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 Services Within Fort Bragg	))))))	ORDER ISSUING DECLARATORY RULING

HEARD: Monday, November 29, 2021, at 2:00 p.m., in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina

BEFORE: Chair Charlotte A. Mitchell, Presiding, and Commissioners ToNola D. Brown-Bland, Daniel G. Clodfelter, Lyons Gray, Kimberly W. Duffley, Jeffrey A. Hughes, and Floyd B. McKissick, Jr.

APPEARANCES:

For Sunstone Energy Development LLC:

M. Gray Styers, Jr. and Bradley M. Risinger, Fox Rothschild, LLP, 434 Fayetteville Street, Suite 2800, Raleigh, North Carolina 27601-2943

For Duke Energy Progress, LLC:

E. Brett Breitschwerdt, McGuire Woods, LLP, 501 Fayetteville Street, Suite 500, Raleigh, North Carolina 27601.

Jack E. Jirak, Deputy General Counsel, Duke Energy Corporation, Post Office Box 1551/NCRH 20, Raleigh, North Carolina 27602.

BY THE COMMISSION: On December 8, 2020, Sunstone Energy Development LLC (Sunstone) filed with the Commission a Request for Declaratory Ruling (Petition). At the time the Petition was filed, Sunstone was seeking to enter into a contract with Bragg Communities, LLC (BCL) — the private entity that provides on-base military housing at Fort Bragg pursuant to the United States Department of the Army's (Army) Residential Communities Initiative (RCI) — to provide solar energy and energy efficiency services to housing units on the federal Army base at Fort Bragg (Proposed Project). Sunstone requests that the Commission issue a ruling declaring that (1) Fort Bragg is not subject to the North Carolina Public Utilities Act because it is a federal enclave; (2) Sunstone's

provision of energy and energy efficiency services within the federal enclave of Fort Bragg does not subject Sunstone to the Public Utilities Act; and (3) the activities Sunstone proposes to undertake will not cause it to be considered a public utility under N.C. Gen. Stat. § 62-3(23). On December 9, 2020, Sunstone filed a corrected Petition.

On January 13, 2021, Duke Energy Progress, LLC (DEP), filed a petition to intervene. On January 21, 2021, the Commission granted the petition.

On February 25, 2021, DEP filed a Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgement Act (Motion to Dismiss). In the Motion to Dismiss DEP requested that the Commission dismiss Sunstone's Petition for failing to present a justiciable case or controversy and for failing to join the Army as a necessary party. DEP further requested that if Sunstone's Petition were not dismissed, the Commission allow parties an additional 20 days from the date of the order on its motion to respond to the substance of Sunstone's Petition.

On February 26, 2021, the Public Staff filed a letter stating that it did not intend to file comments at that time.

On March 12, 2021, Sunstone filed a response (Sunstone Response) requesting that the Commission deny DEP's Motion to Dismiss. Sunstone argued that it has presented a justiciable case and controversy and that the Army is not a necessary party to this proceeding. Sunstone further requested that if the Commission did determine the Army is a necessary party, the Commission join the Army and allow its Petition to proceed.

On May 4, 2021, the Commission issued an Order Denying Motion to Dismiss. The Commission also found good cause to establish new deadlines for the filing of comments from interested parties on the merits of the Petition.

On June 8, 2021, DEP filed initial comments (DEP Comments).

Also on June 8, 2021, the Public Staff filed a second letter stating that it did not intend to file comments at that time.

On July 20, 2021, Sunstone filed reply comments (Sunstone Reply Comments).

On October 20, 2021, the Commission issued an Order Scheduling Oral Argument, Allowing Briefing, and Requiring Responses to Commission Questions (October 20, 2021 Order). Among other things, the Commission found good cause to allow parties the opportunity for pre-argument briefing limited to the issue of whether and, if so, how the September 7, 2021 North Carolina Court of Appeals decision in *State ex rel. Utilities Commission v. Cube Yadkin Generation LLC*, 279 N.C. App. 217, 865 S.E.2d 323 (2021) (*Cube Yadkin*), affects the Commission's Order Denying Motion to Dismiss. The Commission also found good cause to direct that Sunstone, DEP, or both as appropriate, file verified written responses to several Commission questions.

On November 9, 2021, Sunstone and DEP filed verified written responses to the Commission questions.

On November 15, 2021, Sunstone and DEP each filed pre-argument briefs. DEP included in its pre-argument brief a request that the Commission follow the guidance set forth in *Cube Yadkin*, reconsider its Order Denying Motion to Dismiss, and dismiss the Petition for failure to bring a justiciable controversy (Motion to Reconsider). DEP did not in its brief renew its argument that the Army must be joined as a necessary party.

On November 29, 2021, oral argument was held as scheduled.

On February 7, 2022, Sunstone and DEP each filed post-argument briefs and proposed orders.

JUSTICIABILITY OF SUNSTONE'S PETITION UNDER THE DECLARATORY JUDGMENT ACT

After careful consideration, the Commission remains persuaded that the Petition presents an actual controversy proper for consideration under the Declaratory Judgment Act and denies DEP's Motion to Reconsider.

Summary of the Relevant Facts Presented by the Parties

Sunstone explains in its Petition that it is a limited liability company jointly owned by Corvias Solar Solutions, LLC (Corvias), and Onyx Development Group LLC. At the time the Petition was filed, Sunstone was seeking to enter into a contract with BCL to provide solar energy and energy efficiency services to BCL's on-base housing located on Fort Bragg.

Pursuant to 10 U.S.C. § 2872a(a) the Army is authorized to furnish utilities and services, including electric power, to military housing located on a military installation. At Fort Bragg the Army has entered into a Municipal Services Agreement (MSA) with BCL to provide all utility services BCL requires for its on-base housing, including electric power. Sunstone states that the MSA does not require BCL to rely on the Army as the exclusive service provider of utility service for on-base housing; instead, the MSA permits BCL to seek alternative sources for utility services and to negotiate directly with private providers for such services.

In its Motion to Dismiss, DEP states that it understands that Sunstone prospectively plans to construct a combination of ground mounted and rooftop solar facilities that could generate approximately 27 million kWh of electricity annually to meet part of the electricity needs of BCL's on-base housing. DEP notes, however, that Sunstone did not provide the Commission with any executed or proposed agreements between Sunstone and BCL, between Sunstone and other parties at Fort Bragg, or between BCL and the Army.

DEP further states that "Sunstone has not entered into project-specific contracts" as of February 2021, and that it was in the very preliminary stages of project development. DEP highlights that no energy services agreement between Sunstone and BCL existed (at that time), no lease exists to allow siting of the facility at Fort Bragg, the final design and capacity of the system has not yet been determined, and Sunstone does not have a clear timeline for its expected development process. DEP also notes that interconnection studies have not commenced, so there is no agreement authorizing interconnection of any proposed solar project to the Sandhills grid or addressing the possibility of backfeed onto DEP's grid; as a result, it is not clear whether DEP will be an affected system.

Sunstone states in its Reply Comments that its Proposed Project is part of a broader federal policy authorizing alternative energy generation on military bases, citing 10 U.S.C. §§ 2911(g)(1)(A) and 2922a(a) and other United States Department of Defense (DoD) policy directives in support. Sunstone states that the Proposed Project has preliminary Army approval, highlighting that on or about August 24, 2015, Paul D. Cramer, Deputy Assistant Secretary of the Army for Installations, Housing and Partnerships, issued an Approval of Concept for Corvias to Execute Renewable Energy Portfolio Project (Solar Portfolio) to provide solar-generated electricity to the on-base housing areas at Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill, and Fort Riley (Approval of Concept), and that the Fort Bragg Proposed Project received specific approval in a March 21, 2016 Privatized Housing Renewable Energy Solar Major Decision Concept Memorandum issued by Douglas G. Jackson, Chief of Housing Division, Director of Public Works (Major Decision Concept Memo). *See* Sunstone Reply Comments, Exs. F, H. Sunstone notes that these approvals also contemplate necessary amendments to the ground lease between BCL and the Army, as well as execution of a lease "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 solar panels." *Id.* at 10 (internal quotation and citation omitted). Sunstone also states that consistent with these approvals Sunstone and Corvias have already installed solar energy generating facilities at three of the bases identified in the Approval of Concept: Aberdeen Proving Ground, Fort Meade, and Fort Riley.

Sunstone also filed verified responses, along with exhibits, to the Commission's October 20, 2021 Order that directed Sunstone, DEP, or both if appropriate, to respond to six Commission questions related to the development of the Proposed Project. In response to the Commission's first question regarding contractual and developmental status of the Proposed Project, Sunstone discussed other projects in other jurisdictions and confirmed that the only change in circumstance from Sunstone's last filing was its plan to enter a Fort Bragg-specific letter of intent with BCL affirming its intention to execute the Proposed Project. Sunstone provided an unexecuted, confidential contract (Confidential Exhibit 1) as an example of what it, at that time, intended to sign for the Fort Bragg Proposed Project. Sunstone also stated that it, the privatized on-base housing provider, and the local utility company have worked successfully in each other case to allow the projects to move forward but that in this case DEP has declined such cooperation.

In response to the Commission's second question regarding "executed obligations, service agreements, leases, or contracts" related to the Proposed Project, Sunstone provided as Exhibits 2, 3, 4, and 5 the 50-year ground lease between BCL and the United States, the MSA between BCL and the United States, the Approval of Concept, and the Major Decision Concept Memo.

After oral argument, on February 4, 2022, Sunstone and BCL executed a Solar Energy Services Contract for the Proposed Project (Contract). Sunstone filed the Contract with the Commission on February 7, 2022. *See* Sunstone's Confidential Post-argument Exhibit 1.

Discussion

Pursuant to N.C.G.S. § 62-60, the Commission has "all the powers and jurisdiction of a court of general jurisdiction" over matters within its jurisdiction. Sections 1-253 through 1-267 of the North Carolina General Statutes (Declaratory Judgment Act) provide the Commission the authority to "declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C.G.S. § 1-253. Section 1-264 further provides that the purpose of the Declaratory Judgment Act is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally constructed and administered." *See also N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 446-50, 206 S.E.2d 178, 186-89 (1974) (*Consumers Power*).

Under the Declaratory Judgment Act the Commission has "no jurisdiction to determine matters purely speculative, enter anticipatory judgments, declare social status, deal with theoretical problems, give advisory opinions, answer moot questions, adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions[.]" *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960) (citations omitted), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354, 185 S.E.2d 836 (1972). For there to be jurisdiction, the action for declaratory judgment must present an actual controversy. *Time Warner Ent. Advance/Newhouse P'ship v. Town of Landis*, 228 N.C. App. 510, 514-15, 747 S.E.2d 610, 614 (2013); *see also Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 287, 134 S.E. 2d 654, 656 (1964) (adjudicatory bodies have "jurisdiction to render a declaratory judgment only when the pleadings and evidence disclose the existence of an actual controversy between the parties to the action, arising out of conflicting contentions as to their respective legal rights and liabilities under a deed, will, contract, statute, ordinance, or franchise."). While the actual controversy requirement under the Declaratory Judgment Act is less demanding than the "case or controversy" requirement under Article III of the United States Constitution, and "the definition of a 'controversy' must depend on the facts of each case, a 'mere difference of opinion between the parties' does not constitute a controversy"; nor is the "[m]ere apprehension or the mere threat of an action or a suit . . . enough." *Gaston Bd. Of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citation omitted). The

Commission only has "jurisdiction if the judgment will prevent future litigation" and the litigation appears unavoidable. *Id.*; *Little*, 252 N.C. at 244, 113 S.E.2d at 701.

The North Carolina Supreme Court explains that litigation is not unavoidable if "there [is] an impediment to be removed before court action c[an] be started." *City of New Bern v. New Bern-Craven County Bd. Of Educ.*, 328 N.C. 557, 561, 402 S.E.2d 623, 626 (1991). "[A] lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered" constitutes a sufficient impediment to litigation. *Am. Civ. Liberties Union of N.C., Inc. v. State of North Carolina*, 181 N.C. App. 430, 434, 639 S.E.2d 136, 138-39 (2007). Similarly, an impediment exists where "the action in controversy has not been performed but is merely speculative, or . . . the ordinance that is the subject of the suit has not been enacted but merely has been proposed." *Id.* at 434, 639 S.E.2d at 139 (citations omitted). However, "[w]hen no impediment is present, . . . the case is justiciable[.]" *Id.*

North Carolina courts have previously addressed requests involving merely planned or hypothetical action. For example, in *Barbour v. Little*, 37 N.C. App. 686, 247 S.E.2d 252, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978), defendants announced their intention to adopt a proposed "Master Plan" for Eno Park which encompassed the plaintiffs' properties, but there was no evidence that the plaintiff property owners were yet directly or adversely affected — condemnation proceedings had not commenced. The Court of Appeals concluded that the "mere planning" to take certain lands (i.e., the inclusion of a certain tracts of land during the proposed plan's development stage) did not constitute an actionable controversy. *Id.* at 691-92, 247 S.E.2d at 255; *see also Gaston Bd.*, 311 N.C. at 235-36, 316 S.E.2d at 62-63 (defendant's stated intention to take whatever action necessary, and plaintiff Board's stated intention to expel, not enough to establish an actual controversy); *Adams v. N.C. Dep't of Natural & Econ. Res.*, 295 N.C. 683, 703-04, 249 S.E.2d 402, 414 (1978) (no justiciable controversy where plaintiffs' assertions that their property had been impacted or "taken" rested on speculative assumptions — plaintiffs had not yet obtained development permits, variances, or exemptions). Likewise, in *Wendell v. Long*, 107 N.C. App. 80, 418 S.E.2d 825 (1992), plaintiffs, record owners of certain lots in a subdivision, sought to enforce restrictive covenants applicable to the subdivision because, based upon defendants' proposed house site plan from the Plat Book description of the property, they alleged defendants "intend[ed] to violate" those covenants. The Court of Appeals *ex mero motu* considered this contention and concluded that there was no actual justiciable controversy because plaintiffs only alleged some "anticipated . . . future action to be taken by defendants which would result in a violation." *Id.* at 83, 418 S.E.2d at 826.

Recently, on September 7, 2021, the Court of Appeals issued its decision in *Cube Yadkin*, with Judges Griffin and Dietz in the majority and Judge Jackson dissenting. The Court reviewed the Commission's Order Issuing Declaratory Ruling in Docket No. M-100, Sub 152, which declared that Cube Yadkin Generation LLC's (Cube) proposed business plan would cause it to be a public utility subject to Commission regulation. A majority of the panel determined that Cube failed to present a justiciable controversy and therefore vacated the Commission's order.

Judge Griffin highlighted that although Cube made '[p]reliminary contact' and entered into 'active negotiations'" with proposed tenants and "believe[d] 'binding lease agreements could be reached,'" Cube "ha[d] not yet entered into any leasing contracts creating a landlord/tenant relationship, d[id] not . . . have any ownership interest in real property in the Badin Business Park, and [was] not under contract to acquire any real property in Badin Business Park" — Cube instead only intended to move forward after the Commission approved its plan. *See Cube Yadkin*, 279 N.C. App. at 221, 865 S.E.2d at 326. Thus, Judge Griffin held that Cube had no present interest in the resolution of the question, was not in an adversarial position to Duke, and had no legal duties that would demand it act in a way that would unavoidably lead to litigation with Duke. *Id.* at 221-22, 865 S.E.2d at 326-27. "Put another way, there is no certainty that Cube's position is actually adversarial to Duke's exclusive franchise service rights" given that Cube did not yet have the legal right to lease the property required to fulfill its Proposed Plan. *Id.* at 222, 865 S.E.2d at 327.

Writing separately, Judge Dietz concurred. He compared the case to a hypothetical where a business seeks preapproval to change its business model but had yet to buy the land needed, secure leases with other businesses, or make any commitment to pursuing the alternative business model:

> Businesses routinely find themselves in this situation. They address the uncertainty by relying on the advice of legal counsel, and by drafting contracts that account for the uncertainty through contingency clauses and price concessions. [But t]hey cannot force the courts to stand in as legal counsel and offer an advisory opinion that carries the force of a binding legal judgment.

Id. at 224, 865 S.E.2d at 328 (Dietz, J., concurring) (citation omitted).

Although the existence of executed contracts may satisfy a justiciable controversy concern, in *Consumers Power* the North Carolina Supreme Court made clear that it is "[neither] necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief" nor required that "*all* of the participants must sign contracts before the possibility of a justiciable controversy may exist between petitioners-plaintiffs and Duke." 285 N.C. at 450-51, 206 S.E.2d at 189 (emphasis original). In that case it was only because "the complaint [demonstrated] . . . no practical certainty that plaintiffs ha[d] the capacity or power to perform the acts which would inevitably create a controversy with Duke" that the Court concluded "that litigation between the parties concerning the System Contract [did not appear to be] unavoidable." *Id.* at 451, 206 S.E.2d at 189-90.

There is no doubt that the Declaratory Judgment Act does not require actual wrong or loss in order to seek a declaration — "the plaintiff need not have already suffered an injury to file suit under the Act." *ACLU of N.C., Inc. v. State*, 181 N.C. App. 430, 433, 639 S.E.2d 136, 138 (2007); *see also T&A Amusements, LLC v. McCrory*, 251 N.C. App. 904, 912, 796 S.E.2d 376, 382 (2017) ("Plaintiffs are not required to sustain actual losses in order to make a test case; such a requirement would thwart the remedial purpose of the

Declaratory Judgment Act."). It instead serves in part to "enable[] courts to take cognizance of disputes at an earlier stage than that ordinarily permitted" in order to settle those disputes "before they have ripened into violence [or threatened the] destruction of the status quo" and "without either of the litigants being first compelled to assume the hazard of acting upon his own view of the matter by violating what may afterwards be held to be the other party's rights . . . ." *Lide v. Mears*, 231 N.C. 111, 117-18, 56 S.E.2d 404, 409 (1949). The Declaratory Judgment Act itself states that it should be "liberally construed and administered" so as "to settle and . . . afford relief from [this] uncertainty and insecurity . . . ." N.C.G.S. § 1-264.

DEP argues that the Commission should dismiss the Petition because it does not present a justiciable or actual controversy given that the Proposed Project is at this stage still hypothetical and based solely on proposed action. DEP states that Sunstone has no legal obligation to pursue the Proposed Project, has not yet entered into the necessary leases and contracts, or acquired any other contractual obligations, and therefore is not in a realized adversarial position to DEP. DEP highlights that the Court of Appeals in *Cube Yadkin* noted that "[b]ecause Cube may never be able to proceed with its Proposed Plan, and has nothing binding it to moving forward on that Proposed Plan, there is 'a lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered' in this case." DEP Pre-argument Brief at 5 (internal quotation and citation omitted).

DEP also argues that besides the absence of any contractual obligations between Sunstone and BCL, other additional impediments to litigation exist. DEP states that the Proposed Project has not been fully designed or studied and that Sunstone has not secured other necessary legal rights (such as the Army's Major Decision approval or its consent to alter BCL's ground lease) or approvals (such as an interconnection study and agreement from Sandhills, or BCL's agreeing to terminate its MSA) or entered into any contract for the sale of power to any retail customer. DEP states that before litigation may occur Sunstone must remove these many impediments and thus, given these significant obstacles, the controversy is far from avoidable. DEP argues that courts presented with similar fact patterns have routinely dismissed declaratory actions for failure to state an actual existing controversy.[1]

Sunstone responds that there is an actual controversy and that no impediments to litigation exist because (1) BCL has already secured a 50-year ground lease with the Army, and the services provided to BCL will be wholly within this area; (2) the Army has authorized the Proposed Project by its issuing the Approval of Concept and the Major Decision Concept Memo; (3) the Proposed Project is part of a larger ongoing, Army-approved, solar portfolio (in which Sunstone has entered into ten similar agreements); and (4) Sunstone and BCL have entered into a Letter of Intent to enter into a contract

[1] DEP also argued in its Motion to Dismiss that the Petition should be dismissed due to Sunstone's failure to join the Army as a necessary party. DEP did not, however, raise this issue in its Motion to Reconsider and, as such, this order does not address this issue previously addressed by the Commission's Order Denying Motion to Dismiss.

upon affirmative resolution of this docket.[2] Sunstone also argues that litigation is unavoidable because of the nature of the disagreement the parties have over the substantive question and due to DEP's refusal to cooperate without a Commission or court ruling that such activity does not contravene its franchised territory. On these facts, Sunstone argues that its circumstances are very different from the factual circumstances presented in the *Cube Yadkin* case.

Sunstone also highlights that the Commission routinely provides guidance to parties seeking to ascertain whether their actions will deem them a public utility under N.C.G.S. § 62-3(23). Finally, Sunstone suggests that the Commission's authority extends to allow the Commission to consider declaratory requests involving the holders of monopoly utility franchises in order to temper the risks inherent in the structural and market power of those monopoly franchisees.

At the time of oral argument there existed only a non-binding, Fort Bragg-specific letter of intent between BCL and Sunstone, affirming the parties' intention to execute a contract and proceed with the Proposed Project. However, the parties' negotiations continued to advance, and after oral argument Sunstone filed with the Commission its executed Contract with BCL.

Conclusion

After considering the foregoing and the entire record, the Commission agrees with Sunstone and remains persuaded that it has the authority to make a declaratory ruling in this matter pursuant to N.C.G.S. § 62-60 and the Declaratory Judgment Act, and that the purpose of the Act is served by the Commission's doing so.

The Commission finds compelling that: (1) Sunstone has received preliminary Army approval of the Proposed Project, as evidenced by the Army's Approval of Concept and Major Decision Concept Memo; (2) the Proposed Project is part of a larger solar portfolio, and the Army has already approved other of Sunstone's and Corvias' similar portfolio projects at its other bases that are currently further along in the contracting and development process; (3) Sunstone is in cooperation with BCL, the entity that owns the necessary ground lease with the Army, and the proposed services are to be provided to BCL wholly within that leased area; (4) there previously existed a Letter of Intent between Sunstone and BCL to sign a contract to place the Proposed Project's assets at Fort Bragg contingent upon resolution of this docket, *see* Confidential Exhibit 1 to Exhibit A of Sunstone's Pre-argument Brief; and (5) on February 4, 2022, Sunstone and BCL did, in fact, execute a binding Solar Energy Services Contract. The Commission concludes that these concrete steps, taken together, are sufficient to demonstrate that the matter is not purely speculative or hypothetical, Sunstone has the capacity and power to place its Proposed Project at Fort Bragg, BCL has contracted with Sunstone to secure energy from the Proposed Project, and, accordingly, an actual controversy exists between Sunstone and DEP over the questions presented by the Petition.

[2] The Letter of Intent is attached as Confidential Exhibit 1 to Exhibit A of Sunstone's Pre-argument Brief.

The Commission concludes that the instant facts are sufficiently dissimilar to the facts of the cases discussed above that have concluded that no justiciable controversy existed in light of their specific facts. Unlike in *Cube Yadkin*, BCL currently holds a long-term ground lease with the Army and has the legal right to provide the Army with certain services, Sunstone first secured BCL's agreement to pursue this Proposed Project, Sunstone and BCL have an executed Contract, and the Army has issued initial approvals for Sunstone to develop its Proposed Project. Indeed, while the Letter of Intent that existed at the time of oral argument might satisfy Judge Dietz' concern, certainly the executed Contract would do so, as his concurring opinion suggests that a contract with contingency clauses ordinarily would satisfy the actual controversy requirement. *See Cube Yadkin*, 279 N.C. at 224, 865 S.E.2d at 328 (Dietz, J., concurring). Similarly, and unlike the facts presented by *Barbour* and *Wendell*, discussed above, these same acts and approvals go beyond the "mere planning" to take certain lands in some future, hypothetical scenario.

Certainly, it appears true that neither Sunstone nor BCL have secured the final Army approvals for the Proposed Project, but it is not required that "*all* of the participants must sign contracts before the possibility of a justiciable controversy may exist." *Consumers Power*, 285 N.C. at 451, 206 S.E.2d at 189. It is equally true that there is no indication that either the Army intends to withdraw its initial approval or that Sunstone and BCL are not fully committed to the Proposed Project. To the contrary, the existence and further development of Sunstone's and Corvias' both completed and in-progress projects at other Army facilities (e.g., installation of solar energy capability at Aberdeen Proving Ground, Fort Meade, and Fort Riley) supports a conclusion that Sunstone is indeed committed to the Proposed Project. While it is of course possible that Sunstone — or any party seeking a declaration — might ultimately change course or abandon its Proposed Project, this possibility does not defeat the conclusion that at this moment there is a practical certainty that the Proposed Project will move forward and, as a result, litigation between Sunstone and DEP is likely to ensue.

The Commission also sees value in answering the merits of the jurisdictional question by way of declaratory ruling. Sunstone is not first required to expend significant investment upon which it may not see a return for many years or hazard violating what may be DEP's legal rights before finding its answer. *See Lide*, 231 N.C. at 117-18, 56 S.E.2d at 409; *T&A Amusements*, 251 N.C. App. at 912, 796 S.E.2d at 382. The Commission, instead, has full power and authority to settle and afford relief from this uncertainty and insecurity without requiring that Sunstone take these additional risks. As the State's agency charged with the responsibility of regulating public utilities, the Commission is uniquely equipped to apply N.C.G.S. § 62-3(23)a, *et al*., or to interpret its own jurisdiction to decide whether the construction and operation of specific proposed facilities subjects an entity to regulation by the Commission. *See N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 371 N.C. 697, 700, 821 S.E.2d 376, 379 (2018) (A reviewing court gives "great weight to an agency's interpretation of a statute it is charged with administering; however, 'an agency's interpretation is not binding.'") (citations omitted); *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) ("[T]he interpretation of a regulation by an

agency created to administer that regulation is traditionally accorded some deference by appellate courts."). The Commission concludes that it is in the public interest for persons who are considering investing in such projects to have some advance knowledge of whether those projects will cause them to become a regulated public utility. In addition, it is in the public interest and serves judicial economy for the Commission itself to have advance knowledge of whether an entity is being created that will require regulation by the Commission as a public utility. As a result, the Commission finds further support that the Petition presents an appropriate subject for the Commission's exercising its authority under the Declaratory Judgment Act.

In this regard, the operative facts are no different than those presented by Duke Energy Carolinas, LLC's (DEC) petition in Docket No. E-7, Sub 858. There, DEC had signed a contingency contract with one wholesale customer and sought a ruling that certain similar, future wholesale contracts with native load priority would be treated for ratemaking and reporting purposes in the same manner as existing wholesale contracts with native load priority. DEC represented that it was negotiating with other potential customers who were concerned with the issue and that it needed clarification to "avoid such uncertainty and exposure." Joint Petition of Duke Energy Carolinas, LLC, and the City of Orangeburg for Declaratory Ruling, No. E-7, Sub 858, at 5 (June 20, 2008). On this and other bases the Commission decided it was appropriate to issue a declaratory ruling. *See* Order on Advance Notice and Joint Petition for Declaratory Ruling, *Duke Energy Carolinas, LLC's Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Ruling*, No. E-7, Sub 858, at 32 (N.C.U.C. Mar. 30, 2009). This rationale is no less compelling here.

Accordingly, the Commission remains persuaded that the Petition presents an actual controversy proper for consideration under the Declaratory Judgment Act and denies DEP's Motion to Reconsider.

THE COMMISSION'S JURISDICTION OVER SUNSTONE'S PROJECT

The primary question presented by the Petition is whether 40 U.S.C. § 591(a) (Section 8093) subjects the Proposed Project — BCL's contracting with Sunstone for the provision of energy and energy efficiency services within the federal enclave of Fort Bragg[3] — to the Commission's regulatory authority or the requirements of the Public Utilities Act and relatedly, therefore, whether it violates DEP's exclusive franchise rights to serve the territory in which Fort Bragg is located. Because on this record the Proposed Project satisfies 10 U.S.C. § 2922a (Section 2922a), subject to the Army's and DoD's approval, the Commission concludes that it is unnecessary to reach the broader question of whether Section 8093 otherwise and generally applies to purchases of electricity on federal enclaves located in North Carolina. In addition, because the parties have conceded that the Proposed Project will be constructed, owned, and operated by

[3] The parties agree that Fort Bragg became an enclave upon the federal government's purchase of the land in 1918, with the full consent of the State of North Carolina. *See* N.C. Gen. Stat. §§ 104-1 and 104-7; *see also Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 794, 794 S.E.2d 535, 537 (2016). Thus, for purposes of this Order, the Commission assumes this to be so.

Sunstone on the Fort Bragg enclave, federal law applies, in this case Section 2922a, to the Proposed Project; the Commission thus concludes that it may not regulate Sunstone as a public utility subject to the provisions of Chapter 62.

Summary of the Relevant Facts Presented by the Parties

Fort Bragg is located within DEP's franchised service territory assigned by the Commission under North Carolina's Territorial Assignment Act. The on-base electric distribution network is 100% owned, operated, and maintained by Sandhills Utility Services, LLC (Sandhills), a private entity with which the Army has contracted for such service, and DEP currently generates all the power required to serve the base. The Sandhills distribution system connects to DEP's network at the border of Fort Bragg.

In its verified responses to the Commission's October 20, 2021 Order, DEP explains that it is the regulated electric public utility service provider to Fort Bragg through the Fort Bragg Directorate of Public Works (FBDPW), which is the government entity responsible for managing on-base utilities and that purchases electricity from DEP as DEP's retail customer. DEP states that it provides transmission service to four DEP-owned points of delivery at the border of Fort Bragg where electricity is stepped down from 230 kV to 12 kV and delivered to Sandhills to then be distributed throughout Fort Bragg by Sandhills. DEP also states that it provides transmission service to two points of delivery at which Sandhills owns the transformers.

DEP further explains that Sandhills owns, operates, and maintains the electric distribution system at Fort Bragg through a 50-year privatization contract entered into pursuant to 10 U.S.C. § 2688 — Utility Systems Conveyance Authority. DEP states that in addition to providing transmission service to Fort Bragg, it also delivers energy across DEP-owned distribution circuits to 23 distribution-level points of delivery on Fort Bragg.

In its verified responses, Sunstone states that BCL, the purchaser of electricity from the Proposed Project, is a business partner of the DoD for the purposes of operation and management of on-base military housing. Sunstone further states that BCL will be the contracting party with Sandhills for any interconnection agreement that is reached. Sunstone explains that the FBDPW furnishes electricity and other municipal services to BCL under an existing MSA that BCL has entered into with the Army.

Sunstone also states that under the Army's RCI program, military personnel (Service Members) receive from the Army a basic allowance for housing (BAH) that is intended to approximate the cost of adequate housing for Service Members wherever the Service Member chooses to live. If the Service Member chooses to live in BCL's private military housing on base, then the BAH is allocated directly to BCL; if the Service Member chooses to live off base, then the BAH is paid directly to the Service Member, who is then responsible for paying the member's own rent and utilities. Sunstone states that tenants in BCL-owned and -managed on-base housing do not receive a separate bill for electricity or any other utilities from BCL, and the amount of the BAH does not change based on a Service Member's usage of utility service.

Through a combination of ground mounted and rooftop solar facilities, Sunstone states that it intends for the Proposed Project to provide solar energy and energy efficiency services to the on-base housing located on Fort Bragg, generating approximately 27 million kWh of electricity annually. Sunstone estimates that approximately 25% of Fort Bragg's total energy consumption is attributable to on-base housing. Sunstone forecasts that its Proposed Project will serve approximately 35% of the estimated electricity demand needed to serve that housing, which translates to serving approximately 8.75% of total demand at Fort Bragg.[4]

Sunstone states that Fort Bragg's on-base housing will continue to receive the balance of its electricity from DEP, purchased from DEP by FBDPW and then resold to BCL under the MSA. Sunstone asserts that all the solar energy and energy efficiency benefits to BCL of its program will occur "behind the meter" and that there will be no backfeed beyond the Fort Bragg-exclusive Sandhills distribution network. Sunstone also states that DEP will not be asked to purchase or handle any power that the Proposed Project generates on base.

DEP contests Sunstone's claim that there will be no backfeed of power onto DEP's system, stating that BCL's on-base housing will not fully consume the energy generated by the Proposed Project. Instead, BCL will be compensated for providing electricity for use within Fort Bragg via bidirectional metering of its electricity consumption under the MSA. DEP asserts that the Proposed Project will "furnish[] 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," and that DEP will be required to backstand the Proposed Project to ensure that its retail customer, FBDPW — which will continue to sell power to BCL — receives reliable electric service.

In response, Sunstone explains that its rooftop units will generate power that is utilized directly by the structures on which they sit, and electrons not immediately consumed in that fashion will reach Sandhills' distribution grid serving the installation; power generated by its ground mounted units will go first to Sandhills' distribution grid before it is available for consumption by on-base housing structures. Sunstone further explains that bidirectional metering will measure the amount of power generated by the Sunstone solar facilities, and FBDPW is to provide BCL a credit for that production against BCL housing's monthly usage. Sunstone admits that the "electrical distribution reality [is] that neither Sandhills . . . nor Sunstone can state with certainty that every electron generated by the Sunstone facility which enters the on-base distribution grid will ultimately be consumed by military housing." Sunstone Reply Comments at 16.

In its verified response to the Commission's fifth question regarding BCL's bidirectional metering relationship with FBDPW, Sunstone explains that FBDPW currently invoices BCL for electric consumption for metered housing units and electrical fixtures,

[4] In its verified responses to the Commission's October 20, 2021 Order Sunstone states that in October 2021, the FBDPW informed Sunstone that BCL's on-base housing consumes 18.79% of Fort Bragg's power demand, meaning that the Project would typically generate energy that met approximately 6.58% of total demand on the base rather than 8.75%.

and non-metered electrical fixtures are billed at a monthly square-footage rate as defined in the MSA. Sunstone further explains that when the Proposed Project is operational, BCL will continue to calculate metered and non-metered fixtures the same and that bidirectional meters installed with the Proposed Project will meter and report the Proposed Project's generation within the monthly billing cycle. Sunstone states that BCL, Sunstone, or an assigned party will send a monthly generation report to FBDPW no later than the fifth of each month for the previous month's generation, and such generation will be credited on the monthly bill from FBDPW to BCL, reducing the consumption charged to BCL.

Sunstone also states that the Proposed Project will be sized to ensure that there will be no situation in which the amount to be credited exceeds BCL's monthly usage. Sunstone further states that in the extremely rare case of an emergency which results in little to no consumption of electricity from BCL's housing units, the generation will be curtailed within that monthly billing cycle to ensure that there is no over-generation and that, by contract, there will be no avenue under which FBDPW pays BCL for power exceeding BCL's monthly usage.

In its verified response to the Commission's sixth question regarding the potential for backfeed onto DEP's system, Sunstone states that the Proposed Project would be, like others in the Army-approved portfolio, designed and sized to prevent backfeed onto local utility grids and that Sunstone will work with Sandhills to perform a detailed System Impact Study to ensure the same.

In its verified response to the same question, DEP states that Sunstone proposes for the 20 MW ground mounted system to inject into either the Fort Bragg-Knox 230 kV substation, the Fort Bragg 3rd Brigade Substation, or both, and that based upon historical hourly metering data the proposed ground mounted facility could potentially backfeed onto the DEP system. DEP further states that if the Proposed Project generates close to its nameplate electrical output and the BCL housing units that the Proposed Project is intended to serve have an estimated minimum load of 6.5 MW at that given hour, excess electricity will ultimately backfeed onto DEP's system unless protection devices are installed to prevent such occurrence. DEP explains that the load profile for the Fort Bragg Knox 230 kV substation — the primary substation supplying Sandhills for subsequent feed to the Biazza Ridge area of Fort Bragg — has at times been lower at certain hours than what the Proposed Project would potentially generate, giving two historical examples of the same.

DEP states that absent a final project design and interconnection study request it is not possible for DEP to determine which of the two (or more) substations could experience backfeed without a more in-depth analysis of the various Sandhills feeders and Sandhills SCADA capabilities to shift load within the Fort Bragg system. DEP explains that it will need to complete a System Impact Study (or similar) to ensure the reliability of the DEP system.

Discussion

The United States Constitution reserves to Congress the exclusive authority to legislate over all areas purchased by the federal government with the consent of the state; that cession creates what is termed a federal enclave. *See* U.S. Const. Art. I, § 8, cl. 17. "These enclaves include numerous military bases, federal facilities, and even some national forests and parks." *Allison v. Boeing Laser Tech. Servs.*, 689 F.3d 1234, 1235 (10th Cir. 2012). That is not to say that most federally owned lands or facilities are federal enclaves in which the United States has exclusive legislative jurisdiction; to the contrary.[5] The parties agree, and for purposes of this Order the Commission assumes that Fort Bragg is a federal enclave.

On lands that are considered federal enclaves, the "[f]ederal enclave doctrine operates as a choice of law doctrine that dictates which law applies to causes of action arising on these lands." *Allison*, 689 F.3d at 1235. And the general rule is that thereon "the activities of the Federal Government are free from regulation by any state." *Hancock v. Train*, 426 U.S. 167, 178, 48 L. Ed. 2d 555, 565 (1976); *see also Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U.S. 285, 295, 87 L. Ed. 761, 767 (1943) ("in preserving the balance between national and state power, seemingly inconsequential differences often require diverse results . . . . Here we are bound to respect the relevant constitutional provision with respect to the exclusive power of Congress over federal lands"). Put another way, there is the default presumption that the federal government has exclusive jurisdiction within federal enclaves as the parties have agreed Fort Bragg is.

There are three recognized exceptions to this general rule. *See generally Colon v. United States*, 320 F. Supp. 3d 733, 746 (D. Md. 2018); *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs., LLC*, 250 N.C. App. 791, 801-02, 794 S.E.2d 535, 541 (2016). The parties agree that neither of the first two exceptions[6] are applicable and argue only the third

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[5] A sizeable amount of federally owned property exists wherein the federal government has only a proprietorial interest and therefore cannot be subject to the federal enclave doctrine. *See Federal Legislative Jurisdiction*, Report Prepared for U.S. Public Land Law Review Commission, Land and Natural Resources Division, U.S. Dept. of Justice (May 1969), https://publiclandjurisdiction.com/wp-content/uploads/2019/12/1969-Federal-Jurisdiction-Report-Wayne-Aspinall-DOJ.pdf. At the time of the last comprehensive government audit of such property, in the 1960s, approximately 5% to 7% of total federally owned acreage was reported by various federal agencies to be subject to the federal government's exclusive jurisdiction. *Id.* at Appendix B; *see also id.* at 54, 58, 75-143, 162-64. For the 188 Army installations reported, roughly 60% had some measure of federal jurisdiction attached; however, only 18% of all Army property was reported to be subject to exclusive federal jurisdiction. *Id.* at 102, Appendix B at 163.

In addition, it appears that there are numerous federal properties and facilities that are not "owned by the federal government but are instead simply operated, managed, or leased by federal agencies, or by the United States General Services Administration (GSA) on the agency's behalf, that are also not subject to the federal enclave doctrine. For example, "in the Southeast Sunbelt region [alone], the GSA currently manages 141 federally owned facilities and leases space in close to 1,361 commercially owned facilities, totaling approximately 44.4 million rentable square feet (19.7 million owned and 29.7 million leased)." *See* https://www.gsa.gov/about-us/regions/welcome-to-the-southeast-sunbelt-region-4/about-region-4/public-buildings-service (last visited Aug. 3, 2022).

[6] The first two exceptions to the general federal enclave rule are that state law applies within enclaves (1) where state law was in effect at the time the property was acquired by the federal government and does not

exception — whether Congress has "specifically authorized the enforcement of the state law on the federal enclave." *Colon*, 320 F. Supp. 3d at 746. To this end, "Congress [must] affirmatively declare its instrumentalities or property subject to regulation"; if it does not, "the federal function must be left free of [state] regulation." *Hancock*, 426 U.S. at 179, 48 L. Ed. 2d at 565 (internal quotation and citations omitted). Because these "principles shield[] 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.'" *Id.* (citations omitted, emphases added); *see also United States Department of Energy v. Ohio*, 503 U.S. 607, 615, 118 L. Ed. 2d 255, 266 (1992) (*DOE*) (stating that courts should "strictly" "construe [—] in favor of the sovereign" — any federal statute which purports to impose state law upon activity within a federal enclave).

DEP argues that Pub. L. 100-202 § 8093 of the Continuing Authorization Act of 1988, which was codified into law in 2002 as 40 U.S.C. § 591(a) (Section 8093),[7] meets the third exception and authorizes the Commission to assert its regulatory authority over the Proposed Project. In its Petition, Sunstone acknowledges that Section 8093 generally requires federal agencies to follow applicable state laws when purchasing electricity with congressionally appropriated funds. Section 8093 provides in relevant part:

> *General limitation on use of amounts.* A department, agency, or instrumentality of the Federal Government may not use amounts appropriated or made available by any law to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including —
>
> (1) state utility commission rulings; and
>
> (2) electric utility franchises or service territories established under state statute, state regulation, or state-approved territorial agreements.

Sunstone argues, however, that Section 8093 is a limited waiver that is not meant as an all-purpose release of federal jurisdiction with respect to the development and operation of electric generating facilities or the distribution, purchase, and consumption of electricity on federal enclaves like Fort Bragg. Petition at 13.

Sunstone relies on *West River Elec. v. Black Hills Power and Light Co.*, 918 F.2d 713 (8th Cir. 1990) (*West River*). In that case, the Eighth Circuit Court of Appeals addressed Black Hills Power and Light Company's (Black Hills) appeal from a judgment of the district court which held that Congress had not clearly and specifically waived its

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conflict with a federal purpose, and (2) where the State has expressly retained jurisdiction over particular areas of law, such as criminal law.

[7] Sunstone and DEP both correctly note that Section 8093 was subsequently codified into law as 40 U.S.C. § 591(a). Sunstone abbreviates these references as Section 8093; DEP most often refers to Section 591(a) in its discussions; several court decisions reference Section 8093, as it had not yet been codified as Section 591(a). For ease of reading, the term "Section 8093" hereafter will be used to refer to both the statutory enactment and the codified provision.

exclusive jurisdiction over Ellsworth Air Force Base (Ellsworth), a federal enclave, sufficient to require that Ellsworth comply with South Dakota law in the procurement of its utility services. *West River* involved the competitive solicitation of several South Dakota utility providers (and later one North Dakota utility provider, *see West River*, 918 F.2d at 715 n.4) to sell electric power from *off base* to Ellsworth. Black Hills argued that by virtue of the passage of Section 8093, Ellsworth must follow the utility franchise territories prescribed by South Dakota law in procuring its electrical service. In short, the utility argued that Ellsworth must buy electricity from it and no one else.

The Eighth Circuit concluded otherwise. It examined the legislative history and context of Section 8093 before concluding that — "[i]n view of the obvious congressional awareness of the requirement of clear and specific language to bind the United States" — "with respect to subjecting federal enclaves to state utility territories, [S]ection 8093 does not satisfy the traditional requirement that such intention be expressed with sufficient clarity." *West River*, 918 F.2d at 719. The Court also observed that

> [s]hould this be the objective of Congress, it need only amend the Act to make its intention apparent. Absent such amendment, [the Court can] only conclude that in enacting [S]ection 8093, Congress sought to submit federal installations and other federal agencies to state regulation in the procurement of utility service, while refraining from subjecting a federal enclave, a constitutionally-created entity, to such state control.

Id. at 719-20.

In relying upon *West River*, Sunstone states that Section 8093 is "intended to protect against utility abandonment by . . . federal customers," designed to protect local utility customers from significant rate increases occasioned by dramatic changes in a state-regulated utility's demand profile, but that it "contains no . . . specific reference to federal land or area, [and] instead is a general directive that federal agencies and installations follow state law in the procurement of their electric service." Petition at 13-14.

Sunstone cites to a February 24, 2000 Memorandum from the General Counsel of the Department of Defense (DoD) to the general counsel of the Army, Navy, and Air Force (DoD Memo), which states that "[t]he [DoD] must comply with state laws and regulations only when *it* is acquiring the electricity commodity." Sunstone Response at 15 (citing DoD Memo at 9; emphasis added by Sunstone). Sunstone argues that BCL, the entity that will be purchasing electricity from Sunstone, is not the DoD and is instead merely an "eligible entity" under 10 U.S.C. § 2871(5), defined as "any private person, corporation, firm, partnership, company, State or local government . . . that is prepared to enter into a contract as a partner with the Secretary concerned for the construction of housing units and ancillary supporting facilities," and that Sunstone is also merely a private entity operating entirely within the Fort Bragg federal enclave. Petition at 14; *see also* Sunstone Reply Comments at 13. Therefore, according to Sunstone, neither BCL nor Sunstone should be considered a department, agency, or instrumentality of the federal government.

Sunstone further argues that its provision of solar energy and energy efficiency services to BCL would result in no abandonment of a local electricity provider by a federal customer, rather its services will be comprised of an array of "behind the meter" steps to control costs by slimming the demand profile of the on-base military housing owned and operated by BCL. According to Sunstone, there would be no meaningful change in the Army's long-standing relationship with DEP.

In its Initial Comments DEP argues that the federal government has waived its exclusive jurisdiction over Fort Bragg and federal enclaves by providing "clear and unambiguous" consent to state regulation over the retail sale of electricity. DEP asserts that the plain language of Section 8093 requires the federal government, even with respect to Fort Bragg, to comply with state law regarding the retail sale of the electricity commodity, including compliance with electric utility franchises or service territories. DEP also cites 48 C.F.R. § 41.201(e), as requiring DoD to "consult[] 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." DEP Comments at 13.

DEP states that the Proposed Project also implicates the Congressional purpose in enacting Section 8093, which "was to maintain the regulatory framework and . . . 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." DEP Comments at 12 (citations omitted). DEP alleges that its obligation to serve 100% of BCL's electricity needs would be significantly impacted by the Proposed Project. DEP also argues that with at least some backfeed expected on Sandhills' distribution system the Proposed Project directly implicates the electricity service provided to the federal government by DEP.

DEP argues that *West River*, an Eighth Circuit case issued over 30 years ago, is not controlling law in North Carolina and is only outdated authority. DEP states that the most recent and relevant precedent is *Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721 (D. Md. 2001), *aff'd on other grounds*, 290 F.3d 734 (4th Cir. 2002) (*BG&E*), which distinguished between the provision of the electricity commodity and the privatization of a federal enclave's distribution system, and found that with respect to the former, federal law waived exclusive jurisdiction through Section 8093. There, the federal district court of Maryland addressed Baltimore Gas and Electric Company's (BG&E) and the Maryland Public Service Commission's (Maryland PSC) challenge to the DoD's solicitation of bids to privatize the utility distribution systems owned by the Army at Fort Meade, a federal enclave. BG&E argued that the Army must require that its bidders fully comply with state utility regulations, including state licensing requirements, submit to the regulatory jurisdiction of the Maryland PSC, and, thus — as BG&E was the only utility licensed by the Maryland PSC to offer electric and gas service in the Fort Meade area — award any privatization contract at Fort Meade to BG&E. While acknowledging that Section 8093 "require[s] that the Army must follow state law and regulations . . . in its purchase of the commodity electricity," the district court agreed with the U.S. Government

Accounting Office (GAO) and found that Section 8093 did not mean that the Maryland PSC had jurisdiction to regulate a private company selected by the Army to operate the electric distribution system at Fort Meade, because, among other reasons, when narrowly construed, Section 8093 concerns the purchase of the electricity commodity — not operation of the electric distribution system. *Id.* at 738, 740-41.

DEP argues that the district court discussed how Section 8093 applied to the purchase of electricity by Fort Meade and distinguished between the provision of the electricity commodity and the privatization of Fort Meade's electric distribution system. Specifically, the *BG&E* court reviewed (1) 10 U.S.C. § 2688 (Section 2688), which requires competition for the privatization of utility distribution systems on United States military installations; (2) Section 8093, which requires that when the federal government is purchasing electricity, it may not do so "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 . . . or state-approved territorial agreements"; and (3) two of the Army's implementing regulations, which require the federal government to follow state law when purchasing electricity services. DEP notes that the *BG&E* court found that Section 8093 codifies the rule 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." *Id*. at 738. DEP further cites to the DoD Memo, a 2000 Department of Defense General Counsel's opinion, which concluded that Section 8093 "waives the sovereign immunity of the United States with respect to the acquisition of the electricity commodity" and that "the Department must comply with state laws and regulations only when it is acquiring the electricity commodity," which DEP argues was persuasive in the *BG&E* court's decision.

DEP indicates that GAO, the entity with which the court in *BG&E* agreed, relied on a DoD legal opinion that Section 8093 only applies to the purchase of electricity and not to the "privatization" of an electric distribution system. However, with respect to the purchase of electricity, the *BG&E* court found that federal law, specifically Section 8093, waived exclusive jurisdiction in this area, thereby subjecting the government to state utility law within a federal enclave.

DEP also asserts that the DoD Memo cited in *BG&E* concludes that

> [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.

DEP Comments at 16 (quoting DoD Memo at 5). DEP argues that North Carolina law grants DEP exclusive franchise rights in the area encompassing Fort Bragg and that the Proposed Project would violate those rights.

DEP argues that *West River* is: (1) not controlling but merely persuasive law in North Carolina; (2) a decision that predates the *BG&E* decision, the DoD Memo, the Federal Acquisition Regulation, and the recodification of Section 8093; and (3) 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." *Id.* at 17. DEP also argues that "[p]erhaps most importantly" the core Congressional policy behind Section 8093 — to protect the remaining customers of utility systems from having to pay higher rates by reason of the loss of an existing customer — was not directly at issue in *West River*. DEP argues that unlike *West River* and *BG&E*, this policy consideration is present in the instant case.

DEP states that the Commission has previously asserted jurisdiction to regulate public utility rates and operations within Fort Bragg and the construction of renewable energy facilities in federal enclaves such as Camp Lejeune, citing the Commission's Order on Petition for Declaratory Ruling and Application for Certificate of Public Convenience, *Request for Declaratory Ruling by Old North Utility Services, Inc., and Application of Old North Utility Services, Inc., for Certificate of Public Convenience and Necessity*, No. W-1279, Sub 0 (N.C.U.C. Mar. 18, 2008) (ONUS Order). DEP also notes that the Commission regulates FLS YK Farm, LLC's fifty solar thermal hot water heating facilities for officers and personnel serving at Camp Lejeune, citing the Commission's Order Accepting Registration of New Renewable Energy Facility, *Application of FLS Array Owner II, LLC, for Registration of a New Renewable Energy Facility*, No. RET-8, Sub 0 (N.C.U.C. Mar. 31, 2010) (FLS YK Farm Order).[8]

DEP challenges Sunstone's argument that even if Section 8093 waives exclusive jurisdiction regarding electricity sales to the federal government, Section 8093 does not apply to Sunstone or BCL operating as private entities. DEP argues that FBDPW will purchase any electricity generated in excess of BCL's needs to be consumed elsewhere on base and that BCL will be compensated for these indirect sales by way of bill credits. DEP also argues that Sunstone is selling electricity to the federal government through BCL. DEP states that Sunstone admits the BAH, while directly allocated to BCL, originates as a payment to BCL through appropriated funds — "service members sign a form authorizing the U.S. Treasury to send the BAH to [BCL] to pay their rent." DEP Comments at 22.

In its Reply Comments Sunstone argues that the text and legislative history of Section 8093 support the conclusion that the narrow waiver therein was not meant to interfere with the ability of military branches to contract for energy production facilities on lands under their control. Sunstone points to the language in Section 8093(b)(2) that expressly provides that Section 8093(a) does not preclude a military department from "entering into a contract under section 2394 of title 10 [now 10 U.S.C. § 2922a (Section 2922a)]." *See* 40 U.S.C. § 591(b)(2).

[8] On May 10, 2010, the parties petitioned to change the named owner from FLS Array Owner II, LLC, to FLS YK Farm, LLC. The Commission subsequently issued an Errata Order reflecting the name change.

Section 2922a provides, in pertinent part:

(a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years —

(1) under section 2917 of this title [10 U.S.C. § 2917]; and[9]

[9] Although neither party raised or argued whether Section 2922a applies only to the development of geothermal resources under Section 2917, the Commission concludes that the "and" between subsections (a)(1) and (a)(2) must be read in the inclusive or disjunctive sense — meaning that the Secretary of a military department is given authority to act under either subsection but is not required to satisfy both in a single case — for a number of reasons. *See generally In re TCR of Denver, LLC*, 338 B.R. 494, 500 (Bankr. D. Colo. 2006) ("There has been, however, so great laxity in the use of ["and" and "or"] that courts have generally said that the words are interchangeable and that one may be substituted for the other, if consistent with the legislative intent."); *Officemax, Inc. v. United States*, 428 F.3d 583, 588 (6th Cir. 2005); *United States v. Munguia-Sanchez*, 365 F.3d 877, 880 (10th Cir. 2004).

First, Section 2922a(a) is permissive and inclusive, not restrictive or limiting. It permits but does not require the Army to enter into either or both of these two types of contracts. A common similar example would be a parent describing to a child the opportunities for activities while on a beach vacation: "We can play in the sand and in the water and walk the beach and look for seashells." These described opportunities do not mean that the child may only do any of those things if he or she commits to doing each and every one of them.

Second, and more importantly, Congress intended for Section 2922a to apply to more than geothermal resources. The House Armed Services Committee Report explained that it intended to revise and codify as permanent several already existing and already oft recurring provisions relating to military procurement, construction, and family housing, so that they might provide unified and permanent treatment of these laws. *See* H. Rep. No. 612, 97th Cong., 2nd Sess., at 2 (1982). The Report noted that the bill was meant as a codification of already existing law to make it more readily available, with these current policy and procedures "simply . . . incorporated in the new format." *Id.* at 3.

As to codification of Section 2922a specifically, the Report explained that it was meant to permit

> the Secretary of a military department to enter into contracts for up to 30 years for: (1) the development of geothermal energy on military lands, (2) the provision and operation by others of energy production facilities on government or private land and the purchase of energy produced from such facilities, and (3) the purchase of refuse derived fuel or fuel derived from biomass or other sources. The provisions of this subsection are basically the same as those of the source sections cited above for contracts for development of geothermal energy and provision of energy production facilities. The contracting period for purchasing refused derived material would be increased from 10 years to 30 years to align it with the other energy contracting periods.

Id. at 30. In other words, the codification of Section 2922a was never meant to apply only to geothermal resources or bind together multiple energy resource types — that were already separately permitted by way of the annual appropriations bill — to require that these contracts could only be entered if all two (or three) types of energy resources were present at the same facility or in the same contract. If the "and" were read in the restrictive sense, the past appropriations practices allowing for the military's procurement of other types of energy or fuel would be eliminated — not simply incorporated into a new format as intended — and would allow only for one very discrete option: the development, production, and purchasing of geothermal energy alone.

Moreover, if read in the conjunctive sense, the above-stated Congressional purpose behind Section 2922a could not be met — it would be an impossibility. There is no such thing as geothermal produced refuse- or biomass-derived fuel. The House Report also states that "the use of the authority of this section . . . is intended to permit the exploration of a wide range of co-generation possibilities so that the conservation of scarce

> (2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.
>
> (b) A contract may be made under subsection (a) only after the approval of the proposed contract by the Secretary of Defense.

See 10 U.S.C. § 2922a.

Sunstone also highlights that DoD has explained that

> [u]nder Section 2922a, a developer may install an energy production facility on DoD or private property under an agreement pursuant to which the Military Department would purchase energy generated by the facility . . . . After installation, the developer would own, operate, and maintain the facility.

Office of the Assistant Secretary of Defense, Guidance on Development of Energy Projects, Nov. 3, 2016 (2016 DoD Guidance) at 2. Sunstone asserts that Section 2922a is contrary to DEP's contention that BCL could not purchase energy generated by an on-base facility and that the Army's Solar Portfolio program can be countermanded by state law.

Conclusions

The Commission assumes for purposes of this ruling, as the parties generally agree, that Fort Bragg is a federal enclave which has been ceded by North Carolina to the federal government and that, generally, with limited exceptions, the federal government enjoys exclusive jurisdiction in a federal enclave under the U.S. Constitution and federal law.

Accepting that Fort Bragg is a federal enclave, state laws apply to activities on the enclave only to the extent that Congress expressly allows. The United States Supreme Court has observed that once a federal enclave is established, "state law presumptively does not apply to the enclave." *Parker Drilling Mgmt. Servs. v. Newton*, 139 S. Ct. 1881,

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resources may be maximized." All said, the Committee enacting Section 2922a could not have meant for this provision to be so limiting or to apply only to geothermal sources.

It is also notable that Congress, in 48 CFR § 41.201(d), characterizes Section 2922a as "pertain[ing] to contracts for energy or fuel for military installations including the provision and operation of energy production facilities," and does not limit it specifically to geothermal resource development. Likewise, Section 2922a is titled generally, applying to "energy or fuel," whereas Section 2917 is titled as applying only to "geothermal energy." If Section 2922a were meant to apply only to geothermal energy resources it follows that its title would reflect the same.

Third, and finally, DoD and other federal agencies also characterize and treat Section 2922a as applying to other resources, both in word and practice. The Office of the Secretary of Defense has, as early as 2011, approved projects under its Section 2922a authorization that are landfill gas and solar projects. The Commission gives weight to the DoD's own interpretation of its authority under Section 2922a.

1890, 204 L. Ed. 2d 165, 175 (2019). Accordingly, as pertains to the instant proceeding, it is presumed that Chapter 62 of the North Carolina General Statutes does not apply to activities occurring within Fort Bragg unless Congress has expressly provided otherwise; the Commission therefore must look to federal law to decide the issues before it.

The parties contend that the Commission should look to Section 8093 as the relevant federal law, though the parties disagree as to whether and/or how Section 8093 applies to the Proposed Project. One position is that Section 8093 applies to electricity purchases within the federal enclave and that the purchase of electricity must be consistent with state law, including state utility commission rulings and electric utility franchises or service territories. The other position is that Section 8093 does not apply to electricity generated, purchased, and consumed within the federal enclave but only applies when the electricity is purchased at the boundary or outside of the federal enclave. The Commission affirmatively states that it is not making a decision between these competing views of whether and/or how Section 8093 applies to the Proposed Project.

The Commission does not reach the issues of whether and/or how Section 8093 applies to the Proposed Project because the Commission concludes that Section 2922a, a separate preexisting statute that was incorporated as a specific exception to Section 8093, allows the Proposed Project to proceed notwithstanding the provisions of Section 8093, assuming the Proposed Project receives final approval by the Secretary of Defense as required by Section 2922a.

Section 2922a, "Contracts for energy or fuel for military installations," provides that the Secretary of a military department may enter into contracts "for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction . . . and the purchase of energy produced from such facilities," subject to "the approval of the proposed contract by the Secretary of Defense." 10 U.S.C. § 2922a(a) & (b). The House Armed Services Committee Report issued during its codification explained that Section 2922a was intended to

> permit[] the Secretary of a military department to enter into contracts for up to 30 years for: (1) the development of geothermal energy on military lands, (2) *the provision and operation by others of energy production facilities on government or private land and the purchase of energy produced from such facilities*, and (3) the purchase of refuse derived fuel or fuel derived from biomass or other sources.

See H. Rep. No. 612, 97th Cong., 2nd Sess., at 30 (1982) (emphasis added).

The Commission recognizes that the Senate Appropriations Committee that considered Section 8093 specifically highlighted Section 2922a — which was in existence prior to Section 8093 — as removed from Section 8093's reach. The Commission takes note of the fact that in enacting Section 8093 "the Committee [was] not intend[ing] to restrict the ability of military departments to enter into contracts under [now] 10 U.S.C. [§ 2922a]" but rather intended to continue to "permit[] military departments to contract for

the provision and operation of cogeneration and other energy production as an *alternative* to Utility service." S. Rep. No. 235, 100th Cong., 1st Sess., at 70-72 (1987) (emphasis added); *see also* 48 C.F.R. § 41.201(d)(ii) (the Federal Acquisition Regulation implementing Section 8093 recognizing the same).

In response to Commission questions, DEP admitted that BCL could itself install and operate the solar panels on its own rooftops, and could self-supply its own electricity needs, without offending Section 8093. Tr. vol. 1, 49, 56-57. DEP also admitted that a "reasonable reading" of Section 2922a would permit a developer to install an on-base energy production facility under an agreement with the Army to purchase energy generated by the facility. *See id*. at 58-59; *see also id*. at 68-69. DEP instead contended that BCL cannot contract directly with Sunstone to install the same solar panels because "the Federal Government, the Army, is not directly entering into the power purchase arrangement that's between the two affiliates." *Id*. at 69-70.

But the Commission concludes that the Army's contracting with Sunstone by way of BCL is what is occurring, and that for purposes of the question at hand, BCL should be deemed to be acting on behalf of and as the Army's agent for purposes of Section 2922a. The following facts in the record support such a finding: (1) Congress gives the DoD the authority to furnish utilities and services in connection with any military housing, *see* 10 U.S.C. § 2872a(a); (2) BCL provides housing through the Army's RCI; (3) BCL has authority to arrange for utility services pursuant to the MSA and the ground lease it has with Army; (4) the source of funds used to pay for the electricity is from Department of Treasury by means of the BAH; (5) the Army must approve BCL's sublease to Sunstone; (6) the Proposed Project is one of a series of solar projects approved by the Army as part of an ongoing solar portfolio implemented to meet the Army-wide goal of developing 1 GW of renewable energy by 2025; (7) excess generation from the Proposed Project is compensated by FBDPW in the form of bill credits to BCL under the MSA; (8) the Major Decision Concept Memo states that all renewable energy credits associated with the Proposed Project will be transferred to the Army; (9) the Proposed Project is only moving forward by way of earlier concept approvals of the Army; and (10) the Proposed Project must secure Major Decision Approval and be approved by the Secretary of Defense. The Commission thus finds that BCL is an agent of the Army and that the Army can avail itself of Section 2922a, which allows the Proposed Project.

In sum, based upon its review of the foregoing and the entire record, the Commission concludes that to the extent the Proposed Project receives the approval of the Secretary of Defense, as is required by Section 2922a, the Proposed Project may proceed in accordance with Section 2922a, notwithstanding the general limitations of Section 8093.

Finally, given the specific federal law applicable to the Proposed Project and the unique facts and circumstances of the instant proceeding, the Commission's conclusions herein neither serve as precedent for electricity generation or sales in other contexts.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 3rd day of August, 2022.

NORTH CAROLINA UTILITIES COMMISSION

Erica N. Green, Deputy Clerk

Commissioner Lyons Gray did not participate in this decision.