy services agreement to provide solar energy and energy efficiency services exclusively to on-base, privatized military housing at Fort Bragg that is owned and managed by BCL."[6] The Petition later explains that Sunstone would "furnish energy and energy efficiency services to BCL (customer) . . . [which] services would include production of solar energy on base, and delivery exclusively to on-base military housing."[7] The Petition explains that the "operation of, and business relationships between these private entities [Sunstone and BCL] will follow prudent industry practices" and suggests that the prospective energy services agreement between Sunstone and BCL will allow this unregulated entity to furnish and sell partial requirements electric service to BCL. To the best of DEP's understanding, Sunstone has not committed to developing the solar project(s) or funding any to-be-identified system upgrades that may be required to interconnect to Sandhills Utility's (or, potentially, DEP's) system.[8] Also, Sunstone does not have a clear timeline for when it will proceed with development: "At this stage there are not specific dates tied to particular milestones in the expected project development process."[9]

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[5] Petition at ¶¶ 7, 12; *see also* Exhibit 2 Response to DEP Data Request 1-4.
[6] Petition at ¶ 2.
[7] Petition at ¶ 7.
[8] *See* Exhibit 3 Response to DEP Data Request 1-3. At this juncture, based on the limited information known, DEP has not made a determination of whether it would be an "affected system" under the NC Interconnection Procedures due the proposed solar generating facility's interconnection.
[9] *See* Exhibit 1 Response to DEP Data Request 1-2.

The Petition suggests that no backfeed of power onto DEP's electric distribution system would occur.[10] However, DEP now understands that BCL's on-base housing will not fully consume the energy generated by the planned solar project and, instead, BCL will also be compensated for providing electricity for use within Fort Bragg via bidirectional metering of its electricity consumption under an existing Municipal Services Agreement ("MSA") with the Army.[11] In a sense, the planned solar project will be furnishing power to both BCL's on-base housing as well as other on-base customers at times when the planned solar generating facility's energy output exceeds BCL's load. At all times, however, DEP will be required to backstand the solar generating facility to ensure its retail customer, Fort Bragg (which will continue to sell power to BCL) receives reliable electric service.

The Petition requests that the Commission issue a declaratory ruling that: (1) Fort Bragg is not subject to Commission regulation under the Public Utilities Act because it is a federal enclave; (2) Sunstone's provision of solar energy and energy efficiency services within the federal enclave of Fort Bragg does not subject it or its assignees, nor their work, to the Public Utilities Act; and (3) Sunstone's proposed activities will not cause it to be considered a public utility under N.C. Gen. Stat. § 62-3(23).[12] In essence, Sunstone is requesting to operate as an unregulated electricity provider in North Carolina that can compete with DEP without Commission oversight.

[10] Petition at ¶¶ 3, 13.
[11] Petition at ¶¶ 3, 6; *see also* Exhibit 3 Response to DEP Data Request 1-3; Exhibit 4 Response to DEP Data Request 2-5.
[12] Petition at 1.

In its Order Denying Motion, the Commission noted that it has asserted jurisdiction in the past over a utility operating within the Fort Bragg federal enclave and in that instance provided guidance through a declaratory judgment.[13]

INITIAL COMMENTS

The Commission should find and declare that Commission regulation would apply to Sunstone's proposed arrangement for the generation and sale of electricity to BCL and government end-users within Fort Bragg, as presented in the Petition—both under the Public Utilities Act and as applied through federal law and as previously interpreted by the Army. Specifically, and as detailed below, the Commission has jurisdiction over the proposed project and should find that the Proposed Project constitutes unlawful public utility activity because (1) the Proposed Project seeks to engage in unregulated retail sales of electricity that this Commission and the Supreme Court of North Carolina have found violates the exclusive franchise rights of DEP; (2) Congress has provided clear and unambiguous consent to state regulation of retail sales of electricity at Fort Bragg as evidenced by case law and Department of Defense ("DOD") guidance; and (3) the Commission has previously asserted jurisdiction over entities operating as a public utility operating in Fort Bragg. Moreover, the fact that Sunstone's Proposed Project involves private parties within a federal enclave does not afford those private parties greater rights than the federal government, effectively allowing them to sidestep state regulations.

I. Sunstone's Proposed Project Constitutes *De Facto* Public Utility Service that Violates DEP Exclusivity Rights to Serve Fort Bragg

The Petition does not cite to any North Carolina state court or Commission precedent that arrives at the same legal conclusion Petitioners are essentially asking the

[13] Order Denying Motion at 3.

Commission to declare: that an unregulated independent power producer generating electricity and then selling that electricity to a third party within a federal enclave is not subject to regulation under North Carolina's Public Utility Act nor is it constrained by state law that assigns exclusive franchise rights to particular electric utilities. Moreover, Sunstone's proposed arrangement runs directly counter to what North Carolina courts and this Commission have recently held. Sunstone is proposing to act as a *de facto* public utility here and the Commission should assert jurisdiction over the Proposed Project and find that the Proposed Project violates DEP's exclusive franchise rights.[14]

Under the Public Utilities Act, the Commission's regulatory powers extend to public utilities as defined in N. C. Gen. Stat. § 62-3(23)a. For the electric sector, the term "public utility" is defined in subsection a.1, as follows:

> 'Public utility' means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for ... (1) Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.

Recently, the North Carolina Supreme Court affirmed the Commission's determination and the North Carolina Court of Appeals' decision that third-party sales of electricity constituted "public utility" action, as defined above, and is subject to

[14] *State ex rel. Utils. Comm'n v. Mackie*, 79 N.C. App. 19, 338 S.E.2d 888 (1986), *mod. and aff'd*, 318 N.C. 686, 351 S.E.2d 289 (1987) ("The status of an entity as a public utility, entitled to the rights conferred by the statutes and subject to the jurisdiction of the Commission, does not depend upon whether it has secured a certificate of public convenience and necessity, pursuant to G.S. 62-110, but is determined instead according to whether it is, in fact, operating a business defined by the Legislature as a public utility. If an entity is, in fact, operating as a public utility, it is subject to the regulatory powers of the Commission notwithstanding the fact that it has failed to comply with G.S. 62-110 before beginning its operation") (internal citations omitted).

Commission regulation.[15] The Court of Appeals' opinion adopted *per curium* by the Supreme Court found that such action violates the franchised electric public utility's exclusive rights to provide regulated electric utility service within its assigned service territory.[16] In *NC WARN*, NC WARN requested a declaratory judgment from the Commission that its proposed solar leasing arrangements where it would own solar panels and sell and deliver power to a church for a lease payment would not cause it to be regarded as a "public utility" pursuant to the North Carolina Public Utilities Act. The Court of Appeals affirmed the Commission's *Order Issuing Declaratory Ruling*,[17] finding that "there is no doubt that NC WARN owns and operates equipment (a system of solar panels) which produces electricity and that NC WARN receives compensation from the Church in exchange for the electricity produced by the system." The Court found that this action fits squarely in the definition of public utility under the Public Utilities Act, as NC WARN proposed to "own[] and operate[] 'equipment and facilities' that provides electricity 'to or for the public for compensation.'"[18]

The Court's decision in *NC WARN* was also informed by the State's important policy with respect to the regulation of electric utilities providing service to the public in North Carolina. The Court acknowledged the broader policy implications of organizations like NC WARN encroaching on DEP's exclusive franchise rights because "if [NC WARN] were allowed to generate and sell electricity to cherry-picked non-profit organizations throughout the area or state, that activity stands to upset the balance of the marketplace."[19]

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[15] *State ex rel. Utils. Comm'n v. NC WARN*, 255 N.C. App. 613, 619 (2017), *aff'd per curium* 371 N.C. 109, (2018) ("NC WARN").
[16] *Id.*
[17] Docket No. SP-100, Sub 31 (Apr. 15, 2016).
[18] NC WARN, 255 N.C. App. at 616, *citing* N.C. Gen. Stat. § 62-3(23)(a).
[19] *Id.* at 618-619.

The Court's further discussion of North Carolina's policy objectives in *NC WARN* track closely to the policy issues presented in the Petition and considered by the Commission in a number of third-party sales cases dating back to *National Spinning*.[20] The General Assembly has also taken action since the Court's *NC WARN* decision to reinforce electric public utilities' exclusive franchised service rights and North Carolina's well-established ban on third-party sales of electricity. N.C. Gen. Stat § 62-126.5(c), providing for limited, Commission-regulated, solar leasing in the State, states that:

> Any lease of a solar energy facility not entered into pursuant to this section is prohibited and any electric generator lessor that enters into a lease outside of an offering utility's program implemented pursuant to this section or otherwise enters into a contract or agreement where payments are based upon the electric output of a solar energy facility shall be considered a "public utility" under G.S. 62-3(23) ***and be in violation of the franchised service rights of the offering utility or any other electric power supplier authorized to provide retail electric service in the State. This section does not authorize the sale of electricity from solar energy facilities directly to any customer of an offering utility or other electric power supplier by the owner of a solar energy facility.*** The electrical output from any solar energy facility leased pursuant to this program shall be the sole and exclusive property of the customer generator lessee.[21]

Here, as noted above, the geographic area encompassing Fort Bragg "has been assigned exclusively to Duke Energy [Progress]" and "North Carolina law precludes retail electric competition and establishes regional monopolies on the sale of electricity based on the premise that the provision of electricity to the public is imperative and that competition within the marketplace results in duplication of investment, economic waste, inefficient service, and high rates."[22] DEP "ha[s] been granted an exclusive right to provide electricity

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[20] *Order Denying Petition for Declaratory Ruling*, Docket No. SP-100, Sub 7 (April 22, 1996) ("National Spinning").
[21] (emphasis added).
[22] NC WARN, 255 N.C. App. at 617 (citing *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 271, 148 S.E.2d 100, 111 (1966)).

in return for compensation within [their] designated territory and with that right comes the obligation to serve all customers at rates and service requirements established by the Commission."[23] Similar to the policy considerations articulated in *NC WARN*, allowing Sunstone to generate and sell partial requirements electricity to BCL and, indirectly, to other customers within Fort Bragg while being backstopped for reliability by DEP's utility system would shift costs to DEP's other customers.

Sunstone, like NC WARN, "desires to serve customers of its own choosing within Duke Energy [Progress]'s territory at whatever rates and service requirements it sets for itself without oversight."[24] In addition to selling power directly to BCL, Sunstone has admitted that BCL "will be credited" by the federal government ("FBDPW") for the electricity generated by the Proposed Project that flows onto Sandhills' system. These activities make Sunstone a public utility because—like NC WARN—it is proposing to own or operate equipment and to sell electricity "to or for the public for compensation" when it provides electricity to BCL for consumption as well as indirectly under BCL's planned arraignment to furnish power to Fort Bragg. [25]

This activity clearly violates North Carolina's well-established policy "promot[ing] the inherent advantage of regulated public utilities" to provide reliable electric service at rates authorized by the Commission and the Commission should assert its jurisdiction over the Proposed Project under the Public Utilities Act.

[23] *Id.*at 618.
[24] *Id.*
[25] *See* Exhibit 4 Response to DEP Second Data Request 2-5; CONFIDENTIAL Exhibit 5 Response to DEP Second Data Request 2-2; *see also* N.C. Gen Stat. § 62-3(23).

II. Congress Has Provided Clear and Unambiguous Consent to State Regulation of Electricity at Fort Bragg

DEP accepts that Fort Bragg is a federal enclave and that generally the federal government has exclusive jurisdiction in a federal enclave under the U.S. Constitution and federal law. However, with respect to the sale of electricity, the government has waived this exclusive jurisdiction.

A federal enclave is a geographic territory and its associated jurisdiction the federal government has purchased from a state under Article I, Section 8, Clause 17 of the Constitution. While the grant of exclusive legislative power to Congress over federal enclaves bars state regulation within them, there are three general exceptions to this rule: (1) a state law enacted before the cessation continues to apply;[26] (2) a state retains jurisdiction in certain areas when the federal government purchases land from the state;[27] and (3) when Congress provides "clear and unambiguous" consent to regulation.[28] With respect to state regulation over the retail sale of electricity, this third exception applies.

a. The relevant federal statutes and regulations evidence Congress' unambiguous waiver of sovereign immunity with respect to state law governing purchases of the electric commodity by the DOD.

Federal law makes the waiver of sovereign immunity with respect to the purchase of the electricity commodity clear and Sunstone's failure to demonstrate otherwise dooms its petition for declaratory judgement.

Congress enacted Pub. L. 100-202 § 8093 in 1987, which states that a "department, agency or instrumentality of the Federal Government may not use amounts appropriated or

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[26] *See Koren v. Martine Marietta Servs.*, 997 F. Supp. 196, 202 (D. P.R. 1997).
[27] Under N.C. Gen. Stat. § 104-7, North Carolina ceded exclusive jurisdiction to the United States over land acquired by the federal government within North Carolina except for the service of civil and criminal processes. *State v. Smith*, 328 N.C. 161 (1991).
[28] *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988).

made available by any law to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including … (2) electric utility franchises or service territories …" The legislative history of this provision reveals Congress' intent was to maintain the regulatory framework and not to impose increased costs on other customers: "this provision is intended to protect remaining customers of [electric] utility systems from the higher rates that inevitably would result if a Federal customer were allowed to leave local utility systems to obtain retail electric utility service from a nonlocal supplier."[29] As described above, imposing increased electricity costs on other customers is precisely the risk here if Sunstone is able to sell unregulated electricity to BCL and Fort Bragg in violation of DEP's exclusive franchise rights.

Congress later re-codified § 8093 at 40 U.S.C. § 591 in 2002 – evidencing that Congress saw fit to re-codify and make permanent § 8093 as part of federal law. Since re-codification, there has been no indication that the DOD has taken the position that the policy objectives of § 591 to ensure that the federal procurement of electricity adhere to State utility franchise law does not extend to all DOD installations, including federal enclaves such as Fort Bragg. The plain meaning of § 591 leaves little room for multiple interpretations: the federal government must comply with state law regarding the retail sale of the electric commodity. Specifically important here, the statute explicitly notes that this requirement includes compliance with electric utility franchises or service territories.

DOD regulations make this interpretation even more clear. In furtherance of the Congressional intent evidenced in § 8083 and affirmed through the re-codification at § 591,

[29] *See Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721 737 (D. Md. 2001), *aff'd on other grounds*, 290 F.3d 734 (4th Cir. 2002) (citations omitted) ("*BG&E*"); *see also* S. Rep. No. 235, 100th Cong., 1st Sess., at 70 (1987); H.R. Conf. Rep. No. 100-498 at 673 (1987).

the Federal Acquisition Regulations applicable to the DOD state that the DOD must comply with the requirements of § 591 and shall not "purchase . . . electricity . . . in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements."[30] These regulations further require the DOD to ensure that it is adhering to state regulatory frameworks by "consult[ing] with the state agency responsible for regulating public utilities, *that such competition would not be inconsistent with state law governing the provision of electric utility service*, including state utility commission rulings and *electric utility franchises or service territories established pursuant to state statute*, state regulation, or state-approved territorial agreements."[31] These regulations mirror the authorizing statute and are directly applicable in states like North Carolina where electric utilities are assigned exclusive service territories pursuant to state law.

Such consultation by the DOD and compliance with DOD regulations here would result in a determination that the Proposed Project *does* run afoul of North Carolina's regulatory framework and DEP's exclusive franchise. Currently, DEP is required to serve 100% of BCL's electricity requirements and if Sunstone were allowed to generate and sell electricity from the Proposed Project to DEP, DEP's load at Fort Bragg would be reduced by about 27,000,000 kWh annually (8.75% of Fort Bragg's total electric load), which could subject the remainder of customers on DEP's system to higher electricity rates.[32] This is

[30] *See* 48 C.F.R. § 41.201(d)(1).
[31] 48 C.F.R. § 41.201(e) (emphasis added).
[32] *See* Petition at ¶ 8. At this time, DEP has not fully evaluated whether there would be consequences to this significant "quasi self-generation" behind Fort Bragg's metered delivery point under Fort Bragg's current rate schedule for service. This issue would likely need to be considered if the Commission were to decide that Sunstone could own and operate the solar project to provide partial requirements retail electric service within Fort Bragg.

precisely what § 591 was intended to protect against. Sunstone also admits that at least some electricity generated by the Proposed Project is likely to backflow onto Sandhills' distribution system.[33] This arrangement even more directly implicates the electricity service provided to the federal government by DEP. Indeed, Sunstone is selling this excess energy to the FBDPW—the government entity responsible for managing on-base utilities—because when excess energy is generated by the Proposed Project, it "may be directed by Sandhills Utility to other on-base users on [Sandhills'] distribution system…" and "BCL will be credited for the energy generated" by the Proposed Project.[34]

Section 8093, the statutes re-recodification at § 591, and the Federal Acquisition Regulations provisions mirroring the statute provides a clear and unambiguous determination by the federal government of its intent to comply with state law and exclusive franchise rights with respect to electricity sales to the DOD. This constitutes a waiver of exclusive federal jurisdiction as far as electricity sales are concerned.[35] Sunstone has failed to demonstrate otherwise. As a result, the Commission should properly assert jurisdiction over the sale of electricity within the Fort Bragg federal enclave and regulate Sunstone's proposed retail electricity sales.

b. Case Law and DOD Guidance Provide Further Support for the Argument that Congress Has Provided Clear and Unambiguous Consent to State Regulation of Electricity Purchases.

The case law on this issue is limited, but the most recent and relevant precedent supports the argument that § 591 evidences the federal governments clear and unambiguous waiver of exclusive jurisdiction in federal enclaves such as Fort Bragg with

[33] *See* Exhibit 6, Second Set of Discovery Requests 2-1: "Sunstone states that the bi-directional meters will measure electricity generated by the project that flows on to Sandhills Utility's on-post distribution system."
[34] *See* Exhibit 4 Response to Second DEP Data Request 2-5.
[35] *See Goodyear Atomic Corp.*, 486 U.S. at 180.

respect to electricity purchases. Indeed, DEP has found no precedent to the contrary in the past 30 years.

The most applicable precedent here is *Baltimore Gas & Elec. Co. v. United States*,[36] where the court specifically addressed how § 591 applies to the purchase of electricity by Fort Meade – a federal enclave in Maryland – and distinguished between the provision of the electric commodity and the privatization of Fort Meade's electric distribution system. In *BG&E*, the utility argued that a recent privatization of the utility system at a federal enclave was improper because it failed to recognize that the privatization was subject to state and local law and regulation. BG&E argued *it* was the only entity authorized by Maryland law and the Maryland Public Service Commission ("MPSC") to own and operate electric and gas distribution systems in the area that includes Fort Meade and that the rates, terms and conditions of service under which the owner of the privatized system provides service would be subject to public utility regulation by the MPSC. The U.S. Government Accounting Office ("GAO"), where BG&E initially appealed, rejected this argument. The District Court sided with the GAO and also found that the MPSC was without jurisdiction to regulate the private company selected by the Army to operate the electric distribution system at Fort Meade.[37]

With respect to the purchase of electricity, however, the court found that federal law waived exclusive jurisdiction in this area, thereby subjecting the government to state

[36] 133 F. Supp. 2d 711 (D. Md. 2001), *aff'd on other grounds,* 290 F.3d (4th Cir. 2002).
[37] This is consistent with findings in other jurisdictions. For example, in 2000, the Colorado Public Utilities Commission found that the Enclave Clause precluded it from regulating as a public utility the winner of a solicitation to privatize the utility system in the portion of Fort Carson that qualified as a federal enclave. *In the Matter of Petition of Enron Federal Solutions, Inc. For a Declaratory Order Regarding Non-Regulation*, 2000 Colo. PUC LEXIS 682 (2000). However, as discussed in the OSD General Counsel Memorandum, state regulation of privatized utility systems is distinct from state regulation of the sale of the electric commodity. *See* Exhibit 7 OSD General Counsel Memorandum at 6.

utility regulation within a federal enclave. Specifically, the Court found that § 591 codifies the rule that "federal statutory provisions and regulations require that the Army must follow state law and regulations, including utilities regulations and franchise agreement, in its purchase of the commodity electricity."[38]

In large part, the GAO—the entity that the court in *BG&E* sided with—relied on a U.S. DOD legal opinion that § 591 only applies to the *purchase of electricity* and not to the "privatization" of an electricity distribution system. The *BG&E* court was also persuaded by the 2000 OSD General Counsel Memorandum in reaching its conclusion as the Memo explained that § 591 applies to the purchase of electricity.[39] The OSD General Counsel Memorandum specifically finds that § 591 "waives the sovereign immunity of the United States with respect to the acquisition of the electricity commodity" [40] and in its "Conclusions and Recommendations" section states that "[t]he Department *must* comply with state laws and regulations only when it is acquiring the electric commodity."[41] The OSD General Counsel Memorandum concludes that whether the DOD can purchase or obtain electricity from a generating facility is dependent on state law:

> [a] plain reading of Section 8093's operative statutory language ("… to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service…") necessarily leads to the conclusion that the waiver of sovereign immunity in that section is limited to the purchase of the electric commodity (electric power) excluding distribution or transmission services.[42]

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[38] *BG&E*, 133 F. Supp. 2d at 739.
[39] *Id.* at 735. The OSD General Counsel Memorandum instead, as also found by the court in *BG&E*, makes clear that "the state may not regulation the Federal Government's acquisition of utility services related to the on-base utility system" which was the primary issue in *BG&E* related to the privatized on-base distribution system. *See* Exhibit 7 OSD General Counsel Memorandum at 4, 8-9.
[40] *See* Exhibit 7 OSD General Counsel Memorandum at 4.
[41] *See* Exhibit 7 OSD General Counsel Memorandum at 4, 8 (emphasis added).
[42] Exhibit 7 OSD General Counsel Memorandum at 5.

Here, North Carolina law grants DEP exclusive franchise rights in the area encompassing Fort Bragg and the Proposed Project would violate those rights.

> Citing to Section 8093, and consistent with the DOD Memo, the Court in *BG&E* concluded that it was: ... clear that federal statutory provisions and regulations require that the Army must follow state law and regulations, including utilities regulations and franchise agreements, in its purchase of the commodity electricity."[43]

The Petitioners rely heavily on a case in the 8th Circuit issued over 30 years ago to support their argument that the Commission does not have jurisdiction over the Proposed Project because it is located in a Federal enclave.[44] There are a number of reasons why the 1990 *West River* decision should not garner the amount of deference the Petitioners would like. First, *West River* is not controlling law in North Carolina, it is only (outdated) persuasive authority. Second, the decision predates the *BG&E* decision, the OSD General Counsel Memorandum, the Federal Acquisition Regulation, and the re-codification of § 8093 to § 591, and does not represent the most recent guidance from the courts or the DOD on this issue. Finally, the *West River* case is a split decision where the dissent's position is much more consistent with the more recent court decisions and DOD guidance, suggesting that courts and federal agencies were subsequently persuaded by the dissent and moved away from the majority's opinion. In fact, the OSD General Counsel Memorandum itself specifically suggests that the *West River* decision does not align with DOD policy.[45]

Perhaps most importantly, the core policy issue that § 591 (then still § 8093) was enacted for—to "protect remaining customers of utility systems from having to pay the

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[43] *See BG&E*, 133 F. Supp. 2d at 738.
[44] *See West River Elec. Ass'n, Inc. v. Black Hills Power & Light Co.*, 918 F. 2d 713 (8th Cir. 1990) ("*West River*").
[45] *See* Exhibit 7 OSD General Counsel Memorandum at 5, fn 1 ("If the Department were to apply to holding of [*West River*] to all its privatization actions on installations within Federal legislative jurisdictions, the applicability of section 8093 would be limited to an even greater degree than suggested by this memorandum").

higher rates by reason of a loss of an existing customer"—was not as directly at issue in *West River* and the case does not speak to that policy consideration. In fact, the lower court in *West River* specifically noted that the solicitation at issue was not within the scope of Congress's concern to protect utility abandonment by their federal customers. The Court in *BG&E*, almost 13 years later and after Congress re-codified § 8093 as § 591, also recognized that this Section was "intended to protect the public from higher rates . . ." that would arise from "abandonment of an existing supplier."[46]

Here, unlike *West River* and *BG&E*, § 591's policy is directly at issue as the Proposed Project would effectively carve off a significant portion of Fort Bragg's load to serve with third party-owned generation.[47] And, as revealed through discovery, while that reduced load would primarily come from the on-base privatized housing through a sale of power to BCL, Sunstone acknowledges that there are times when excess electricity produced by the Proposed Project would also flow onto Fort Bragg's electricity distribution system and reduce the electricity demand from the base more broadly than just the housing unit.[48] Both the sale of the electric commodity to BCL and to FBDPW constitute public utility action and run counter to North Carolina policy designed to prevent shifting the cost of reduced load onto DEP's remaining customers.

In sum, *BG&E* should be viewed as a more modern statement of the meaning of *West River*, and the Federal Acquisition Regulation, which now incorporates the limitations imposed by § 591, further demonstrate that *West River* is not controlling or even persuasive precedent today.

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[46] *BG&E*, 133 F. Supp. 2d at 740.
[47] *See* Petition at ¶ 12 (noting that the Proposed Project would reduce Fort Bragg's electricity demand from DEP by approximately 8.75%).
[48] *See* Exhibit 4 Response to DEP Discovery Request 2-5.

III. The Commission Has Previously Asserted Jurisdiction to Regulate Public Utility Rates and Operations within Fort Bragg

Contrary to the Petition's contention that Fort Bragg is a federal enclave and "is not subject to the Public Utilities Act,"[49] it is notable that the Commission has previously asserted jurisdiction over public utility service within Fort Bragg and has also regulated construction of renewable energy facilities in other federal enclaves such as Camp Lejeune. In Docket No. W-1279, Sub 0, the Commission determined that Old North Utility Services, Inc. ("ONUS"), a North Carolina corporation with water distribution and wastewater collection operations located in Fort Bragg, was a public utility as defined under N.C. Gen. Stat. § 62-3(23)a.2 and Commission Rules R7-2(a) and R10-2(a) and thereby subject to regulation by the Commission.[50] The Commission accepted ONUS' argument that although the federal government compensates ONUS for its water distribution and wastewater collection services, ONUS provides these services for the benefit of the end-users located within Fort Bragg, and that the federal government "is only a necessary conduit."[51]

Pursuant to the Commission's determinations in ONUS, even where a private utility service provider contracts with the federal government to ultimately provide services to "private" end-users within Fort Bragg, that private utility is a "public utility" subject to regulation by the Commission pursuant to the Public Utilities Act. Stated differently, even where the federal government is involved in energy transactions between otherwise "private" utility providers and end-users in a federal enclave, the Commission may still

[49] Petition at ¶ 21.
[50] *Order on Petition for Declaratory Ruling and Application for Certificate of Public Convenience and Necessity*, Docket No. W-1279, Sub 0 (Mar. 18, 2008).
[51] *Id.* at 3-4.

assert state jurisdiction over those "private" utilities and end-users. In this case, there is no federal "conduit" between Sunstone and its proposed customers, just a private utility and private end-user; thus, it is logical for the Commission to similarly assert jurisdiction over those parties, as was done with ONUS.

Additionally, it is worth noting that at Camp Lejeune, the Commission regulates FLS YK Farm, LLC's fifty solar thermal hot water heating facilities for officers and personnel serving at the Marine Corps Base as new renewable energy facilities pursuant to Commission Rule R8-66.[52] This further evidences that the Commission's regulation of renewable energy facilities under the Public Utilities Act has been extended into federal enclaves in North Carolina.

IV. The Fact that Sunstone's Proposed Project Involves Private Parties in a Federal Enclave Does Not Afford Those Private Parties Greater Exclusivity Rights than the Federal Government

Sunstone contends that even if § 591 waives exclusive jurisdiction with respect to electricity sales to the federal government, § 591 does not apply to private entities, such as Sunstone and BCL operating within a Federal enclave. Such an outcome is an absurd result and inconsistent with case law. Simply stated, it is inconceivable that Congress would have intended to allow a contractor to the federal government to take actions within a federal enclave that Congress determined the federal government itself cannot.

Sunstone's argument—that because it is not a federal entity, it enjoys the jurisdictional exclusivity of a federal enclave regardless of any sovereign immunity waiver by Congress—runs counter to the U.S. Supreme Court's decision in *Offut Housing. Co. v.*

[52] *Order Accepting Registration of New Renewable Energy Facility,* Docket No. RET-8, Sub 0 (Mar. 31, 2010).

Country of Sarpy.[53] In *Offut*, the Supreme Court held that because Congress had waived exclusive jurisdiction with respect to taxation at a federal enclave, then the State had the power to tax a private party operating within the federal enclave. Furthermore, the Court determined that "the more persuasive construction of the statute . . . is that the States were to be permitted to *tax private interests*, like those of this petitioner, in housing projects located on areas subject to the federal power of 'exclusive Legislation.'" *Id.* Finally, the Court concluded that "we hold only that Congress, in the exercise of this power, has permitted such state taxation as is involved in the present case." Simply because Sunstone proposes to operate within a federal enclave does not mean it can then enjoy immunity from State laws even in instances where Congress has explicitly waived exclusivity to legislate and regulate.

Sunstone's argument here also does not align with the facts that the Army will ultimately be the purchaser of at least some of the output of the Proposed Project.[54] It is DEP's understanding that the FBDPW would purchase excess electricity generated by the solar facility to be consumed on-base, outside of BCL, and that BCL would be compensated for such indirect sales of electricity through a credit to BCL's bill. This indirect sale to FBDPW further undercuts the Petitioners' argument that § 591 is not applicable because the provision is only applicable to the "purchase of energy by a federal department, agency or instrumentality, and clearly does not apply to non-governmental entities purchasing electricity within a federal enclave."[55] The sale of excess electricity

[53] 76 S. Ct. 814 (1956).
[54] *See* Exhibit 7 Response to DEP Discovery Request 2-5 ("it is feasible there will be occasions when physical electrons produced by the [Proposed Project] may be directed by Sandhills Utility to other on-base users on its distribution system.").
[55] Petition at ¶ 20.

generated by the Proposed Project to the government would certainly be subject to § 591, as described above.

Of course, in addition to the electricity sales to FBDPW, Sunstone is selling electricity to the federal government through BCL. Sunstone effectively hides behind how the "rent" payments for BCL are structured in an attempt to evade § 591's applicability. Sunstone suggest that § 591 is inapplicable because the military personnel living in BCL receive a Basic Allowance for Housing ("BAH") that is directly allocated to BCL to cover rent expenses, and, therefore, the federal government itself is not directly paying for the electricity generated by the Proposed Project and sold to BCL.[56] This argument ignores where the BAH originates: the BAH is paid to BCL through appropriated funds, as Sunstone explains in a discovery response that "service members sign a form authorizing the U.S. Treasury to send the BAH to [BCL] to pay their rent."[57] In other words, the electricity generated by the Proposed Project is paid for by the U.S. Treasury Department to BCL and ultimately to Sunstone under the proposed arrangement.

Petitioners seemingly suggest that the federal procurement statute under which Sunstone is considered an "eligible entity", occupies the entire field of utility provisions for military housing. This argument is undercut by the fact that the statute gives the "Secretary" the authority to furnish utilities and services in connection with any military housing "acquired or construed" under the statute and located on a military installation. *See* 10 U.S.C. § 2872a(a). This statute does not speak to a private party's authority to

[56] Petition at ¶ 4.
[57] *See* Exhibit 8 SUN00001; *see also* Exhibit 9 CONFIDENTIAL SUN00106 ("Rent" includes payment for utility services).

supply electricity to another private party on a federal enclave and therefore there is no federal preemption.

CONCLUSION

For all of the foregoing reasons, and for whatever additional reasons the Commission may find persuasive, DEP respectfully requests that the Commission issue a declaratory judgment finding that (1) it has jurisdiction over the Proposed Project under the Public Utilities Act; and (2) that the Proposed Project violates DEP's exclusive franchise rights to provide retail electric service within Fort Bragg.

Respectfully submitted, this the 8th day of June, 2021.

/s/E. Brett Breitschwerdt

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Counsel for Duke Energy Progress, LLC

DEP Exhibit 1

Response to DEP Data Request 1-2

Docket No. SP-100, Sub 35

INTERROGATORIES

1-2. **Describe in detail Sunstone's efforts to develop the planned solar generating facility(s) to be located within Fort Bragg, including planned size (in MW) of the facility, dates of significant milestones in the development process, and any contracts entered into by or on behalf of Sunstone.**

Response: Without waiving any of its objections, Sunstone states that the aggregate projected capacity of all of its multiple solar facilities on Fort Bragg will be up to 25MW, employing a combination of ground mount and rooftop elements. The final design, and capacity, of the system will not be determined until completion of an engineering study, as described in response to Interrogatory 1-3. At this stage there are not specific dates tied to particular milestones in the expected project development process. However, information about the purpose, background and expected actions in connection with the project are set forth in a Privatized Housing Renewable Energy Solar Project Major Decision Concept Memorandum, issued through the Army's Installation Management Command, which recommends approval of Sunstone's development of solar energy capacity for military housing at Fort Bragg. The Army's memorandum is produced in response to Request for Production 1-1 and bears the Bates Stamp Nos. SUN00010-SUN00012. Sunstone has not entered into project-specific contracts, as of the date of these responses.

DEPARTMENT OF THE ARMY
US ARMY INSTALLATION MANAGEMENT COMMAND
HEADQUARTERS, UNITED STATES ARMY GARRISON, FT BRAGG
FORT BRAGG NORTH CAROLINA 28310

REPLY TO
ATTENTION OF

IMBG-PWH

21 Mar 16

MEMORANDUM THRU DPW SFS 28 Mar 16

FOR Garrison Commander

SUBJECT: Privatized Housing Renewable Energy Solar Project major Decision Concept Memorandum

1. Purpose. Recommend approval and signature of the attached major decision concept memorandum

2. Discussion.

a. Corvias is proposing a project to install a network of photovoltaic (PV) rooftop arrays throughout the Fort Bragg housing neighborhoods. No costs associated with this PV project shall be incurred by Bragg Communities LLC (BC).

b. Corvias will partner with a third party provider for the installation and maintenance/repair of all PV hardware. The PV will require an interconncetion agreement with Sandhills Utility Services prior to approval.

c. DPW Energy Manager has concurred with the initial project scope. Final project scope must be approved by DPW and Fort Bragg energy partners.

3. Recommendation. Garrison Commander approve and sign major decision concept memorandum at TAB A.

Douglas G. Jackson
DOUGLAS G. JACKSON
Chief, Housing Division
Director of Public Works

Corvias | military living

March 11th, 2016

MEMORANDUM THRU: OFFICE OF THE CHIEF OF STAFF FOR INSTALLATION MANAGEMENT, PUBLIC-PRIVATE INITIATIVES DIVISION, ATTN: Mr. Don Brannon, Program Manager, Room 9529, 2511 Jefferson Davis Highway, Arlington, VA 22202

TO: OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS & ENVIRONMENT), OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS & HOUSING), ATTN: Mary Jeanne Marken Program Manager, Capital Ventures Directorate, Room 3D453, 110 Army Pentagon, Washington, DC 20310-0110.

SUBJECT: Privatized Housing Renewable Energy Solar Project – Fort Bragg, North Carolina (the "Solar Project")

1. PURPOSE:

a. Bragg Communities, LLC ("BC") requests approval of a proposed Solar Equipment Lease ("SEL") for the Solar Project in accordance with the Deputy Assistant Secretary of the Army Installations & Housing (DASA I&H) Capital Ventures Directorate's memo dated August 24th 2015 titled "Approval of concept for Corvias to Execute Renewable Energy Portfolio Project." The Solar Project will be structured to benefit the privatized housing project at Fort Bragg without adversely impacting the Army's existing utility infrastructure. The proposed SEL will be signed with an effective date aligning with completion of construction.

2. BACKGROUND:

a. The Solar Project is expected to be installed and functioning no later than December 2016. Construction is currently projected to commence by May 2016.
b. The installation of 255W/260W Solar PV Panels utilizing Hyundai: HiS- M250MG module materials will allow 6kW or comparable system sizes. The production estimates assume a total estimated annual production of 35MW -/+ 10% installed with a kW LA rate at or below the current/kW utility rate.
c. Over the life of the Solar Project, it is estimated to provide $7.6 million in savings to BC for rate stabilization and security.
d. There will be no cost for the development of the Solar Project to the Army because all development, engineering, construction and legal costs associated with the Solar Project will be incurred by the solar developer. Additionally, none of the associated implementation or legal costs will be incurred by BC.
e. Long term operations and maintenance will be provided by the solar developer.
f. All renewable energy credits associated with the Solar Project will be transferred to the Army.

3: ACTIONS

a. Develop interconnection agreement with local utility operator, Sandhills Utility Service, and Garrison Energy Manager.
b. Sign SEL with the solar equipment owner, which includes the grant of a license for the solar equipment owner to enter the Ground Lease premises for, among other things, the installation, operation, owning, maintaining, removing, and replacing of the solar panels.
c. Communications to residents of the solar installation program and the impact to their homes.
d. Incorporate renewable energy awareness into the RCI Live Army Green program at Fort Bragg.
e. Amend the Ground Lease between BC and the Army to include renewable energy language.
f. Finalize the process for receiving RECs (renewable energy credits) and reporting. RECs to be retired and replaced by the solar equipment owner. BC will provide a cover letter to the Army demonstrating the RECs have been retired in the name of the Army to fulfill the requirement of the lease agreement. The replacement RECs will be placed into a third party tracking system by the DevCo with an option to retire the RECs and notes section to define the transaction.

Corvias | military living

March 11th, 2016

4. SIGNATURES:

Both the Managing Member and the Designated Member of BC agree with this request, and ask that the Major Decision Committee approve the modification outlined herein.

Charles E. Parker
Managing Member
Bragg Communities, LLC

COL Brett Funck
Designated Member
Bragg Communities, LLC

Encl:
(DASA I&H) Capital Ventures Directorate "Approval of concept for Corvias to Execute Renewable Energy Portfolio Project"

DEP Exhibit 2

Response to DEP Data Request 1-4

Docket No. SP-100, Sub 35

1-4. **Regarding Sunstone's statement in Paragraph 12 of the Request that "[d]emand from on-base housing will be reduced by 35% through solar energy and energy efficiency", please describe in detail these projections and calculations.**

Response: Without waiving any of its objections, data provided by the Army shows that actual consumption from on-base military housing at Fort Bragg between January 2019 and December 2019 (the last full calendar year of data available at the time of calculation) was 107,335,762 kWh. Ongoing Energy Conservation Measures (ECMs) employed in on-base housing are projected to reduce consumption by 10% (10,733,576 kWh) to around 96,600,000 kWh annually. Based on the projected annual generation from a 20MW solar energy program of approximately 27,000,000 kWh, the total projected reduction anticipated from ECM and solar generation is approximately 37,700,000 kWh, or roughly 35% of total consumption from on-base military housing in 2019.

DEP Exhibit 3

Response to DEP Data Request 1-3

Docket No. SP-100, Sub 35

1-3. **Please confirm that energy proposed to be furnished by Sunstone from its proposed solar generating facility would be exclusively consumed by Bragg Communities, LLC's privatized military housing at Fort Bragg ("Bragg Communities").**

a. **If you cannot confirm that energy produced by Sunstone from its proposed solar generating facility will be exclusively consumed by Bragg Communities, please explain how the electricity produced by Sunstone that is not consumed by Bragg Communities is consumed.**

b. **Will electricity generated by Sunstone's proposed solar generating facility be directly or indirectly delivered to or consumed by the Army at Fort Bragg?**

Response: Without waiving any of its objections, Sunstone states that, yes, its proposed project would provide solar energy and energy efficiency services exclusively to on-base, privatized military housing at Fort Bragg that is owned and managed by Bragg Communities, LLC ("BCL"). Sunstone would provide energy for consumption only by BCL's on-base housing units. As a part of Sunstone's development process, its interconnecting provider located on-base, Sandhills Utility Services, LLC ("Sandhills Utility"), will be conducting an engineering study to evaluate the peak production expected to be produced by the solar facility, and will evaluate the impact on Sandhills Utility's distribution grid to help balance electron flow based on the addition of such alternative renewable generation. This study would indicate whether any system upgrades are required, and Sunstone would pay for any necessary transmission or interconnection upgrades required by Sandhills Utility - which relate to the solar project - after review of the engineering study with Sandhills Utility. All energy efficiency benefits of the Sunstone solar energy and energy efficiency program will be realized by BCL, with the aid of bi-directional meters. Upon information and belief, power delivered to or consumed by other facilities or users at Fort Bragg that are not a part of on-base housing operated by BCL would continue to be procured by the Army from its existing providers.

DEP Exhibit 4

Response to DEP Data Request 2-5

Docket No. SP-100, Sub 35

2-5. Sunstone's response to DEP's Interrogatory 1-3 further states that "all energy efficiency benefits of the Sunstone solar energy and energy efficiency program will be realized by BCL, with the aid of bi-directional meters."

a. **Does the response mean that the benefits will be "realized" by BCL because the electricity itself is not necessarily all consumed by BCL at the time it is generated?**
b. **Is it feasible under the planned design of the proposed generating facility interconnection that energy generated may be consumed elsewhere on Sandhill Utility's distribution system and credited to BCL as a bill reduction?**

Response: Without waiving any of its objections, Sunstone states that there will be instances in which all of the physical electrons generated by its solar facility will not be consumed by on-base housing at the time they are generated. Moreover, it is feasible there will be occasions when physical electrons produced by the Sunstone facility may be directed by Sandhills Utility to other on-base users on its distribution system. BCL will be credited for the energy generated by the Sunstone project, and upon information and belief no other entity operating on base will see an invoice reduction from FBDPW.

DEP Exhibit 5

CONFIDENTIAL
Response to DEP Data Request 2-2

Docket No. SP-100, Sub 35

DEP Exhibit 6

Response to DEP Data Request 2-1

Docket No. SP-100, Sub 35

2-1. In its prior discovery responses to the Public Staff dated April 10, 2019, Sunstone stated that [BEGIN CONFIDENTIAL] "BCL's bi-directional meters will track electricity consumption from [Fort Bragg Department of Public Works] and will track generation for the solar generating facilities BCL is leasing from the Lessor." [END CONFIDENTIAL] *See* CONFIDENTIAL SUN00017.

a. Please provide a diagram of an operational, proposed bi-directional meter, indicating the electricity flow between Sandhills Utility Services, LLC ("Sandhills Utility"), BCL, and Sunstone's proposed project.

b. Please explain whether the proposed bi-directional meters would measure electricity generated by the proposed project that flows on to Sandhills Utility's distribution system?

Response: Without waiving any of its objections, Sunstone states that it has attached a cut sheet of meters installed in a similar military installation setting as Exhibit A. To the extent the interrogatory seeks a "single line diagram," Sunstone does not expect that to be available until later in the engineering interconnection process. Further, Sunstone states that the bi-directional meters will measure electricity generated by the project that flows on to Sandhills Utility's on-post distribution system.

DEP Exhibit 7

OSD General Counsel Memorandum

Docket No. SP-100, Sub 35

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

FEB 2 4 2000

MEMORANDUM FOR GENERAL COUNSEL OF THE ARMY
GENERAL COUNSEL OF THE NAVY
GENERAL COUNSEL OF THE AIR FORCE

SUBJECT: The Role of State Laws and Regulations in Utility Privatization

Section 2688 of title 10, United States Code, provides permanent authority to the Military Departments to convey certain listed types of utility systems to a utility company or other entity. As consideration for the conveyance, the Secretary shall receive fair market value, in the form of a lump sum payment or a reduction in charges for utility services provided by the utility or entity. The department commonly refers to the process of conveying the utility system to a non-Federal entity and concurrently contracting for services from the new owner, as privatization of that utility system. As we explore the role of state laws and regulations in utility privatization, we must be acutely aware of these two distinct and yet interrelated components, because the extent to which state laws and regulations are applicable to privatization varies depending on which component of privatization is at issue. Consequently, this memorandum addresses two questions: (1) Do state laws and regulations apply to the conveyance of an on-base utility system under section 2688 of title 10, United States Code?; and (2) Do state laws and regulations apply to or otherwise affect the Federal government's acquisition of utility services related to an on base utility system conveyed under section 2688 of title 10, United States Code? As discussed more fully below, the answer to this second question is different for the commodity electricity than for electric utility services, and for other types of utilities.

I. DO STATE LAWS AND REGULATIONS APPLY TO THE CONVEYANCE OF AN ON-BASE UTILITY SYSTEM UNDER SECTION 2688 OF TITLE 10, UNITED STATES CODE?

It is a longstanding Constitutional principle that the states may not regulate the Federal government except to the extent that the Constitution so provides or the Congress consents to such regulation, McCulloch v. Maryland, 17 U.S. 316 (1819). For Congress to consent to such regulation, it must waive the sovereign immunity of the United States. A waiver of sovereign immunity must be unequivocal. See, e.g., United States Department of Energy v. Ohio, 503 U.S. 607 (1992) ("(t)his Court presumes congressional familiarity with the common rule that any waiver of the Government's sovereign immunity must be unequivocal. Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." Citation

omitted). In Hancock v. Train, 426 U.S. 167 (1976), the Supreme Court discussed Federal supremacy at length particularly as it relates to Federal installations:

> It is a seminal principle of our law "that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." From this principle is deduced the corollary that "[it] is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." Id., at 427.
>
> The effect of this corollary, which derives from the Supremacy Clause and is exemplified in the Plenary Powers Clause giving Congress exclusive legislative authority over Federal enclaves purchased with the consent of a State, is "that the activities of the Federal Government are free from regulation by any state."
>
> * * *
>
> Taken with the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign" "without a clear expression or implication to that effect." this immunity means that where "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding Federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

426 U.S. at 178 (citations omitted).

The authority to convey an on-base utility system, granted by Section 2688, is in furtherance of the Congress' authority under Article IV, Section 3, of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; ...". Consequently, in this instance, the "rights and privileges of the Federal Government at stake ... find their origin in the Constitution", specifically, the property clause of Article IV, Section 3.

Through Section 2688 Congress granted to the military departments the authority to convey its utility systems. Regardless of the jurisdictional/enclave status of the installation, the disposal of Federal property is a Federal action which may not be restricted by the state, absent an explicit waiver of Federal sovereignty. Consequently, if Congress were to waive the sovereign immunity of the United States with respect to the

conveyance of an on-base utility system, it is likely it would do so, if at all, in Section 2688. Section 2688 refers to state regulation in its subsection (c)(2)—

> (c) Consideration.—(1) The Secretary concerned shall require as consideration for a conveyance under subsection (a) an amount equal to the fair market value (as determined by the Secretary) of the right, title, or interest of the United States conveyed. The consideration may take the form of—
>
> (A) a lump sum payment; or
>
> (B) a reduction in charges for utility services provided by the utility or entity concerned to the military installation at which the utility system is located.
>
> (2) If the utility services proposed to be provided as consideration under paragraph (1) are subject to regulation by a Federal or State agency, any reduction in the rate charged for the utility services shall be subject to establishment or approval by that agency.

Paragraph (2), by its own language, only applies when the consideration for the purchase of the on-base utility system is a reduction in charges, as opposed to a lump sum payment, and then only to the rate charged for the utility services. Consequently, if the sale is for a lump sum payment, there is no waiver of sovereign immunity under 10 U.S.C. § 2688. Furthermore, if the consideration for the sale is a reduction in charges, there is a waiver of sovereign immunity, but the waiver is limited to regulation of the rate charged for the utility services. There is nothing in Section 2688 that can be interpreted as a waiver of the Government's sovereign immunity from state or local regulation with respect to the conveyance of the on-base utility system. To the contrary, Section 2688 specifically indicates the manner by which the government may convey the on-base utility system: "[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures." 10 U.S.C. 2688(b).

In addition to section 2688, there is, for electricity, a special statutory provision contained in the Department of Defense Appropriations Act, 1988, Public Law 100-202, that bears on the question of whether Congress has waived the sovereign immunity of the United States—

> Sec. 8093. None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State approved territorial agreements: Provided, That nothing in this section shall preclude the head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287; nor shall it preclude the Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 or from purchasing electricity from

> any provider when the utility or utilities having applicable State-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

As will be discussed in more detail later, this provision waives the sovereign immunity of the United States with respect to the acquisition of the electricity commodity. However, nothing in this provision can be construed as waiving the sovereign immunity of the United States with respect to the disposal of an on-base utility system.

Because Congress has not waived the sovereign immunity of the United States with respect to the conveyance of an on-base utility system under section 2688 of title 10, United States Code, state law is not applicable to the conveyance of an on-base utility system under Section 2688; rather, Section 2688 governs that conveyance. Accordingly, "[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . ., the Secretary shall carry out the conveyance through the use of competitive procedures", not on a sole source basis to a utility that state law indicates has an exclusive right to provide utility service in the relevant geographic area.

Section 2688 also provides that the Secretary concerned may not make a conveyance of a utility system until he submits an analysis demonstrating, *inter alia*, that "the conveyance will reduce the long-term costs of the United States for utility services provided by the utility system concerned . . .." Whether this economic standard is met – and whether conveyance of the utility is permissible under section 2688 – can be substantially affected by whether state laws and regulations apply to the Federal Government's acquisition of utility services from the prospective new owner of the utility system. We now turn to address that question.

II. DO STATE LAWS AND REGULATIONS APPLY TO OR OTHERWISE AFFECT THE FEDERAL GOVERNMENT'S ACQUISITION OF UTILITY SERVICES RELATED TO AN ON-BASE UTILITY SYSTEM CONVEYED UNDER SECTION 2688 OF TITLE 10, UNITED STATES CODE?

A. CAN THE STATES REGULATE THE FEDERAL GOVERNMENT'S ACQUISITION OF UTILITY SERVICES?

For the reasons discussed in the previous section, the states may not regulate the Federal government in any respect absent an unequivocal waiver of sovereign immunity. With one exception discussed below with respect to acquisition of the electricity commodity, there has been no such waiver with respect to Federal acquisition of utility services, hence states may not regulate these transactions directly.

Some have argued that through Section 8093 of the Department of Defense Appropriations Act, 1988, Congress may have waived the sovereign immunity of the United States with respect to the acquisition of electric utility services. As indicated previously, Section 8093 provides that

> [n]one of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner inconsistent with State law governing the provision of electric utility service, including State utility commission rulings and electric utility franchises or service territories established pursuant to State statute, State regulation, or State-approved territorial agreements.

A plain reading of Section 8093's operative statutory language ("...to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service...") necessarily leads to the conclusion that the waiver of sovereign immunity in that section is limited to purchase of the electric commodity (electric power) excluding distribution or transmission services.[1] There is nothing in this section to indicate that "purchase electricity" should be read in any way other than its plain language. Consequently, electricity does not include the provision of utility services other than the commodity itself. This reading of section 8093 is also buttressed by the rule of statutory *construction that waivers of sovereign immunity should be narrowly construed.* See, e.g., United States Department of Energy v. Ohio, 503 U.S. 607 (1992) ("(t)his Court presumes congressional familiarity with the common rule that any waiver of the Government's sovereign immunity must be unequivocal. Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.").

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[1] In West River Elec. Assn., Inc. v. Black Hills Power & Light Co., 918 F.2d 713 (8th Cir. 1990), the United States Court of Appeals for the Eighth Circuit considered the application of section 8093 to the purchase of electricity at Ellsworth AFB. The court concluded that—

> ...Congress, through section 8093, has not provided the necessary clear authorization to defer its exclusive jurisdiction over Ellsworth and to apply in its stead the South Dakota utility service territories as established under South Dakota law.
>
> Nor are we able to find in section 8093, on its face or in relation to the Appropriations Act as a whole, or from the legislative history, any clear and unambiguous declaration by Congress to amend the extensive and carefully-crafted body of federal procurement law. In fact, nowhere in section 8093 or its legislative history is the Competition in Contracting Act mentioned. Furthermore, as previously noted, the legislative history clearly states that this legislation was intended to protect against utility abandonment by their federal customers. It is undisputed that no abandonment is occurring here.

918 F.2d at 719. If the Department were to apply the holding of this case to all its privatization actions on installations with exclusive Federal legislative jurisdiction, the applicability of section 8093 would be limited to an even greater degree than suggested by this memorandum.

Furthermore, the legislative history indicates that the "provision is intended to protect remaining customers of utility systems from the higher rates that inevitably would result if a Federal customer were allowed to leave local utility systems to obtain retail electric utility service from a nonlocal supplier." Senate Report 100-235, Report of the Committee on Appropriations accompanying S. 1923, the Department of Defense Appropriations Bill, 1988, page 70. There is nothing about the disposal of a government constructed and owned utility distribution system, and the subsequent acquisition of services from that system, that in any way undermines the stated purpose of section 8093.

However, because section 8093 waives the sovereign immunity of the United States with respect to the purchase of the electricity commodity, whether we could purchase or obtain electricity from a generating facility the Department has transferred through section 2688 is dependent upon state law.

B. CAN THE STATES REGULATE PROVIDERS OF UTILITY SERVICES TO THE FEDERAL GOVERNMENT?

While states generally recognize that they cannot regulate Federal contracting functions directly, some states have tried to regulate Federal contractors. Using this device, states sometimes attempt to accomplish indirectly what they could not achieve through direct oversight over activities of the Federal Government. The result is often a conflict between Federal regulations affecting Federal purchases and state regulation of providers of goods and services in its territory. Typically states will require a provider of a particular service or item of supply to be licensed while Federal contracting rules do not require the vendor to obtain a state license.

Conflicts between state and Federal laws are resolved through the Supremacy Clause of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Article VI, clause 2. Where there are direct conflicts between state and Federal law, state law must give way. The answer is less clear-cut where state and Federal laws do not directly conflict but where state laws affect Federal policies and programs to a greater or lesser degree. The Supreme Court has explained the rules for resolving conflicts between state and Federal law as follows:

> In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. E. g., Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Second, congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.

> Elevator Rice v. Santa Fe Corp., 331 U.S. 218, 230 (1947). . . . As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 478 (1984); Fidelity Federal Savings & Loan Assn v. De la Cuesta, 458 U.S. 141, 156 (1982). Nevertheless, pre-emption is not to be lightly presumed. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

California Fed. Savings & Loan Association v. Guerra, 479 U.S. 272, 284 (1987).

In the Federal contracting arena it appears that the second prong of the Guerra Supremacy Clause analysis applies. That is, the Federal Government has "occupied the field" of rules and standards applying to federal procurement and left no space for state intervention. In Miller v. Arkansas 352 U.S 187 (1956) the state attempted to prosecute a Federal contractor for not obtaining a contractor's license. The Supreme Court held that the Federal regulations establish methods for ensuring the responsibility of Federal contractors and that the states' attempt to insert themselves in this process violated the Supremacy clause. Many other cases since Miller have reaffirmed that the states may not require licensing of Federal contractors. The justification that regulation is intended to exclude bad contractors duplicates the Federal Government's own contractor selection procedures and is deemed an unwarranted interference with this Federal function. United States v. Virginia, 139 F.3d 984 (1998). Based on these precedents, state attempts to require that Federal utility service contractors operating a utility system on the installation obtain a state license to "ensure the Government gets quality service". should certainly fail.

States may justify regulation of a utility contractor on other grounds e.g. safety and health considerations affecting the broader utility distribution framework. This requires a different Supremacy Clause analysis since it is not the case that Congress has "left no room" for state regulation to ensure safe and economical operation of intrastate utility distribution systems. On the contrary, such regulation occurs in every state. Given potentially inconsistent Federal and state regulations each addressing legitimate concerns, a balancing test is required. United States v. Town of Windsor 765 F.2d 16, 19 (2d Cir, 1985)("application of the Supremacy Clause requires a balancing of the state and local interest in enforcing their regulations against the Government's interest in opposing the regulation."), United States v. Philadelphia 798 F2d 81, 87 (3d Cir. 1986)("a mere conflict of words is not sufficient; the question remains whether the consequences [of state regulation]....sufficiently injure the objectives of the federal program to require non recognition." citing McCarty v. McCarty, 453 U.S. 210, 232 (1981).

Using the balancing test, courts have found that a state building code is inapplicable to a Federal project, concluding that "[e]nforcement of the substance of the permit requirement against the contractors would have the same effect as direct enforcement against the Government." 765 F.2d at 19; and invalidated a state statute that prohibited carriers from transporting government property at rates other than those approved by a state commission because it was a prohibition against the Federal government and clearly in conflict with Federal policy on negotiated rates. Public Utilities Commission of California v. United States, 355 U.S. 534 (1958). On the other hand, in North Dakota v. United States, 495 U.S. 423 (1990), the Court held that state liquor reporting and labeling requirements imposed on contractors who sell liquor to the Federal government were not invalid because they did not regulate the Federal government directly, were not discriminatory, and did not impose a significant burden on the Federal government or conflict with a Federal system of regulations. Similarly, where the application of the state regulation required the contractor to comply with certain work safety rules, the Court found the impact on the Federal government's interest incidental and concluded that the rules were valid as applied against the contractor. James Stewart & Company v. Sadrakula, 309 U.S. 94 (1940).

In applying a balancing test, the Courts would be required to balance Federal policies favoring maximum possible competition in government contracting against whatever safety or other regulatory concerns the states could articulate. It would seem clear from the case law that the state could not impose a license requirement because that could operate to overturn the Federal selection of a contractor using competitive procedures. Miller v. Arkansas 352 U.S 187 (1956); United States v. Virginia, 139 F.3d 984 (1998). However, the state may well regulate the operation of that contractor in a non-discriminatory way to protect the health and safety of all its citizens as long as that regulation does not impose a significant burden on the Federal government or conflict with a Federal system of regulation. North Dakota v. United States, 495 U.S. 423 (1990). Some degree of state regulation of the contractor operating a utility system on the installation may be permissible, to ensure, for example, that the operation of the on-base system does not threaten the safety and reliability of any utility system to which the on-base system connects.

III. CONCLUSIONS AND RECOMMENDATIONS.

When the Department disposes of an on-base utility system, and more than one entity expresses an interest in the conveyance, the Department must dispose of the utility systems "using competitive procedures" notwithstanding state laws and regulations regarding who can own a utility system. Congress has not waived the sovereign immunity of the United States with respect to disposal. Any effort to dispose of the system in a non-competitive manner, when more than one entity expresses an interest in the conveyance, even if undertaken to voluntarily comply with state law, would violate the express terms of section 2688.

Additionally, the state may not regulate the Federal Government's acquisition of utility services related to the on-base utility system. Federal procurement laws and

regulations are supreme in this area. The Department must comply with state laws and regulations only when it is acquiring the electricity commodity.

Finally, while the entity to whom the Department conveyed the on-base utility system is not required to submit to state licensing or similar requirements that undermine the Federal competitive selection of that entity, to the extent the state has regulations regarding the conduct of operation and ownership of utility systems, the entity may have to comply with those requirements if those state requirements do not impose a significant burden on the Federal Government, conflict with a Federal system of regulation, or undermine the Federal policy being implemented. This will require a careful analysis of particular state requirements in relation to the Federal action.

Douglas A. Dworkin
Acting General Counsel

DEP Exhibit 8

January 8, 2018 Email Correspondence

Docket No. SP-100, Sub 35

From: Connor, Mark J CIV USARMY HQDA (US) <mark.j.connor.civ@mail.mil>
Sent: Tuesday, January 9, 2018 9:57 AM
To: Bill Culton
Subject: RE: [Non-DoD Source] Communities' entities question

Project LLCs are not "instrumentalities of the United States" -- rather, they are "eligible entities" as defined at 10 USC 2871(5).

From: Bill Culton [Bill.Culton@corvias.com]
Sent: Tuesday, January 09, 2018 7:48 AM
To: Connor, Mark J CIV USARMY HQDA (US)
Subject: [Non-DoD Source] Communities' entities question

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Hi Mark – I hope all is well. Someone asked me if our partnership/LLC's with the Army are considered "instrumentalities of the Army or US Government". I said I'd be shocked (and appalled) if that were the case. The only time I've heard the term "instrumentality" used is in the context of AAFES. I explained that the "federal funds" that make their way to the LLC are really just the service members BAH (which they can use outside the installation) and only come to our lockbox b/c the service members sign a form authorizing the US Treasury to send the BAH to the LLC to pay their rent.
Is there anything you can point me to that would make it clear that our LLC's are not instrumentalities?
Thanks in advance,
Bill

Corvias

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DEP Exhibit 9

CONFIDENTIAL
Corvias Memo Regarding BAH Calculation

Docket No. SP-100, Sub 35

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Initial Comments of Duke Energy Progress, LLC*, as filed in Docket No. SP-100, Sub 35, was served via electronic delivery or mailed, first-class, postage prepaid, upon all parties of record.

This, the 8th day of June, 2021.

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