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July 20, 2021

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

RE: Sunstone Energy Development LLC
Reply Comments
Docket No. SP-100, SUB 35

Dear Ms. Dunston:

On behalf of Sunstone Energy Development LLC, we hereby submit the attached Reply Comments to comments filed by Duke Energy Progress, LLC on June 8, 2021.

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

Thank you in advance for your assistance.

Sincerely,

Brad Risinger

Brad M. Risinger

pbb
cc: All parties of record

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 that the Jurisdiction of the North Carolina Utilities Commission does not extend to the Federal Enclave within Fort Bragg	)))))	REPLY COMMENTS OF SUNSTONE ENERGY DEVELOPMENT LLC

Sunstone Energy Development LLC ("Sunstone") hereby submits these comments in reply to the Initial Comments of Duke Energy Progress, LLC ("DEP").

INTRODUCTION

As DEP's Comments make clear, it "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." Comments, at 11. DEP agrees that only in an instance of "clear and unambiguous" Congressional consent to regulation could state utilities laws apply to Fort Bragg. *Id.* The only waiver of the federal enclave doctrine that DEP contends may apply is that contained in 40 U.S.C. § 591 (2006) (referred to, hereafter, as "Section 8093"). Comments, at 11-13. It provides in full, as set forth below:

> Purchase of electricity
>
> (a) **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.

(b) **Exceptions. –**

(1) Energy Savings. - This section does not preclude the head of a federal agency from entering into a contract under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287).

(2) Energy Savings for Military Installations. - This section does not preclude the Secretary of a military department from—

(A) entering into a contract under section 2394 of title 10; or

(B) purchasing electricity from any provider if the Secretary finds that the utility having the applicable state-approved franchise (or other service authorization) is unwilling or unable to meet unusual standards of service reliability that are necessary for purposes of national defense.

Section 8093(a) provides a straight-forward and limited waiver of sovereign immunity that requires departments, agencies or instrumentalities of the federal government to follow state law and regulations, including utilities regulations and franchises, when purchasing the commodity of electricity. DEP casually suggests the measure is a waiver "with respect to the **sale** of electricity" that allows "state regulation over the **retail sale** of electricity" inside a federal enclave. It further warns of the risks "if Sunstone is able to sell" electricity to a party within a federal enclave. Comments, 11-12 (emphasis added). This broader framing of Section 8093 is subtle, but unsupported in the statute.

Section 8093 allows state regulation of **purchases** of electricity **by the federal government** using **federally appropriated funds**. Its provisions – and therefore DEP's Comments – provide no basis to support a waiver to allow state regulation *inside* a federal enclave of the construction, maintenance, and operation of an energy-producing facility that a state commission may regulate *outside* a federal enclave. The *only* question presented by the *only* exception to the federal enclave doctrine DEP raises is this:

> Does the proposed provision of electricity by Sunstone to Bragg Communities, LLC within the Fort Bragg enclave constitute a purchase of electricity by the federal government using federally appropriated funds? If not, there is no avenue for state utilities law to apply.

The answer is clearly "no". The proposed project by Sunstone is behind Fort Bragg's metered delivery point. The Fort Bragg Directorate of Public Works (FBDPW) is not abandoning DEP as a supplier of electricity, and in fact will continue to purchase energy and capacity exclusively from DEP. Sunstone's proposed project – endorsed and supported by the Department of Defense to further the Army's policy goals of procuring solar energy or other renewable energy, diversifying energy sources, improving resiliency, and reducing costs – has no significant impact on DEP specifically or on the general framework of state utility regulation outside of the unique Fort Bragg enclave. For all of these reasons, the Commission should grant Sunstone's Request.

I. DEP Labors Mightily to Prove a Point About Section 8093 with which Sunstone Agrees

In its Request for Declaratory Ruling, Sunstone states that "Section 8093 provides a limited and specific waiver of the Army's sovereign immunity to the extent it purchases electricity with federal funds." Petition, ¶ 31. The authorities DEP cites in its Comments support the narrow framing of Section 8093 set forth in Sunstone's Petition.

In a February 24, 2000 memorandum, the Acting General Counsel of the United States Department of Defense ("DOD") informed the service branches that the waiver of sovereign immunity effected by Section 8093 to allow state regulation "is limited to purchase of the electric commodity (electric power)" by the federal government. DOD Memo, at 5 (Exhibit A). DOD found that this limited-purpose waiver "should [not] be read in any way other than its plain language." *Id.* Thus, DOD reasoned that Section 8093 did not allow for state regulations to apply when a federal military branch conveyed an on-base utility distribution system under Congressional privatization directives.

DEP suggests that *Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721 (D. Md. 2001), *appeal dismissed by*, 290 F.3d 734 (4th Cir. 2002), supports its expansive view of Section 8093. However, that district court's analysis adopted a similarly narrow view of Section 8093 in rejecting a local utility's argument that state rules and regulations (including state-granted franchises) should apply to privatization of utility distribution systems within Fort Meade.

The *BG&E* court found that Section 8093's waiver to allow regulation of electricity purchases by the federal government did not allow for state regulation of Fort Meade's "operation of its electricity and natural gas distribution infrastructures" inside a federal enclave. *Id.* at 742.[1] Sunstone cites *West River Elec. Ass'n, Inc. v. Black Hills Power & Light Co.*, 918 F.2d 713 (8th Cir. 1990) for the same principle that emerges from the analysis of Section 8093 endorsed by DOD and the *BG&E* court: the waiver applies narrowly to the government's acquisition of electricity but "contains no [ ] specific

[1] DEP concedes the point in its Comments, noting that Fort Bragg has a "federally-regulated privatized distribution system" owned by Sandhills Utility Services, LLC ("Sandhills Utility"). Comments, at 3.

reference to federal land or area" that suggests Congressional authorization to regulate other undertakings within a federal enclave. *Id.* at 719; Petition, ¶ 32.

Indeed, courts routinely hold that the federal government's authority over an enclave encompasses its entire footprint. For example, in *Colon v. United States*, 320 F.Supp.3d 733, 745 (D. Md. 2018), the court considered state-based claims relating to the privacy and distribution of plaintiff's medical records that occurred in a federal enclave. The court observed that "the federal enclave doctrine establishes that the federal government obtains the right to choose whether state or federal law governs a territory from the time it exerts exclusive jurisdiction over that territory." *Id.* at 745. Further, it noted that "*the federal government* has exclusive authority to determine the choice of law on that federal enclave." *Id.* at 747 (emphasis in original).

This is consistent with long-standing policy that limits state regulation of the federal government to only that extent Congress expressly allows. The principle is so strong that the Supreme Court has observed that once an enclave is established, "state law presumptively does not apply to the enclave." *Parker Drilling Management Services, Ltd.*, 139 S.Ct. 1881, 1890 (2019). *See also United States Department of Energy v. Ohio*, 503 U.S. 607, 615 (1992) ("any waiver of the National Government's sovereign immunity must be unequivocal... Waivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.") (citations omitted); *Hancock v. Train*, 426 U.S. 167, 178 (1976) ("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.") (citations omitted); *G ex rel RG v. Fort Bragg Dependent Schools*, 343 F.3d 295 (4th Cir. 2003), *quoting EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976) ("Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous.").

BG&E draws the inescapable conclusion from this well-settled precedent: a regulation requiring the Army to purchase electricity pursuant to applicable state law did not open up Fort Meade's federal enclave to state regulation that, in BG&E's eyes, would have required an operator of the installation's privatized distribution system to have a state-granted franchise and other state regulatory approvals. *BG&E*, 133 F. Supp. at 734. As *BG&E* held, Congress could have granted state regulators that sort of broad utility jurisdiction over military installations, but "it did not."[2] *Id.* at 744.

DEP misapprehends the order of operations in a federal enclave analysis. It suggests that if there is not a federal statute that "speak[s] to a private party's authority to supply electricity to another private party on a federal enclave," then federal law has failed to preempt state regulation of such activity in an enclave. Comments, at 22-23. But, what *BG&E* emphasizes is that such state regulation in an enclave is only permitted when specifically allowed by Congress. Where it has not done so, as here, the Supreme Court has cautioned that courts should be loathe to undertake the creative broadening of

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[2] DEP's reliance on an order in *In the Matter of Request for Declaratory Ruling by Old North Utility Services, Inc.*, Docket No. W-1279, SUB 0 (March 18, 2008) is unavailing to establish that Section 8093 provides the type of broad Commission jurisdiction over Fort Bragg that *BG&E* considered and rejected. The *ONUS* order contains no meaningful discussion of the Commission's authority to regulate inside a federal enclave, nor of the specific waiver by the federal government that would allow it. *ONUS* makes a brief reference to federal acquiescence in the declaratory relief request that is not applicable here, where the Army has affirmatively chosen to work with Corvias/Sunstone at Fort Bragg and several other military installations across the country to develop on-base alternative energy facilities.

federal statutes that DEP advocates. *See e.g.*, *Jama v. Immigration & Customs Enf't,* 543 U.S. 335, 341 (2005) ("[W]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.").(citation omitted).

A. The Commission Should not Expand Section 8093 to Include a Result Congress Considered, and Actually Legislated to Avoid

The rationale for rejecting DEP's expansive view of the statute is further reinforced by the text and legislative history of Section 8093 – each of which reflects that its narrow waiver was not to interfere with the ability of military branches to contract for "energy production facilities" on lands under the control of the applicable military branch. The exception is explained in Section 8093's legislative history:

> [T]he Committee does not intend to restrict the ability of military departments to enter into contracts under 10 U.S.C. 2394. That section permits 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. 70-72 (1987) (emphasis added). Indeed, the codified version of Section 8093 enumerates an exception that the law "does not preclude the Secretary of a military department from . . . entering into a contract under section 2394 of title 10." 40 U.S.C. § 591(b)(2)(A) (10 U.S.C. §2394 was transferred to § 2922a in 2006).

Under 10 U.S.C. § 2922a, the Secretary of the Army "may enter into contracts for periods of up to 30 years":

> 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.

10 U.S.C. § 2922a(a)(2). DOD interprets § 2922a as applying "to any type of energy production facility, not just geothermal or renewable energy." Office of the Assistant

Secretary of Defense, *Guidance on Development of Energy Projects*, November 3, 2016, https://www.acq.osd.mil/eie/Downloads/IE/Guidance%20on%20Development%20of%20Energy%20Projects_3Nov2016.pdf (Exhibit B). As DOD explained:

> Under 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.

Id. Indeed, this reflects a federal policy contrary to DEP's primary contentions that (i) BCL could not purchase energy generated by an on-base facility, and (ii) that the Army's Solar Portfolio program can be countermanded by State law.

II. The Sunstone Project is Part of a Deliberate Federal Policy on Alternative Energy Generation on Federal Military Bases

In *Hancock*, the abiding principle of enclave protection was noted as ensuring that "the federal function must be left free of [state] regulation." *Hancock*, 426 U.S. at 178 (citations omitted). The federal function and purpose are readily apparent here. The Army has approved the proposed Sunstone project at Fort Bragg as part of a broader Army program authorized at military installations across the country, and consistent with federal statutes, goals and objectives.

The federal policy at play is further confirmed, as stated in the Request, by the energy policy of the DOD. Request, ¶¶ 14-17. This includes: (1) procuring or producing at least 25% of energy at DOD facilities from renewable energy sources by fiscal year 2025 and thereafter[3]; (2) procuring solar energy or other renewable forms of energy

[3] 10 U.S.C. 2911(g)(1)(A)

whenever possible[4]; (3) commitment to develop 1 GW of renewable energy Army-wide by 2025[5]; (4) diversifying energy sources[6]; and (5) addressing resiliency and costs[7].

A. The Sunstone Project has the Approval of the Army and Fort Bragg

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 housing areas at Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill, and Fort Riley. The Army's memorandum approves the Solar Portfolio program pursuant to a series of requirements and conditions, and contains a specific affirmation that "the Army supports the portfolio approach." Moreover, it provided specific guidance on amendment of relevant ground leases at each base as well as the disposition of Renewable Energy Credits (RECs). The Army's memorandum of approval previously was produced to DEP, and is attached hereto. (Exhibit F).

Pursuant to the Army's approval of the on-base Solar Portfolio program, Sunstone and Corvias worked together under the program's auspices to install solar energy capability at Aberdeen Proving Ground (7.1 MW of rooftop and ground mount), Fort Meade (8.7 MW, rooftop), and Fort Riley (10.5 MW, rooftop). Sunstone also has

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[4] 10 USC 2922b(a)

[5] Office of the Assistant Secretary of the Army for Installations, Energy & Environment, *Energy Initiatives*, https://www.asaie.army.mil/Public/ArmyPowerEnergy/EnergyInitiatives.html#. (Exhibit C)

[6] Department of Defense Directive Number 4180-01 (August 31, 2018), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/418001.pdf?ver=2018-11-07-112520-837. (Exhibit D)

[7] Secretary of the Army, *Army Directive 2020-03 (Installation Energy and Water Resilience Policy)* (March 31, 2020), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN21689_AD2020_03_FINAL_Revised.pdf. (Exhibit E)

developed, and its indirect affiliates operate, a solar-energy producing facility on Edwards Air Force Base (3.9 MW, rooftop) (Affidavit of Daniel Swayze, ¶¶ 12-13) (Exhibit G).

On or about March 21, 2016, Douglas G. Jackson, Chief of Housing Division, Director of Public Works, issued a Privatized Housing Renewable Energy Solar Project Major Decision Concept Memorandum recommending approval of Sunstone's development of solar energy capacity for military housing at Fort Bragg. The approval memo issued out of the Army's Installation Management Command at Fort Bragg. The Army's memorandum of approval previously was produced to DEP, and is attached hereto as Exhibit H.

The Fort Bragg-specific approval was in response to a memorandum from Corvias, attached to the approval, that discussed background information for the project that included the type of solar panels, the impact on rate stabilization and security for the on-base housing provider, and that "[l]ong term operation and maintenance will be provided by the solar developer." *Id.* The request approved by the Army also included contemplation of 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.*

B. DEP Proposes a Substantial Invasion of the "Federal Function"

DEP finds it "absurd" and "inconceivable" that Congress would require the federal government to follow state laws in purchasing electricity but also allow private parties operating with Army approval behind the meter in a federal enclave to generate,

purchase and consume solar power. Comments, at 20. Sunstone respectfully suggests the "ask" DEP makes of the Commission is very substantial. In essence, DEP asks that a federal statute designed so that the customers of local power suppliers are protected from the consequences of abandonment by federal customers be conflated into a regulatory Trojan Horse.

DEP argues that the Commission should interpret Section 8093 to allow state laws and regulators to manage, and even countermand, steps a United States military branch takes within a federal enclave to advance its energy resilience, security and efficiency. This is contrary to the abiding principle that "the federal function must be left free of [state] regulation." *Hancock*, 426 U.S. at 178 (citations omitted).

The Supreme Court has carried that forward to observe that an enclave's protections also apply to private actors who "carry out a federal mission, with federal property, under federal control." *Goodyear Atomic Corp.*, 486 U.S. 174, 181 (1988). In *Goodyear*, the Court held that a federally-owned nuclear facility was "shielded from direct state regulation even though the facility is operated by a private party under contract with the United States." *Id.* at 181. The enclave doctrine, the Court held, leaves no room for instances where a "State is claiming the authority to dictate the manner in which the federal function is carried out." *Id.*, fn. 3.

DEP attempts to shroud the complexity of its position with a slogan: "Congress would [not] 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." But the practical translation is this: DEP wants the Commission to do exactly what the *BG&E* court declined. There, the utility asked the court to find that Section 8093 had a

broader reach that would allow for state regulation of Fort Meade, and its distribution system. But the court emphasized that Section 8093's regulation of the Army's purchase of the electric commodity was not a broader waiver of the protections of its enclave:

> "[U]nless the federal government itself enacted laws recognizing the PSC's jurisdiction over Fort Meade, which, as explained above, it did not, I have no warrant to compel the federal government to recognize the PSC's jurisdiction or to contract with a state-created monopoly."

BG&E, 133 F. Supp. 2d at 744.

DEP also urges the Commission to breach Fort Bragg's enclave by misconstruing *Offut Housing Co. v. County of Sarpy*, 351 U.S. 253 (1952), holding it out as an example of a "waive[r] [of] exclusive jurisdiction with respect to taxation at a federal enclave," that then logically allowed taxation of a "private party operating within the federal enclave." Comments, at 21. Yet, the Supreme Court explicitly stated the case involved quite the opposite fact pattern.

Instead, the statute at issue expressly allowed for State and local taxation of leasehold interests held by private parties in leases with the federal government. *Offut*, 351 U.S. at 258. The Court noted that the statute made no reference at all to property in federal enclaves, and instead applied generally to lessee interests wherever they may be located. *Id.* at 259. Indeed, the Court concluded that the general taxation statute could be deemed to apply inside an enclave even without an "explicit and unambiguous legislative enactment." *Id.* At 260. On this key issue, *Hancock* abandoned the *Offut* analysis 45 years ago, requiring just such "clear and unambiguous" waivers to effect state regulation in a federal enclave.

III. DEP Fails in its Efforts to Recharacterize the Sunstone Project as Resulting in Electricity Purchases by the Federal Government Using Federal Funds

DEP tries gamely to recharacterize projects under the Army's Solar Portfolio program into the only transaction covered by Section 8093: a purchase of the electricity commodity by the federal government. It fails in several important respects.

First, BCL is not a federal department, agency or instrumentality that is subject to Section 8093. Instead, by federal statute BCL is an "eligible entity" under 10 U.S.C. § 2871(5), defined as:

> any private person, corporation, firm, partnership, company, State or local government, or housing authority of a 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.

Id.[8] BCL's status is a product of Congressional policy as a private entity responsible for renovation, construction, operation, and asset management for privatized, on-base military housing facilities on Fort Bragg pursuant to the Department of the Army's Residential Communities Initiative ("RCI"). The RCI is the Army's implementation of the Military Housing Privatization Initiative ("MHPI") contained in the National Defense Authorization Act for Fiscal Year 1996.

Second, Sunstone's project does not present a purchase of electricity by the federal government with appropriated funds. DEP makes the novel and wide-ranging argument that "Sunstone is selling electricity to the federal government through BCL"

[8] In a similar setting, the Department of Justice has taken the position that privatization entities such as BCL are not agencies or arms of the federal government. *See* Department of Justice Position Letter in *Joe Federico, et al. v. Lincoln Military Housing, LLC, et al.*, March 23, 2012. (Exhibit I)

because the Basic Allowance for Housing (BAH) that the Army pays to its military personnel (Service Members) can be directed towards covering rent for on-base housing, including the provision of utilities. Comments, at 22.

However, under the RCI program, Service Members receive a BAH that is intended to approximate the cost of adequate housing for wherever the Service Member chooses to live. If a Service Member or a Service Member and his or her family *choose* to reside in BCL's privatized military housing on base at Fort Bragg, the Service Member's BAH is allocated directly to BCL (the housing provider) to cover one hundred percent (100%) of the Service Member's basic rent obligations. If the Service Member chooses to live off base in private housing, the BAH is paid directly to the Service Member to contribute to the Service Member's housing expenses. (Aff. ¶ 14).

The Service Member that receives a BAH has complete control over how it is spent to meet his or her housing obligations. If a Service Member elects that a BAH be conveyed to BCL to cover on-base housing – that includes electric service – DEP contends the Commission should conclude that it is a transaction where "electricity generated by the Proposed Project is paid for by the U.S. Treasury Department to BCL and ultimately to Sunstone." Comments, at 22. Essentially, DEP proposes that the Commission conduct a "look back" investigation to deconstruct the MHPI and RCI to facilitate a conclusion that these privatization entities established by Congress are an artifice to be ignored for purposes of determining the provenance of BCL's payments to Sunstone. It is an unusual proposition to suggest such a direct tie between an employer and the goods or services an employee pays for with compensation or tangible benefits, but even more so when a Service Member pays it to a Congressionally established

privatization entity set up specifically to own, operate and manage on-base housing so that *the Army does not have to do it.*

Finally, DEP attempts a "speak it into existence" strategy by simply announcing that the Army "will ultimately be the purchaser of at least some of the output" of Sunstone's proposed project. Comments, at 21. Yet, saying it does not make it so. The Army approved the Solar Portfolio program under which Corvias and Sunstone would develop on-base solar generation facilities. But, a solar services agreement would be entered into between Sunstone and the privatized military housing provider at each of the involved Army installations. (Swayze Aff. at ¶ 12). Indeed, at Fort Bragg the Ground Lease entered into between Bragg Communities, LLC and the United States specifically allows BCL to "make its own arrangements for new or additional utility systems and services provided or distributed *by private parties on the Installation*[.]" (Exhibit J).

Sunstone proposes to generate solar energy from a mixture of rooftop and ground mount units that provide power for consumption in different manners. The rooftop units generate power that is utilized directly by the structures on which they sit, and electrons not immediately consumed in that fashion reach the installation's privatized distribution grid owned by Sandhills Utility. (Swayze Aff. at ¶¶ 4-5). Power generated by the ground mount units goes first to the Sandhills grid before it is available for consumption by military housing structures. This is necessary because Sandhills owns and controls the infrastructure that connects and distributes power between and among the military housing owned and managed by BCL. *Id.* at ¶¶ 6-7. Bi-directional metering measures the amount of power generated by the Sunstone solar facilities, and FBDPW provides BCL a credit for that production against its monthly usage. *Id.* at ¶ 8.

DEP bases the assertion that FBDPW is buying electricity from Sunstone on Sunstone's discovery response that "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." Comments, at 21, fn 54 (citing DEP Exhibit 7, Responses to Duke Energy Progress, LLC's Second Data Request 2-5) (emphasis added). This response reflects the electrical distribution reality that neither Sandhills Utility 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. (Swayze Aff. ¶ 8).

IV. The Sunstone Project does not Offend the Applicable Regulatory Objectives of Federal or State Law

DEP argues the Army-approved solar generation on Fort Bragg "would effectively carve off a significant portion of Fort Bragg's load," which it estimates at 8.75% of the installation's overall demand from DEP. It suggests this reflects the "abandonment of an existing supplier" that Section 8093 was enacted to avoid. Comments, at 13, 18.[9]

But the facts Sunstone presents in its Request, and which DEP sets forth again in its Comments, do nothing to suggest the federal customer at issue – the FBDPW – is abandoning DEP as a supplier of electricity. Under the Army's Solar Portfolio program, the FBDPW would still acquire more than 90% of its electricity from DEP. Those projections are reflected, below in Figure A:

[9] DEP concedes it has no evidence that there would be <u>*any*</u> rate consequences. *Id.* at 13.

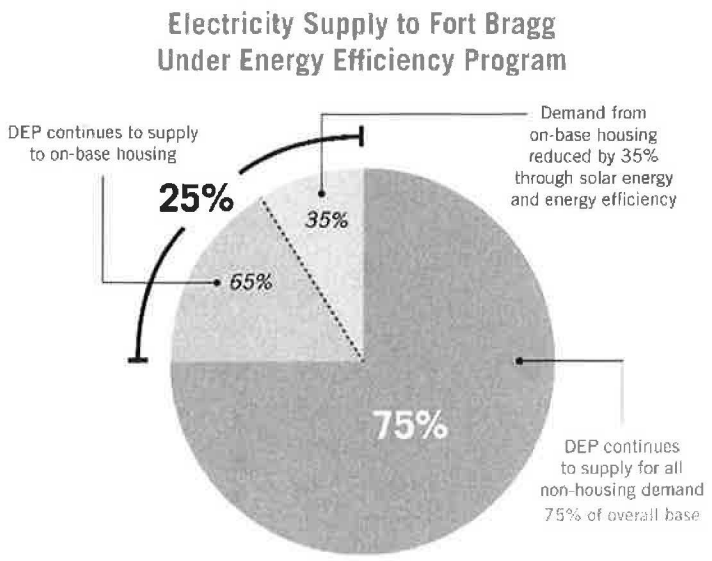

Figure A

Indeed, these facts are not akin to the failsafe Congress intended under Section 8093, where it legislated to prevent situations in which "Federal customer[s] were allowed to leave local utility systems[.]" *BG&E*, 133 F.Supp.2d at 735 (*citing* S.Rep. No. 235, 100th Cong., 1st Sess., at 70 (1987).

DEP notes that it currently generates 100% of the electricity required to serve Fort Bragg and that the installation's total electric load could decrease as a result of the proposed solar energy generation "**behind Fort Bragg's metered delivery point.**" Comments, at 3, 13 (emphasis added). Yet, these facts do nothing to establish that Section 8093 establishes a federal legislative entitlement to DEP that it provide *all* of the power needed by the base. What Section 8093 does establish is that a franchised provider such as DEP is protected from having a federal purchaser move to a competing supplier; i.e., a statutory bar on abandonment. Sunstone's Request in this docket does *not*, in any way, violate or infringe upon DEP's territory or exclusive right to provide energy at Fort

Bragg's metered delivery point. The sale and delivery of electricity at that meter will still be exclusively by DEP.

A. On-Base Power Generation Does Not Reflect Abandonment of DEP as a Supplier to Fort Bragg

DEP's comments caution against the "significant 'quasi self-generation' behind Fort Bragg's metered delivery point" presented by the proposed Sunstone project. Comments, at 13, n. 32. Yet, the Army recently contracted with DEP and an alternative energy developer, Amaresco, to construct a floating solar energy facility at Camp Mackall, a Special Forces training site near, and closely affiliated with, Fort Bragg. The Army will own and operate the solar facility upon completion. *Largest floating solar power plant in the Southeast coming to Fort Bragg* (September 30, 2020), https://news.duke-energy.com/releases/largest-floating-solar-power-plant-in-the-southeast-coming-to-fort-bragg (Exhibit K). This solar facility will deploy a 1.1-MW solar system on Big Muddy Lake to supplement power supplied from the grid and provide backup power during service outages. The Army's solar facility that results from the $36-million design-build contract is projected to reduce site energy use by 7 percent. *U.S. Army Awards Duke Energy and Ameresco Contract to Enhance Resiliency and Readiness at Fort Bragg* (September 3, 2020), https://www.ameresco.com/u-s-army-awards-duke-energy-and-ameresco-contract-to-enhance-resiliency-and-readiness-at-fort-bragg/ (Exhibit L).

DEP's comments reflect no reticence about the Army owning and operating an on-base solar-generating facility that would reduce base energy usage, and therefore reduce the demand placed upon DEP's state-granted franchise.

B. North Carolina Law and Policy on Third-Party Sales Cannot Apply Inside a Federal Enclave

In this appropriate context, DEP's reliance on *State ex rel. Utils. Comm'n v. NC WARN*, 255 N.C. App. 613, 619 (2017), *aff'd per curiam*, 371 N.C. 109 (2018) is misplaced. DEP urges the Commission to rely upon *NC WARN* to "assert jurisdiction over the Proposed Project and find that the Proposed Project violates DEP's exclusive franchise rights." Comments, at 7. However, neither Section 8093 nor *BG&E* afford the Commission that authority inside a federal enclave, behind Fort Bragg's delivery point.

DEP emphasizes the General Assembly's adoption of N.C. Gen. Stat. § 62-126.5(c) "reinforce[d] . . . North Carolina's well-established ban on third-party sales of electricity." Comments, at 9. But, even if correct as a general proposition, in this particular circumstance the state statute can provide no more state regulatory power *within the Fort Bragg enclave* than Section 8093 allows. Moreover, in this particular instance, Sunstone's customer is BCL – an entity wholly within the enclave and therefore not a customer of DEP. (Swayze Aff., ¶ 9).

In *NC WARN,* the Court of Appeals observed that its ruling was necessary to prevent a "cherry-picked" approach by NC WARN to serve non-profits "throughout the area or state." *NC WARN*, 255 N.C. App. at 618-19. "That activity stands to upset the balance of the marketplace," the court reasoned. *Id.* But here, Sunstone is not proposing to construct a solar facility in Fayetteville to serve off-base communities where military families reside, nor to transport such efforts to residential areas outside other federal military installations. That would be the analog to the regulatory interests the *NC WARN* court sought to protect, and which the General Assembly underscored.

To the contrary, the Request highlights a single project to be built and operated within a federal enclave pursuant to an alternative energy program adopted by a federal military branch. It poses no risk of replication in DEP's franchised territory areas which are outside of a federal enclave. Sunstone is not involved in the development of any additional solar energy projects on military bases within North Carolina, but, to the extent that the federal government pursues such alternative energy generation on its installations, such specific projects would be within the limited scope of a federal enclave and beyond the general "marketplace" that State law regulates and protects. (Swayze Aff., ¶ 15).

The very narrow scope and unique law (and facts) of Sunstone's Request has no significant impact either on DEP specifically, as explained above, or on the general framework of state utility regulation by the Commission outside of the Fort Bragg enclave.

CONCLUSION

For the reasons reflected in its Request and these Reply comments, as well as on its consideration of the positions taken by the Public Staff and DEP, Sunstone respectfully requests that the Commission: (i) affirm that Fort Bragg is a federal enclave; (ii) confirm that the limited waiver of Section 8093 does not subject Sunstone or its assignees to regulation under the Public Utilities Act arising from the on-base project and activities described; and (iii) that neither Sunstone nor any assignee would be considered a public utility in carrying out—within the Fort Bragg federal enclave—the project and activities described.

Respectfully submitted this the 20th day of July, 2021.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Reply Comments of Sunstone Energy Development, LLC upon all parties of record by electronic mail.

This the 20th day of July, 2021.

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