PLACE: Dobbs Building, Raleigh, North Carolina

DATE: Monday, November 29, 2021

TIME: 2:00 p.m. - 4:30 p.m.

DOCKET NO: SP-100, SUB 35

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

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

NORTH CAROLINA UTILITIES COMMISSION

A P P E A R A N C E S:

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P R O C E E D I N G S

CHAIR MITCHELL: All right. Good afternoon. Let's come to order and go on the record, please. I'm Charlotte Mitchell, Chair of the Utilities Commission, and with me this afternoon are Commissioners ToNola D. Brown-Bland, Lyons Gray, Daniel G. Clodfelter, Kimberly W. Duffley, Jeffrey A. Hughes,and Floyd B. McKissick, Jr.

I now call for oral argument, Docket Number SP-100, Sub 35, 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.

Before I proceed further, as I'm required to do, in compliance with the State Government Ethics Act, I remind Members of the Commission of their duty to avoid conflicts of interest and inquire, at this time, as to whether any member has a known conflict of interest with respect to matters coming before us this afternoon.

(No response)

CHAIR MITCHELL: The record will reflect that no conflicts have been identified, so we'll

proceed. On December 8th, 2020, Sunstone Energy Development filed, in this proceeding, a request for Declaratory Ruling requesting that the Commission conclude 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.

3) The activities Sunstone proposes to undertake will not cause it to be considered a public utility under North Carolina General Statute Section 62-3, Sub 23.

On December 9th, 2020, Sunstone filed a corrected Petition.

On January 13th, 2021, Duke Energy Progress filed a petition to intervene.

On January 21, 2021, the Commission granted that petition.

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

On March 12, 2021, Sunstone filed a Response to Duke's Motion to Dismiss requesting that the Commission deny that Motion to Dismiss.

On May 4th, 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 8th, 2021, Duke filed the initial comments -- Duke filed its initial comments.

On June 15th, 2021, Sunstone filed a Motion for Extension of Time in which to file its reply comments, and on June 23rd, 2021, the Commission granted that motion. And, thereafter, on July 20th, 2021, Sunstone filed its reply comments.

On October 20th, 2021, the Commission issued an Order Scheduling Oral Argument, allowing briefing, and requiring responses to Commission questions.

Among other things, the Order scheduled oral argument to be held today, November 29th, at this time and in this place. The Order also set the deadline for any Pre-argument Briefs to be filed on or before November 9th, 2021.

On November 9th, both Sunstone and DEP filed

Verified Responses to Commission's questions, including one confidential exhibit and four public exhibits.

On November 15th, Sunstone filed its Pre-argument Brief, and also on November 15th, DEP filed its Pre-argument Brief and Request for Reconsideration. That brings us to today.

I now call upon counsel for the parties to announce their appearances, for the record, beginning with Sunstone.

MR. STYERS: Thank you, Madam Chair. My name is Gray Styers with the law firm of Fox Rothschild, on behalf of Sunstone Energy Development.

MR. RISINGER: Brad Risinger, also with Fox Rothschild, on the behalf of Sunstone.

CHAIR MITCHELL: Good afternoon, Mr. Styers, Mr. Risinger. Duke.

MR. BREITSCHWERDT: Chair Mitchell, Brett Breitschwerdt with the law firm of McGuireWoods, on behalf of Duke Energy Progress. With me today is Jack Jirak, Deputy General Counsel for the Duke Companies.

CHAIR MITCHELL: Good afternoon, Mr. Breitschwerdt and Mr. Jirak.

MR. STYERS: Madam Chair, if I can just --

since there are folks in the room that the Commission may not know, I'd just like to also just state, for the record, that we have in the room today Mr. Dan Swayze, who is manager of Sunstone Energy Development, and Ms. Beth Worley, and Kevin Cox, who are members of Sunstone Energy Development.

CHAIR MITCHELL: Good afternoon. Any other preliminary matters to take up?

MR. BREITSCHWERDT: Chair Mitchell, if we're going to introductions now, I'd also like to recognize that Mark Tabor is here who is the large account manager for the Fort Bragg Department of Public Works, and then also Mr. Bo Summers, who we all probably know well in his former role as Deputy General Counsel, who is now the Vice-President of Strategic Regulatory Initiatives with the Company.

CHAIR MITCHELL: Good to see you, Mr. Summers. I've forgotten what you look like. Any other preliminary matters before we begin?

(No response)

CHAIR MITCHELL: If there are none, this is how we're going to proceed this afternoon. So counsel for Petitioner will proceed with its argument, and then we'll be followed by Duke.

Sunstone and Duke are each afforded 30 minutes in which to make their arguments. Use your time wisely. Make every word, every minute count.

We'll be given the opportunity -- we, the Commissioners, will be given the opportunity to ask questions at the end of each party's arguments, so I'll check in with my colleagues to see if they have questions for you-all after you deliver your arguments. We may also ask you questions while you are arguing to us, so just be on your toes and be ready.

Sunstone, if you'd like to reserve any of your time for rebuttal, you may do so. Just let me know. It's your preference that you-all proceed in a manner that doesn't require that we clear the hearing room, so do your best to avoid the use of confidential information.

If you must use it, please alert me to that fact before you launch off and say something that's confidential so that I can go off the record, clear the hearing room, and then go back into confidential session. Questions on process for today?

(No response)

CHAIR MITCHELL: If there are no

questions --

MR. BREITSCHWERDT: Just very briefly. I have three -- what I marked as exhibits to provide the Commission. The first is already in the record. The second is two statutes that are generally available, and the third is an excerpt from my case.

That's also generally available, so I don't need or anticipate the Commission will need them to be entered into the record, but I have premarked them. I've shared them with counsel for Sunstone.

I shared them with the court reporter, so I would plan to pass those out to the Commission at the time of my argument, but I just wanted to identify that up front of the Commission's information.

CHAIR MITCHELL: Thank you, Mr. Breitschwerdt. Please, do pass them out before you get started, just so we have them and can reference them easily. And we'll take judicial notice of whatever points of law you're using, so we'll do that when we get to that point in the argument.

MR. BREITSCHWERDT: Thank you.

CHAIR MITCHELL: Okay. Any other -- Mr. Styers, any other questions?

MR. STYERS: No.

CHAIR MITCHELL: Then let's go ahead and get started.

(Pause)

MR. RISINGER: I'm not athletic, in the slightest. Being tall has only served me to get tall things off of shelves and kitchens, and being too far away from a microphone when it's on a table top, so I'm going to do my best. And if it please the Chair, we'd like to reserve five minutes.

The project that's here before you today, I'll discuss, sort of briefly, the facts of the project. And I'm happy to answer any questions, but I think the interest of the Commission, given the orders that you've issued, lie beyond the basic facts.

This is a roof and ground mount Solar project that would be constructed solely within Fort Bragg on land controlled by the United States of America and leased to Bragg communities.

Sunstone would build the plant, and either Sunstone or an assignee would operate it and sell electricity to BCL. BCL is the private entity that owns and controls military housing on the base.

And just as a background manner across, really now, all the branches of the -- the military

branches of the -- Federal military branches, privatized housing is the norm across bases now, in general.

Go straight to the issue that some questions have been asked about, and the Court of Appeals' decision in Cube Yadkin has been brought to your attention, and we'd like to talk about it in a couple different ways.

One way is the criteria that the Court of Appeals has set down in Cube Yadkin and why they're not an obstacle to the Commission being able to render a decision, and a second is a second path that we would respectfully suggest that the Commission think about in tandem with the factual criteria that Judge Griffin enunciated on behalf of the Court in Yadkin.

So under the fact-based criteria of Cube Yadkin, Sunstone feels like there's a defined existing controversy based only on, you know, following the criteria that are set forth in the case.

The Court of Appeals' opinion is animated by a concern about the Commission and the courts getting into the business of rendering speculative and hypothetical decisions that amount to, as the Court of Appeals said, offering General Counsel services,

offering an opinion on the wisdom of someone's business plan, and getting involved in speculative decisions that neither the Commission or the Court should be involved in.

And what's missing -- and so what the Court of Appeals alighted upon in Cube Yadkin were a series of issues that it felt on those facts didn't establish that there was yet an existing controversy, and so the Court of Appeals was concerned that a controversy didn't yet exist in that case.

Cube didn't own, own a property or a leasehold interest in the property, in the business park that it proposed to develop.

It didn't have tenants, nor any particular prospects for tenants, and the Court of Appeals, in pretty choice words, you know, had the feeling that it was being asked to serve as the General Counsel for a relatively speculative investment and wanting advice as to the propriety or the legality of that adventure.

What's important, we think, about Cube Yadkin, and the fact-based nature of its opinion, is that the indicia that are present in Yadkin, that are being asked about, aren't present, in this case.

And, so, if you're only looking within

Yadkin and you're going how well the Court of Appeals look upon me if I determine, in the wake of Cube Yadkin, that I had jurisdiction as a Commission to act here, I think it's the things that are missing from the record, in this case, that distinguish it from Cube Yadkin.

Here, you don't have a party that's offering to the Commission, "You know, I'm thinking about approaching the Army about getting into the Solar business, and I'm a little concerned about the overlay of rules and regulations that might apply there. Help me out, if you would."

The party here is not saying, "Well, I don't have a relationship with this entity that owns and controls the housing within Fort Bragg, but I'll sure go get one if you give me a positive reaction as to, you know, the question that I'm asking before the Commission."

Nor is it the case where the party is like Cube Yadkin in that we're thinking about what a business relationship might look like, and we'll get to it if the Commission tells us it's okay for us to proceed, but we'll get to that down the road.

And so none of those -- all of those missing

things distinguish the case from Cube Yadkin in a way that should leave the Commission comfortable that Cube Yadkin is not an obstacle to entertaining the question that's before the Commission.

This is one project and, overall, a Solar portfolio program that's been approved by the Army. It is up and running on bases across the country.

As we said in brief, there's two projects in Maryland, there's one in Kansas. There's another in Louisiana that's at the system impact stage, all under the portfolio of approvals that the Army has said.

That in reaction to our responsibilities as the Federal government, by Federal statute, and our obligations with regard to alternative energy generation, we're proceeding down this path.

And, so, Sunstone doesn't come to you with a speculative enterprise solely about Bragg. It comes to you with one piece of a larger Federal program that is proceeding apace in many other states and on many other similar situated Federal enclaves.

It's also not a case like Yadkin, Cube Yadkin where the property is in flux. Cube Yadkin's Court of Appeals is concerned about not having a leaseholder interest or owning the property.

The property is taken cared of here in that the United States Government owns the property. The United States Government has entered a ground lease with BCL, which owns and operates the housing on the base, and the energy production would occur on lease that BCL holds -- on land that BCL holds the lease on.

The contracting is also not a hypothetical situation. The parties involved in these transactions and bases across the country have engaged in similar contracting enterprises.

And, as part of the record, the Commission has seen on a confidential basis -- I'm not going to discuss details on it, but on a confidential basis, the most recent contract that Sunstone entered at Fort Riley.

And it follows a template that has been used in bases across the country, and we've also submitted a proposed contract that based on the usage of the contracts at Riley and Aberdeen and meeting on other bases that would be entered here.

So the contracting, the way the relationships would be structured, is also not akin to Yadkin where the Court of Appeals was concerned about the speculative and hypothetical nature of it.

There's a second aspect about Cube Yadkin that we think is important for the Commission to consider as part of its deliberations, and that's that in -- under the Cube Yadkin factors, and in that case, the Commission is being asked whether there's jurisdiction to ultimately render a question under State law, and to render an answer under State law.

There's really a different situation occurring here where the petition actually frames a request as to whether State law's going to apply at all.

And we would suggest that not only does the dispute present cleanly with regard to the Cube Yadkin factors to present an active controversy that's justiciable by the commission of the courts, but there's also an active controversy as to whether State law applies at all inside the enclave, and whether one particular exception in Federal law applies to the enclave.

Sunstone with, you know, all due respect, Sunstone, in concert with the Army and Sandhills Utility, feels like that it can proceed apace with the project under Federal law, and that State law does not govern its activities.

The Public Utilities Act does not govern its activities in a way that would, for instance, allow Duke Energy to say that should be my project because I'm the franchise holder of the area in which the bases is situated.

Duke has a very clearly articulated position on that issue of whether State law can apply inside the base. Duke has a particular position that through Section 8093, that State law can apply through Federal law to allow the Commission to apply principles of the Public Utilities Act inside of Bragg.

There's a wholly -- apart from the factors in Cube Yadkin, there's a clearly delineated actual controversy between the parties. The parties engaged in cordial discussions before the proceeding that we're here before you today was initiated.

And, ultimately, Duke's answer, as is indicated in the filings that Sunstone has made, Duke's answer was if you need clarity on this issue, we can't give it to you. You need to go to the Commission or a court to get it.

You know, in that sense, on the issue of unavoidability of litigation, Sunstone believes that on the issue of issuing Declaratory relief, litigation

is unavoidable on either of these treaties, on the issue of whether all the criteria are met that makes us different, and the issue of this finally articulated controversy between the parties as to whether State law has any role to play at all.

We were ultimately going to be here. We were going to be in a justicial position either way, and so we believe that the test on either of those avenues of analysis as to whether litigation is unavoidable has been met.

The substantive issue for 8093 is a simple one, we believe, and that's that state law doesn't apply inside the Fort Bragg enclave unless a specific exception has been met.

And the specific exception that has been suggested by Duke, and that both parties have briefed at length, is Section 8093, and the exception is that Congress meant to allow the regulation of purchases of electricity by the Federal Government.

That's not occurring here. The Federal Government is not buying any electricity. BCL is purchasing electricity from Sunstone.

On the face of waivers of sovereign immunity are, under Federal law, to be construed very narrowly.

And, here, it can be construed only when both parties discussed at length the BG&E case, Federal District Court in Maryland.

And what the BG&E Court and the Department of Defense has said in its own Memoranda -- the DEP is going to mark a 2000 Memoranda from the Department of Defense. What the Department of Defense and BG&E both say is that the exception is read exactly the way it's written.

And if it's not a purchase for electricity by the Federal Government, there's not been a waiver of sovereign immunity that would provide an avenue for state regulation inside the enclave.

The parties have had a reasonable amount of discussion as to whether -- and raised by Duke and answered by Sunstone -- as to whether the fact that the service members are ultimately purchasing power indirectly from BCL because they're paying to BCL for their rent, including their utilities.

And I think that the attenuated argument that Duke suggests is that somehow because the Army is paying the basic allowance for housing to a service member, that if a service member elects to use that to live on base, that somehow that's the Federal

Government paying for power.

That's not how the basic allowance for housing operates. It's paid out to the service member. The service member has to make an election about what to do with his or her money on behalf of himself or herself or her family.

They can pay that money to BCL for on-base housing to cover 100 percent of those obligations. They can take all of that money and live off base. So we think that it's a bit of an illusory argument to suggest that the Federal government is somehow buying power itself because it's paying that allowance for housing to its service members.

There's also a broader aspect that --

CHAIR MITCHELL: Mr. Risinger, I'm going to stop you right there. So service members who elect to live on base, what do they pay for electricity? How do they pay for electricity?

MR. RISINGER: Service members themselves pay for electricity as part of conveying their basic allowance for housing to BCL. So as a lump unit, they pay for the right to live in the housing and the municipal services that are provided to the on-base housing.

CHAIR MITCHELL: So, essentially, make sure I understand it correctly, the service member that elects to live on base, lives in on-base housing and all of the utility services are supplied to that service member, that end user, and as a consequence of his or her election to use that on-base allowance. Is that right?

MR. RISINGER: That's right, Commissioner. The election by the service member, it is the fulcrum.

CHAIR MITCHELL: Got it.

MR. RISINGER: It's either an election to spend that money on on-base housing or an election to take that money and use it outside the base on private housing.

CHAIR MITCHELL: And so who is buying the power? Who is paying Duke Energy Progress for the power that is supplied to the base?

MR. RISINGER: So as the -- Fort Bragg, Department of Public Works, acquires power from Duke, and the Department of Public Works bills entities on the base for the dispersion of power that's used for their enterprises. And so --

CHAIR MITCHELL: So is BCL one of the substantive --

MR. RISINGER: BCL does not have a relationship with Duke. BCL is billed by DPW. And the power that's generated, generates a credit against the power, you know, that's used, and that BCL pays DPW for.

CHAIR MITCHELL: And, so, again, just making sure I understand the facts here, BCL buys from Fort Bragg directed to Public Works pursuant to the Municipal Services Agreement?

MR. RISINGER: Yes.

CHAIR MITCHELL: And the rates that are set forth in the Municipal Services Agreement, I'm looking at Special Provision A, electric service. This is Exhibit 3 that was provided by Sunstone. Those rates are Duke Energy Progress tariff rates. What are those rates?

MR. RISINGER: I want to make sure that I get the answer right. I think the answer is that those are negotiated rates between the Government and BCL. Hang on one second. I'll just check and come back and give you an answer.

(Pause)

MR. RISINGER: Sorry. DPW tells BCL what the rates are going to be for each calendar year, at

the beginning of each calendar year.

CHAIR MITCHELL: And you don't know what the basis of those rates is?

MR. RISINGER: I don't. I don't.

CHAIR MITCHELL: Okay.

MR. RISINGER: Oh. Equal to the rates they're charged.

CHAIR MITCHELL: And then also, again, looking at Special Provision A, electric service to the Exhibit 3 that you-all provided, there's a note that says:

"Sandhills Utility Services Facilities charge began January of 2007. Include BC, LLC prorated operation and maintenance shared cost charged to DPW."

So are there charges that are being passed on to BCL other than the rates that -- the rates that DPW pays DEP for electricity?

MR. RISINGER: We're not provided a breakdown on the charge that's stated from DPW to BCL.

CHAIR MITCHELL: What I'm getting at is, is BCL paying something, paying DPW a different rate or a different charge than DEP charges DPW?

MR. RISINGER: As I tried to answer before,

I didn't do a very good job, that that rate is the same -- DPW tells us that rate is the same. That the rate DPW passes to BCL, they represent to us as the rate they pay from.

CHAIR MITCHELL: And with respect to electric service, there are no other charges other than perhaps a charge associated with Sandhill's Utility Service Facilities? There are no other charges for electric service than the pass-through of the DEP charges?

MR. RISINGER: I'm sorry. Not that are revealed to us individually, as part of the component number that's charged in on.

CHAIR MITCHELL: Okay.

MR. RISINGER: As my time -- to understand, I want to make sure on the 8093 issue and whether the exception even applies. And, again, Sunstone's position is that Section 8093 has a limited waiver that only allows for the role of state regulation to occur when the Federal Government is purchasing power.

And to find here, in this case, in favor of Sunstone is entirely consistent with the way the Statute is written and the way legislative history reflects the Statute was purposed.

The legislative history of Section 8093 indicates that it was designed to avoid abandonment of local utilities. There's no abandonment of DEP is occurring here.

DEP is still supplying most of the power to the base. But what we know about Section 8093 is that Congress, in drafting an exception to allow for the regulation, only when the Federal Government is purchasing electricity, we know, for certain, that Congress was not intending to get at self-generation behind the meter on the base because it's specifically accepted in the Statute.

The Statute specifically provides that a secretary of a military branch can contract for the provision and operation of energy development of entities on its land.

And the provision was originally intended as a geothermal provision, and the Department of Defense, on repeated occasions, has indicated that this covers all forms of energy production.

And so the Statute itself was not designed to target what's going on here, generation behind a meter. It was designed to attack another issue. And I'm sorry. I'll stop. You're coming back to the

microphone.

CHAIR MITCHELL: Yes. Just clarify for me. Is it Sunstone's position that this is a type of self-generation or is it Sunstone's position that this is a behind-the-meter generation?

MR. RISINGER: Yeah. It is akin to the ways in which the Commission would think about self-generation. The art -- under --

CHAIR MITCHELL: Just to be clear, it's Sunstone's position that this is self-generation?

MR. RISINGER: It's generation that's allowed for the same reason. Yeah. I mean, for example -- for instance, let me try answer it.

It's our position that the United States could contract directly with Sunstone for energy generation.

Under 8093, that's a specific exception, and it's our position that BCL can act in the same way that the United States could act as the privatized entity that controls the housing, and that BCL can acquire -- can allow for energy to produce on the base and acquire it in the same way.

It's self-generation in the broader sense that it's behind-the-meter generation that the Federal

government allows and approves, that reduces the overall demand that the base pulls down from DEP.

COMMISSIONER CLODFELTER: All right. Let me take you up on the invitation you just gave me. So I agree with you completely.

I mean, the exception, B2B exception in 8093 says it does not prevent the department from purchasing electricity from any provider pursuant to 2394, now codified as 2292.

Why is yours not structured that way? Why have you structured the transaction -- I'm curious. Why have you structured the transaction other than having the Army purchase from Touchstone (sic) and then resell at the same price to BCL, problem solved?

MR. RISINGER: Yeah.

COMMISSIONER CLODFELTER: Why isn't it structured that way?

MR. RISINGER: Well, the answer, Commissioner, is that it's structured in the fashion that we brought it before the Commission today because that's how the United States tells us how to do it.

The United States makes an election not to do it directly with us, and they're making an election to use the privatized structure that they have set up

for -- you know, for how a private housing is governed, you know, to get the Federal Government out of the business of doing the things they're not so good at and focusing on the Army things they're good at.

The United States' preference is that it's done this way. It's negotiated that way. All the parties are at the table together in approving the portfolio.

It's done -- I agree it's totally frustrating. It's totally frustrating to us, but it is a choice that the United States makes as to how it's structured.

COMMISSIONER CLODFELTER: Well under your proposal, who pays Touchstone, (sic) I mean Sunstone, excuse me. I'm thinking of another item. Who pays Sunstone?

MR. RISINGER: BCL.

COMMISSIONER CLODFELTER: BCL? And that's done because that's the Army's preference?

MR. RISINGER: Yeah. I mean, essentially the answer is yes.

COMMISSIONER CLODFELTER: Can I read more about that anywhere in the record? Are there

regulations, manuals, program guidelines, anything else that would help me understand how the Army arrived at that position? Because, again, under the statutes, it's crystal clear that Fort Bragg Department of Public Works could buy this directly from Sunstone and resell it to BCL, and we wouldn't be here.

So I want to understand a little bit more about why the Army wants it structured this way. What can I read in the record?

MR. RISINGER: Well, to be honest, you can't read that -- you can't read that in the record. The inference that's in the record is that as an eligible entity under the Statute, BCL, in taking this function away from the Government, that's been given to them under the Privatization Act, is acting as the Government, you know, inside the enclave.

And the Government, you know, feels that it's the -- the Government doesn't feel like it has to do it, Commissioner, because the Government feels like that BCL, as a privatized entity, that's an eligible entity under the Statute, can do it just like the Government. That's it.

And so that's why there's not clarity on

that position in the record because, you know, we're provided the clarity that the Government, you know, gives us, you know.

CHAIR MITCHELL: Mr. Risinger, the proposed project that we're talking about today, is it 1 Megawatt of generation or is it 25 Megawatts of generation?

MR. RISINGER: It's up to 25. And the reason why I say up to 25 is that the system impact study process, you know, is designed, as it has been designed and carried out of all the other bases that we've done the project, to develop a project where there's no backfeed outside of the base.

And so there are places that system upgrades are required by the distribution system, you know, inside the military base.

We anticipate, you know, that we may reduce the name plate capacity in combination with some upgrades with the ultimate goal of the end of the system impact process, as it is with all the other bases, that there's no impact outside the base.

CHAIR MITCHELL: So it sounds like some preliminary engineering has been done on this project?

MR. RISINGER: I mean the preliminary

engineering is -- the general architecture has been done multiple times at multiple bases, but the specific engineering of the project has not occurred, and the specific engineering is a product of the SIS that occurs in cooperation with Sandhills, the federally regulated distribution entity on the base.

CHAIR MITCHELL: The other bases in which these projects have been implemented by the United States, what states are those bases located in?

MR. RISINGER: So two in Maryland; Meade in Aberdeen; Fort Riley in Kansas; Fort Bragg in North Carolina, and Polk in Louisiana.

And the Fort Riley facility in Kansas is a similarly structured monopoly jurisdiction where Sunstone operates with the cooperation of the franchised territory.

Louisiana has a somewhat similar structure. It's not as far along as Fort -- as that system impact study is being conducted at Polk currently.

CHAIR MITCHELL: So Riley is in service?

MR. RISINGER: Riley -- one is in service and the other one -- the second phase of Riley is going in December of this year. Aberdeen and Meade are in service. The -- I'm sorry.

The numbers officially in the record, it's 7.1 Megawatts of roof and ground at Aberdeen, 8.7 of Roof at Meade, 10.5 at Roof and Riley, with 1.7 to come in the next energizing event, which I think is in December, and then Polk yet to be determined.

CHAIR MITCHELL: What can you tell me about the -- I don't know if I'm going to say this correctly but the Camp McCall. Is that how it's pronounced?

MR. RISINGER: Yes.

CHAIR MITCHELL: The Camp McCall project?

MR. RISINGER: Yes.

CHAIR MITCHELL: What do you know about the transaction for that project? Who owns that project? What is the arrangement for the sale of power generated by that facility?

MR. RISINGER: With deference, I'm going to say counsel is going to tell you exactly -- we know what the publicly conveyed facts are.

What we believe the publicly conveyed facts to be is that the Army contracted with Duke and Ameresco to build the floating Solar project for them on Camp McCall, and the public statements issued by both parties is that the Army will own and operate that project on base post the construction.

And at the last public meeting at Bragg to discuss their multiple alternative projects, they said that the floating Solar project was essentially done. But the public knowledge is that the Government will own and operate it, and that it was built for them on contract by Duke and Ameresco.

CHAIR MITCHELL: When you say "the Government" or "the Army," do you mean BCL or do you mean some other entity?

MR. RISINGER: Not BCL. The Department of Public Works or an adjunct to the Department of Public Works, but the United States, itself, is -- at least in the public documents that we've seen, is going to be the owner and operator of the facility.

CHAIR MITCHELL: And why did Sunstone feel that it was relevant to bring that project to the Commission's attention and its reply comments?

MR. RISINGER: Well, I mean, I think that the McCall project, I think, is emblematic of the Army's approach to what it believes its sovereign authority is on the base.

To have the authority to engage in multiple partnerships on the base that produce electricity that is then not needed to be pulled down in demand from

the franchise provider that provides power at the distribution points, you know, into the base.

And so, you know, from our standpoint, that project is of similar ilk to the authority that the United States has under 8093 to contract with someone to produce it on their property. It can also own and operate in a self-generation sense, the property in that way.

CHAIR MITCHELL: Has the sort of -- just following on here, has the Fort Bragg specific Letter of Intent been executed yet?

MR. RISINGER: Yes.

CHAIR MITCHELL: It has it been?

MR. RISINGER: Yes.

CHAIR MITCHELL: Has it been put in the record in this proceeding?

MR. RISINGER: Yes. And that's a Letter of Intent on -- from the parties on really our side of the aisle that they're going to follow through just, you know, like they did at Bragg. It's a BCL/Sunstone Letter of Intent, but that's executed and that's in the record.

CHAIR MITCHELL: And is it contingent on a decision by this Commission?

MR. RISINGER: Being able to move forward, yes.

CHAIR MITCHELL: Okay. Go ahead.

MR. RISINGER: Have I successfully reserved five or --

CHAIR MITCHELL: Yes, you have. You can finish up.

MR. RISINGER: Okay. The thing I would like to leave you with is that it is a complex collision of State and Federal law, and we understand that.

We also understand that it comes with the Commission observing its authority through the prism of Yadkin, but this is a really unique project.

It is -- the scope of the project is limited to what occurs, you know, in a Federal enclave on Federal property.

It does not implicate the functions that the Utilities Commission has in other settings to determine, you know, that someone is acting or not acting as public a utility if they're in Greensboro or Fayetteville, you know, outside of the enclave.

A ruling for Sunstone, you know, on these facts is simply a ruling that says we're keeping the waiver of Section 8093 to its terms. That's

what we're suppose to do as state regulators and judges.

We're supposed to look at the waiver, interpret it narrowly, interpret it as applying only to purchases of electricity. That's not what's going on here.

There's a way to cleanly rule for Sunstone in the proceeding without implicating the Commission's authority or having any kind of slippery or even non-tactile slope that you've got to deal with later on. Thank you for your time. And, again, we'd like to reserve our time.

CHAIR MITCHELL: Let me check in with Commissioners to see if there are questions. Commissioner Brown-Bland.

(No response)

CHAIR MITCHELL: Commissioner Duffley?

(No response)

CHAIR MITCHELL: Commissioner McKissick.

(No response)

CHAIR MITCHELL: No questions?

COMMISSIONER McKISSICK: No.

CHAIR MITCHELL: Okay. Just a few more for you here from our side. You mentioned the Letter of

Intent. Any other binding contracts that Sunstone has entered into at this point in time or BCL --

MR. RISINGER: Um --

CHAIR MITCHELL: -- related to the proposed project?

MR. RISINGER: Well, yeah. I mean, tangentially, BCL has entered into a ground lease with the United States for 50 years, so the control of property, that factor we were talking about in Cube Yadkin, you know, that's a firm contract, for sure.

CHAIR MITCHELL: And the proposed project won't necessitate any amendment to that ground lease?

MR. RISINGER: Not that we're aware.

CHAIR MITCHELL: Any interconnection requests submitted?

MR. RISINGER: No.

CHAIR MITCHELL: Is the proposed project planning to interconnect on the Sandhills system or the DEP system?

MR. RISINGER: Sandhills.

CHAIR MITCHELL: And is it possible that a 25-megawatt Solar generating facility can interconnect the distribution, at the distribution level?

MR. RISINGER: Well, I mean, it's a question

that we -- you know, that we cooperatively approach with, you know, Sandhills. We believe that the initial take of information from Sandhills is that it's possible, but we're prepared, you know, to negotiate with Sandhills, the face plate size of the project and necessary upgrades, you know, to get up to or as close to the capacity as we can.

CHAIR MITCHELL: There's some discrepancy in the numbers you-all -- in the percentages that you-all have cited as to on-base housing relative to total demand at Fort Bragg. What's the percentage of total demand represented by on-base housing?

MR. RISINGER: I think what we originally said was it's 25. And the most recent information we got, that we supplied in the responses to the Commission's question, was that it was 18.

The 18 was the most recent information we've been provided by DPW as to the size of that usage by military housing.

CHAIR MITCHELL: Okay. You've described, both in your argument and the papers filed so far in this docket, how excess energy would be, really, the billing arrangement that will occur between FB, DPW, and BCL, and you've made some remarks regarding

treatment of excess energy.

If there are no contracts in place to -- you know, how can you speak with authority about how billing will occur and how excess energy will be treated, I mean, if you-all haven't really put -- you know, come to terms on those issues?

MR. RISINGER: You know, well, I think -- Commissioner, I think the fairest way to answer that is that first, as to the billing issue, that follows a template of how the billing is occurring at multiple other sites within the overall Army portfolio, and so the billing is occurring in the fashion and manner that it's occurring in other parts of the portfolio.

In our inner changes with DPW and Sandhills, we have no impression that that's, you know, going to be any different.

As to the excess energy, I mean that -- we have not had a curtailment issue come up at a previous project, but, you know, curtailment is -- you know, Sandhills Utility ultimately wouldn't have that kind of authority in a dire situation in overproduction.

That's a matter by contract, you know, when we're tapping and interconnecting into Sandhills, what we would expect to negotiate with Sandhills.

CHAIR MITCHELL: Okay. Let's see. I have one additional question for you. Bear with me here.

(Pause)

CHAIR MITCHELL: Mr. Risinger, on one of these decisions, there's discussion about the legislative history of 591. The discussion pertains to concern related to reduction and load. I'm trying to find it for you right now, just to get you oriented.

Anyway, my question -- as soon as I find it, my question will be how do you reconcile Sunstone's position with that, the discussion of legislative history about concern related to reduction and load?

MR. RISINGER: Yeah.

CHAIR MITCHELL: Do you know enough?

MR. RISINGER: Yeah.

CHAIR MITCHELL: Okay.

MR. RISINGER: That's plenty. Holler at me if you want me to stop.

CHAIR MITCHELL: Go ahead. Go ahead. Thank you.

MR. RISINGER: So with respect to the legislative history, we think that the predominant legislative history concern of Section 8093 is

abandonment of local utilities by the Federal Government.

And, you know -- and we think that the abandonment has to be read in concert with what does Congress think abandonment is. Congress doesn't think abandonment is producing energy behind the meter in a self-generation, or, you know, on-site production sense, because Congress specifically accepted that from the Statute.

And so when Congress said we're really concerned, we want to make sure that there's no abandonment of DEP, they weren't saying oh, yeah, in the United States, you can't generate any power behind the meter that would reduce the demand.

It was saying United States, our concern is you walking away from local providers and disturbing the Matrix of regulations and policies that provide power, you know, in a given state, so we read those provisions together. Is that a fair response to your question, Commissioner?

CHAIR MITCHELL: It is a --

MR. RISINGER: It's a response.

CHAIR MITCHELL: Yes, you're responding, so thank you. Thank you, Mr. Risinger. Anything else

before he sits down? Commissioner Brown-Bland.

COMMISSIONER BROWN-BLAND: Just following up on that last exchange, so reading the 8093 and the Statute, I think it's 2922?

MR. RISINGER: Um-um.

COMMISSIONER BROWN-BLAND: Reading those together, how do you get that assurance that the Federal installation doesn't abandon or walk away from the local provider?

MR. RISINGER: Well, it's an interesting question, Commissioner. The Statute doesn't provide, you know, a guidepost other than indicating that as part of the United States' abilities to tend to its own interests as a sovereign of an enclave, that it can generate power within that enclave.

I mean, there is -- you know, you reach a theoretical touchpoint where some day, the question may be litigated if the Government comes along and says I'm going to, you know, generate 80 percent of my power, you know, on base, and I'm no longer going to need only but 20 percent of that power.

I mean, that's going to be -- I assume that question's going to come up in a fact-based setting, and some other setting, other than a place where what

we're talking about is, you know, 8 percent of the power, but there aren't bumpers on the lanes or a particular safeguard built into the Statute on that exact question, Commissioner.

COMMISSIONER BROWN-BLAND: So just in terms of statutory construction, I mean, those two fit together, in your mind, and aren't in conflict with each other such that they need some resolution?

MR. RISINGER: Well, I mean, in terms of a resolution from this Commission, we would say no because we think that those -- you know, this Commission's interpreting those provisions, but in terms of the Congressional concern about abandonment.

But, also, the Congressional endorsement of self-generation, you know, we're in that generation behind, you know, a metered point, and it's quite small, you know, in the instance of this project, you know, whether there would be a touchpoint down the line later where a Commission in the state or a court may look at that differently if the numbers were vastly larger and different. I mean, it's hard to say, to be honest.

COMMISSIONER BROWN-BLAND: Thank you.

CHAIR MITCHELL: Mr. Risinger, you may sit

down, and we'll give you your five minutes.

MR. RISINGER: Thank you.

CHAIR MITCHELL: All right. Duke.

(Pause)

CHAIR MITCHELL: Mr. Breitschwerdt, make sure you pull the mic.

MR. BREITSCHWERDT: Is that coming in well on your end?

CHAIR MITCHELL: (Nods affirmatively).

MR. BREITSCHWERDT: Very good. Thank you, Chair Mitchell, Members of the Commission, Brett Breitschwerdt, again, with McGuireWoods, on behalf of Duke Energy Progress.

The Company appreciates the opportunity to appear before the Commission today to address the important issues presented in Sunstone's petition, as their proposal violates the Company's exclusive franchise providing regulated electric service to Fort Bragg, through its retail customer, Fort Bragg Department of Public Works.

And, if allowed by the Commission, would potentially indirectly affect all of DEP's customers through shifting costs and higher rates for electric service.

Now, as the Commission may be aware, Fort Bragg is one of the largest major military complexes in the world totaling over 70,000 military personnel and civilian employees.

The Company delivers power to the Fort Bragg Department of Public Works, as you've heard, which that power is then distributed through the base by Sandhills Utility System, which is a privatized owner of the distribution system under prior privatization legislation passed in the late 90's by Congress.

The Fort Bragg Department of Public Works is a large and important retail customer of DEP with an annualized peak demand in 2020 of well over Megawatts, so a significant customer for the Company.

And the risk of having its load reduced are a material concern. And, finally, the Company's very proud of the opportunity to reliably serve Fort Bragg along with other major military installations in eastern North Carolina.

And, for the State itself, it's important to provide reliable, affordable, resilient, and increasingly clean electric service to Fort Bragg.

As the Commission noted in its order on the Company's Motion to Dismiss, the Department of Defense

has been an active advocate on behalf of Fort Bragg and other major military installations at North Carolina to ensure just and reasonable rates.

To DEP's knowledge, in former rate cases and other proceedings, the Department of Defense has never questioned, as a Commissioned authority, to save rates for electric service provided to Fort Bragg or other bases in North Carolina.

The North Carolina General Assembly has also recently enacted state laws to provide expended renewable energy opportunities at major military installations.

The Commission will recall in House Bill 589 passed in 2017. The Commission -- or excuse me, the General Assembly specifically carved out providing direct and renewable energy procurement two major military installations under the Green Source Advantage Program, and those carve-outs are available today.

Duke Energy, as you heard earlier, and I'll speak a little bit more to, is also working with the Department of Defense at Camp McCall, which is an Army training facility southwest at Fort Bragg, to develop a floating Solar array and battery-stored project.

Importantly, that project will be owned by the Army and will be used to help achieve the Army's renewable energy and resiliency goals. The Companies have developed this project consistent with State law and regulation on behalf of the Army.

The Company's -- it's a less than two Megawatt generating facility, so it's not subject to a CPCN by the Commission.

The Companies have submitted -- and when I say "the Companies," Duke Energy's unregulated subsidiary Amaresco, who's the contractor development project, has submitted a report of proposed construction which is a requirement under the Commission's regulations.

And the Army will own the project and self-generate power, so I know that you had the discussion with Mr. Risinger about whether the BCL and Sunstone arrangement is self-generation.

The Company's view and why we're here today is that that is a third-party sale of electricity and is distinguishable from self-generation, which is especially carved out of the definition of public utility under the statutory framework.

And contrast that with the project at Camp

McCall where the Fort Bragg Department of Public Works will be the owner and operator of that facility at the time it's placed into service, and will, in fact, self-generate.

So it's been developed to be consistent with State Public Utility Law, and we think it's very distinguishable from the proposed transaction that Sunstone is seeking to enter into with its affiliate BCL.

And just -- I think as a point of background, to DEP's knowledge, the Department of Defense of North Carolina, the Army's never questioned whether the Commission regulation of public utility service to Fort Bragg exceeds its jurisdiction or is inconsistent with Federal law not found in any cases, either at the Commission or in the appellate courts in North Carolina that would have the Army or the Department of Defense taking that position.

And we've never seen or not aware of the Department of Defense ever advocating that would have the authority to allow unregulated, independent power producer generating facilities to be located within Fort Bragg, and to then sell power at retail within the Federal enclave without Commission oversight.

So we do think what Sunstone is proposing here, in its petition, is unprecedented, and there's no case law, Commission guidance that would be precedential to the situation proposed here.

CHAIR MITCHELL: Mr. Breitschwerdt, I'm just making sure I understand Duke's position here. Is it the ownership of the asset, are the proposed ownership of the asset, in this situation, that distinguishes it from the otherwise allowable or unobjectionable Camp McCall project, or is there some element of a sale of the power that makes it objectionable?

MR. BREITSCHWERDT: I think those two components are related, so the fact that it's not owned by BCL. So, for example, BCL owns the housing. If it were to put Solar panels on its own roof and not enter into a third-party arrangement where it was an unrelated entity, an affiliate or unaffiliate entity, but a separate legal entity that was entering into a power personal arrangement to sell the power, then that would be self-generation, which would be accepted from the definition of public utility, and would be not controversial.

So, frankly, we wondered from the beginning why they didn't approach it in that manner and just

have BCL own the Solar project.

CHAIR MITCHELL: Okay. And just to clarify, I'm not hearing -- so there is no concern or is there less concern about excess energy than there is about the sale from a third-party?

MR. BREITSCHWERDT: Excess energy that is --

CHAIR MITCHELL: So energy that wouldn't otherwise be consumed by the on-base housing that might go backfeed onto the system?

MR. BREITSCHWERDT: Well, I think it would initially backfeed onto the Sandhills Utility System, which is where the generating facility -- facilities -- because there's going to be some combination, we understand, of rooftop, and then ground mounted, and then it will directly backfeed.

And, I think, that's established in the record, that the intent is it will backfeed into Fort Bragg, and they'll be by directional metering that will capture that generation output.

And, as a result, Sunstone will be credited for the power that's being essentially consumed, if I understand it, based on patent loads elsewhere on the base.

Whether it would actually backfeed Duke

Energy Progress' system is something that hasn't been determined and would need to be studied, I think.

Sunstone has represented that they plan to work with Sandhills Utility to ensure that backfeed does not occur, and that's an important issue for Duke Energy Progress, that they would do a study to -- an interfaction study, presumably, or at least make a preliminary determination that a study is not needed to determine whether it potentially could backfeed onto the DEP system and then would take steps to ensure that didn't occur.

CHAIR MITCHELL: Thank you for that. Again, just make sure I understand, Duke's concern about an impermissible third-party sale does not hinge on potential backfeed onto DEP's system, but sort of the other mechanics of this deal, as you've described them?

MR. BREITSCHWERDT: That's right.

CHAIR MITCHELL: Okay.

MR. BREITSCHWERDT: We feel like it would be an impermissible third-party sale, whether it backfeeds onto DEP's system, whether it backfeeds onto the Sandhills Utility system within the base, or whether it's simply -- I think that's the arrangement.

So this clearly will backfeed onto the Sandhills Utility System, if I understand the facts correctly.

CHAIR MITCHELL: Okay. Mr. Breitschwerdt, while I have you look at Duke's initial comments, do you have those in front of you?

MR. BREITSCHWERDT: I do.

CHAIR MITCHELL: Okay. Footnote 32, the Company describes this --

MR. BREITSCHWERDT: I'm sorry, Chair Mitchell. Could you provide me with the page cite again?

CHAIR MITCHELL: Yeah. I'm looking at page 13 of the initial comments of DEP, and down the bottom, footnote 32.

MR. BREITSCHWERDT: Sorry. Give me one second. Okay.

CHAIR MITCHELL: The Company describes the proposal as quasi self-generation. Just help me understand the Company's use of that term, quasi self-generation there.

MR. BREITSCHWERDT: It was perhaps an inartful term, but I think the concept is that all of this generation will be behind Fort Bragg's metered delivery point. So from the perspective of the DEP

system, it's being generated behind the quote unquote "retail meter" of Fort Bragg.

But, clearly, there is a sale, and the sale is resulting in power flowing from generation owned by Sunstone or proposed to be owned by Sunstone, back onto the -- the Sandhills' utility distribution system. And, potentially, although as we learn more, we think it's less like likely that it would flow back on the DEP system.

CHAIR MITCHELL: Okay. One last question. Does Duke have concerns with the relationship or the arrangement between FB, DPW, and BCL in terms of whether it's a resale of electricity?

MR. BREITSCHWERDT: It's a good question, and we've been talking about this recently. And the fact that -- and this goes to some of your questions earlier.

The rates being paid are the same rates. It's simply as a pass-through, so we don't have a concern that it violates the Statute or it violates the exception for the definition of public utility as a resale, because the cost of the power is just a pass-through from DEP to DPW, and then DPW to BCL.

MR. BREITSCHWERDT: So your understanding is

similar to Mr. Risinger's, that it is a pass-through, that FB, DPW is simply passing through the charges from Duke?

MR. BREITSCHWERDT: That is our understanding.

CHAIR MITCHELL: Okay.

MR. BREITSCHWERDT: Or that is my understanding.

CHAIR MITCHELL: Okay.

COMMISSIONER HUGHES: When you said that you weren't sure why they didn't do the model where it was just owned and operated by BCL, are you aware of any of that model of any of your other service areas?

MR. BREITSCHWERDT: The model where?

COMMISSIONER HUGHES: The model where there's a private housing provider that has put Solar on their property to scale and you suddenly noticed a drop in your --

MR. BREITSCHWERDT: Well, I think that's what the Army is doing through the Camp McCall project. Is they're doing, owning, operating a generating facility, and they're using it to self-generate and meet the exception, the self-generator exception of North Carolina law,

specific to other jurisdictions and how they're structuring third-party owned Solar.

I'm not as familiar, and I would also say it's highly dependent on what the statutory framework is. So in other jurisdictions, you may not be limited to self-generation in the same way you are in North Carolina.

So what I would anticipate is when the Federal Government provided what we call the conceptual portfolio approval, they were not focused on what State law required or limited in North Carolina in terms of prohibiting third-party sales of electricity, and so that is perhaps why these proposed arrangements have been -- have progressed in other jurisdictions but have been partly at a standstill for the last five years in North Carolina, and we're here today.

So I'd also say when we met with the folks from Qorus (phonetic) early on, we asked for clarity of how other states and other state utilities that were interconnecting with the bases were considering the proposed arrangement under Federal law and under State law, and we didn't receive any detail or documentation that would get the Company comfortable

that this was something that was not a violation of Section 8093 under Federal law or, you know, traditionally vertically integrated jurisdiction like North Carolina or -- I'm not as familiar with Kansas how it would be allowed there, so...

COMMISSIONER CLODFELTER: Mr. Risinger has said Kansas is a franchise state like North Carolina. Have you explored that?

MR. BREITSCHWERDT: I have not, no.

COMMISSIONER HUGHES: You're only comfortable -- let me ask you: Are you as comfortable with the BCL ownership model if they, in turn, then actually charged their tenants electricity than then they becoming third-party?

MR. BREITSCHWERDT: Yes, sir.

COMMISSIONER HUGHES: But you're comfortable because BCL would put the electricity in the rent. Is that -- I'm just -- you seem very comfortable of that, yeah BCL only owning it I'm trying to get nuance as all these ownership mods are similar with.

MR. BREITSCHWERDT: Understood. I'm comfortable in the sense that reading our state's Public Utility Act, it carves out from the definition of public utility an entity that is self-generating,

so not entering into a third-party sale or a lease that is beyond the scope of the leasing program established in House Bill 589.

So if BCL were to self-generate and consume the power, that would be consistent with North Carolina statutory framework, so I'm comfortable in that respect. I haven't looked at the applicability or how the Public Utilities Act would treat a landlord that is then including the cost of generation their tenant's rent directly, but I recall -- I seem to recall that was an issue a few years ago in another American's Home for Rent or something to that effect, so there is precedent out there applying the Public Utilities Act to somewhat similar situations that would be --

COMMISSIONER CLODFELTER: Which is the exact issue of the Cube Yadkin case where the Court of Appeals said we shouldn't have issued the Declaratory ruling in the first place.

MR. BREITSCHWERDT: Well, there's that. If there are no more questions, I'd like spend sometime talking about the justiciability of any issues before the Commission.

COMMISSIONER CLODFELTER: Before you do

that, I do have further questions on the merits issue, if I can, so I want to pursue with you a little bit the question I asked Mr. Risinger.

MR. BREITSCHWERDT: Sure.

COMMISSIONER CLODFELTER: As I read 8093, which is what you rely on, there's a specific exception from that Statute for contracts entered into, into what is now codified as 2294(a).

This Section does not preclude the Secretary of the Military Department from entering into a contract under Section -- what is now 2294(a) of Title 10.

So would you agree with me that if the arrangement were that, as I asked Mr. Risinger, if the arrangement were that the Fort Bragg Department of Public Works contracted with Sunstone to buy the energy output, and then turn around and resold it on the Federal enclave, to BCL, that that would be completely exempt from State regulation?

MR. BREITSCHWERDT: I think the Statute could be read that way. I haven't seen any Department of Defense guidance or case law that has interpreted it that way, and so what I would point you to --

COMMISSIONER CLODFELTER: Well, they can buy

it. The Statute says they can buy it, right? They can enter into a contract to buy from any facility developed on the Federal enclave. They can buy the electricity.

MR. BREITSCHWERDT: I think that is a reasonable reading of the Statute.

COMMISSIONER CLODFELTER: Can -- 8093 doesn't then apply to any resales of that electricity on the base. It only applies to purchases by the department.

So once we've gotten past the purchase exception, and now the Department says or the Fort Bragg Water and Public Works says I want to resell the electricity, but I'm reselling it on the base, not off the base, I'm reselling it entirely on the base, to a buyer on the base, 8093 doesn't apply to that, does it?

MR. BREITSCHWERDT: I can't give you a definitive answer, and the reason -- I understand your reading of the Statute, and it's intuitive in a number of respects.

COMMISSIONER CLODFELTER: It follows the plain language.

MR. BREITSCHWERDT: I think it's intuitive

in a number of respects. What is interesting to me, and one of the points I was planning to make in my argument, is that if you look at the DOD memo, which you would think that the DOD would carve out broadly that they would have the right to do exactly what you're identifying on the page 6 of the memo, which I've shared with the Commission, General Counsel -- and just for context for the Commissioners, so this memo was issued in the year 2000 after the Department of Defense -- excuse me, Congress established a directive for the Department of Defense to privatize utility systems on military bases, so the distribution transmission systems, so this was an issue across the country.

Sandhills and Fort Bragg is the owner/operator of that system, and it doesn't speak specifically to the issue of that exception. It doesn't call it out specifically, but what's notable to me, Commissioner Clodfelter, is this second statement that I've highlighted here, which says:

"Because Section 8093 waives the sovereign immunity of the United States with the purchase of the electric commodity, whether we can purchase or obtain electricity from a generating facility, the Department

has transferred through Section 2688," which is the utility privatization's section, "is dependent upon State law."

So the Section 8093 was initially enacted in 1987, what is now 2922(a). This section you're siting to was initially enacted in the early 80's.

And so if that's the way the Department of Defense is reading this statutory framework, it's not intuitive to me why they would make the point that they would only be able to purchase from a generating facility they've -- which presumably is on base, they are purchase power from a generating facility that they've sold to a non-utility through privatization action if it's dependent upon State law.

So it doesn't seem, from this memo at least, that DOD has taken that position, and I have not been able to find any guidance or court cases that interpret that Statute and provide that clarity.

I don't think it's determinative of the issues here today, and I think Mr. Risinger would agree with that, but I do understand the position that you're articulating --

COMMISSIONER CLODFELTER: All right.

MR. BREITSCHWERDT: -- and why that would --

COMMISSIONER CLODFELTER: Well, let's stay with me for a minute, and I appreciate you're calling 2688 for my attention. I'll look at that, but, clearly, we don't have that fact-pattern here because this is not an energy production facility being transferred by their Army to anyone. It's being developed from scratch from Sunstone.

MR. BREITSCHWERDT: That's right.

COMMISSIONER CLODFELTER: So let's stay with the line of questioning. I thank you for calling that to my attention and I'll look at 2688 and think more about that.

But let's stay with it for a moment and say that the intuitive reading -- I understand you don't agree with it, but let's follow it down --

MR. BREITSCHWERDT: I don't necessarily disagree with it. I'm just thinking it's not applicable of the mere facts here.

COMMISSIONER CLODFELTER: Follow it down the road a bit and suppose the Army looks at that pattern and says gee, we could do this. But you know what? Why should we be the middle man here, unnecessary middle man?

We could do it, it follows the Statute.

We're authorized to do it, but why don't we just sort of get out of the middle and let Sunstone sell directly to BCL, and we'll handle our role in this through a crediting mechanism. And you say that's objectionable because now the sale is to -- from Sunstone to BCL.

MR. BREITSCHWERDT: That's correct.

COMMISSIONER CLODFELTER: Yeah. Aren't you exalting form over substance here? Isn't that the real problem with your argument?

MR. BREITSCHWERDT: I don't think so. I think that we're applying the Public Utilities law in saying that what Section 8093 directed the Federal Government to do what Congress directed the Federal Government to do in enacting Section 8093, was to comply with State law in terms of how state Public Utilities Acts and how Franchise and Territorial Assignment Acts determined what entities could sell and deliver power.

So under North Carolina law, that is a third-party sale. Exactly what they've done is precisely what NC WARN sought to do three, four years, ago. And it went up to the Court of Appeals and the Supreme Court, and they said that's a third-party sale

that's unlawful under North Carolina law.

COMMISSIONER CLODFELTER: Absolutely right, under North Carolina law, but am I not called upon, in this case, to construe Federal law? Isn't that the point? And the task before me is to construe Federal statutes here.

And one of the things I'm told to do is to construe any exception to the authority of the Army to do whatever it wants on the Federal enclave, and to construe the exceptions very narrowly.

And, here, I have statutes that say to me that, well, you know, if they simply push the paperwork around a little bit differently on their desks, as I read the statutes, as you say intuitively, this is plainly authorized, and so they want to move the paperwork around a little bit differently on the Federal desks. And so I should hang the decision on that?

MR. BREITSCHWERDT: I'm not sure that I follow --

COMMISSIONER CLODFELTER: Under Federal law, under Federal law, I should interpret Federal law to make that fine distinction dispositive?

MR. BREITSCHWERDT: Respectfully, I think

the Company's position is that it's not that fine of a distinction, and this clearly is a third-party sale. And the question under State law --

COMMISSIONER CLODFELTER: Under State law.

MR. BREITSCHWERDT: Under State law, which is what Congress, in enacting Section 8093, directed the Federal Government to adhere to, with the exception of when they are procuring power from an on-base generating facility, and I think we've agreed that's applicable here.

COMMISSIONER CLODFELTER: All right. I'll let you get back to your argument and pick up where you want to go. I think you see the issue for me is whether I need to give that State law, the construction under Federal law --

MR. BREITSCHWERDT: And I appreciate --

COMMISSIONER CLODFELTER: -- or whether -- Federal law requires me to interpret the transaction a little bit differently.

MR. BREITSCHWERDT: Yeah. And I would re-emphasize for the Commission that one of the things that the Company has advocated for in our initial Motion to Dismiss or to join the Army is that this is a question where we don't have -- I mean, Mr. Risinger

made a lot of representations on behalf of the Army, but the only thing we have are preliminary approvals from 2015 or 2016, and there's no clarity on what the Army's intent is, what their position is.

And there's nothing that Duke Energy Progress has been provided that says the Army believes Section 8093 should be applied in this manner, and that there's no conflict between that Statute and the North Carolina Public Utilities law or that's it's inapplicable.

So we've highlighted in a number of pleadings that there is a Federal regulation that directs the Army to their contracting officer to either with advice of legal counsel or advice of the Commission, who is responsible for implementing State Utilities law, to make a determination of whether they can competitively obtain electric supply under the Section 8093.

And to the best of our understanding, that hasn't happened. We haven't obtained any clarity, and I think Sunstone even opposed the Army being joined in this proceeding on how the Army views this arrangement and what their position is on how the project would go forward.

So the documents speak for themselves on the initial portfolio approvals and the initial conception approvals, but I would submit that those were based on the perspective of the housing administration, based on my reading of them, and don't, in any way, address how this proposed Solar project and power sales arrangement aligns with Federal law or State law, so I do think that's an important point to clarify.

We don't have any certainty on how the Army views the applicability of Section 8093 or the exception that you identified. And there is a mechanism that, if I'm reading it correctly, the Army could and perhaps should be undertaking to provide that guidance before it allows competitive supply of electricity.

COMMISSIONER CLODFELTER: Thank you for your answers. I appreciate it.

CHAIR MITCHELL: And what mechanism is that?

MR. BREITSCHWERDT: It's 48 CFR 41.201(e).

COMMISSIONER CLODFELTER: I'm sorry. Give it again.

MR. BREITSCHWERDT: Yeah. 48 CFR Section 41.201(e), and that Section of the Federal Acquisition Regulations is essentially the Department of Defense

implementing Section 8093 of the U.S. Code.

CHAIR MITCHELL: Okay.

MR. BREITSCHWERDT: Or what is now 591, but originally 8093.

CHAIR MITCHELL: All right. Mr. Breitschwerdt, I'm going to ask you to do something. I'm going to put you on the spot a little bit here, but do you have the reply comments in your hands, Sunstone's reply comments?

MR. BREITSCHWERDT: I should have left this binder at my desk.

CHAIR MITCHELL: That would have been smart.

MR. BREITSCHWERDT: Always lessons to be learned. I do.

CHAIR MITCHELL: Turn to page 7. And you and Commissioner Clodfelter have been going around this for a minute now, but just look at -- are you on page 7?

MR. BREITSCHWERDT: I am.

CHAIR MITCHELL: Look at -- review Section A there? Do you see Section A?

MR. BREITSCHWERDT: I do.

CHAIR MITCHELL: Review that and then rebut that for me.

(Pause)

MR. BREITSCHWERDT: All right. So this is the conversation that Commissioner Clodfelter and I were just having. So I think if --

CHAIR MITCHELL: As clearly as you can, Mr. Breitschwerdt.

MR. BREITSCHWERDT: Understood. This was a conversation Commissioner Clodfelter and I were just having. And if this was an arrangement where the Army was contracting directly with the generating facility within the Federal enclave, then I think intuitively and reading the plain language, there is a reasonable argument that this would not be subject to State utilities law.

However, that hasn't been clearly stated by the Department of Defense or in any case law that I've been able to find interpreting Section 2922(a).

And reading the Department of Defense's 2000 memo, they seem to suggest that in the instance where they're transferring a generating facility to an unregulated entity as part of a privatization action, that in that instance, they would have to follow State law.

So, again, I think it is an intuitive

reading of the Statute. It's also not the facts that Sunstone had brought before the Commission in their petition because they are presenting a third-party sale, and the Federal Government, the Army, is not directly entering into the power purchase arrangement that's between the two affiliates.

CHAIR MITCHELL: Okay. Thank you.

MR. BREITSCHWERDT: You're welcome.

CHAIR MITCHELL: You can return back to your argument now.

MR. BREITSCHWERDT: All right. We've gone all over the place. I'm trying to do my best to get back to it, but one thing we haven't spoken about is the issue of current case controversy.

Actually, before we do that, I'd like to spend a minute -- you asked me about the policy objectives, which I was excited to talk about because that was one of the demonstrative exhibits that I provided to the Commission.

But just briefly, if you take a look at Oral Argument Exhibit 2, which I provided to the Commission, Sunstone, in their briefing argument and some of the court decisions, the limiting court decisions that are interpreting this Section 8093,

have really focused on the question of abandonment of utility systems and whether the -- and advocated that that is what Congress was looking to solve for, was whether or not third-party supplier would result abandonment of the incumbent utility and result in higher rates for other customers.

And the dissent in the West River case, which was the case that was issued very soon after Section 8093 was enacted, and we submit and it doesn't seem like Sunstone has a differing opinion necessarily, was overly restrictive.

And it is certainly the view of the Department of Defense memo and its application of Section 8093, the dissent in that decision emphasize that the broader purpose of this provision was to insure that the general regulatory framework between the Federal Power Act and State regulation in terms of who's responsible for retail electric service versus Federal responsibility for wholesale and transmission under the Federal Power Act, would be maintained in this divided responsibility for serving customers, would be preserved through Section 8093.

So I do think this is broader than the concept of just abandonment and as applied through

North Carolina law through decisions like the North Carolina WARN Court of Appeals decision where the Commission determined that a third-party sale of electricity would have -- would be contrary to State law and would have adverse policy impacts in terms of higher rates and insufficient service for customers. That lines up well.

And so to the extent the Commission was focused on this concept of abandonment as the policy behind enacting Section 8093, I think it's important to take a look at the broader policy that was presented here, and it does demonstrate that it was more focused on ensuring that State law and regulation was followed, because that's the policy framework between Federal regulation and State regulation of the provision of retail electric service.

So turning to the issue that's most recently before the Commission about whether this current case or controversy, the justiciability of the issue before the Commission, I think starting just briefly with a little bit of background, that -- you know, the Company filed its Motion to Dismiss the proceeding because the initial discussions with Sunstone really didn't provide any insights on the project status and

whether it was approved by the Army.

So, through discovery, we discovered that the Company or Sunstone had obtained preliminary approval five years ago, back in 2015, 2016, but there was no certainty about the project in terms of its size, location, or point of interconnection, and there were no milestones for developing the project, no milestones for seeking interconnections with Sandhills or how BCL would amend the ground lease and usable service agreement with the Army.

Sunstone admitted also that it had not entered into any projects, specific contracts with either BCL as the offtaker, Sunstone as the interconnect utility.

And, again, there were no arrangements and there continues not to be between Sunstone and the Army or between BCL amending the agreement between the Army as a counterpart in Riley's MSA. (sic)

So because there were no concrete development plans, the Company submitted its Motion to Dismiss and the Commission denied that. But we appreciate that you're willing to reconsider that determination in light of Cube Yadkin, so that's really what I want to focus on briefly.

So the November 9th response to Commission question 1 that Sunstone submitted, admitted that there had not been any change in the project development status, the contracts, contractual relationship between any of the parties, no new binding agreements.

Sunstone identified that it planned to enter into an LOI with its affiliate, BCL, but that LOI, to borrow the Court of Appeals basketball analogy from the Cube Yadkin opinion, is essentially presents Sunstone and BCL's affiliated entities that have entered into the LOI to play on the same basketball team, have made preliminary efforts to go to the arena but will never be allowed to play against Duke if the Army, which is the arena owner, refuses to allow Sunstone on the court.

So, I think, from Duke's perspective, Sunstone's response, and the issue before the Commission on justiciability, continues to be whether the project has made sufficient progress or whether there remains impediments based on the unique circumstance of Sunstone developing this project within the Federal enclave that is subject to the Army's approval and its jurisdiction to determine

whether or not the project can move forward.

As Company detailed in its brief, in response to Sunstone's Commission to question 2, they admit that the major decision approval to move forward with the project is still required and has not been issued by the Army.

So the only information we have about the Army's position on the project are the 2015 and 2016 initial portfolio concept approvals, and then the preliminary approval out of the Housing Department at Fort Bragg back in 2016 of Qorus' (phonetic) proposal.

So the major decision approval, which we believe should be issued and we also believe that there should be more certainty around, from the Army's perspective, under the Federal regulations that I cited, 41 CFR -- or excuse me, 48 CFR 41.201(e) that requires the Army's contracting officer to determine, with the advice of counsel or by consultation with the Commission, whether competitive supply would be allowed.

There hasn't been any progress on that front or any actions taken by Sunstone that would provide certainty that the Army believes that this arrangement would be able to move forward under the applicable

Federal and State procurement laws.

And so those factors, along with the fact that the project has not progressed in developing the contractual framework for the project in terms of entering into an amended ground lease, modifying the municipal service agreement between BCL and the Department of Public Works, those support the preliminary nature and the fact that there remain impediments to moving forward with the proposed project.

And so, as we stated in our brief to the Commission, for that reason, we think it continues to be not justiciable and not before the Commission because those impediments remain under the Cube Yadkin guidance, and so that's why the Company is renewing its request for the Commission to dismiss the petition on justiciability grounds.

So we spent a little bit of time earlier talking about the 2000 memo, and I think -- I had a couple points that I'm somewhat taking out of order now, but I do want to empathize to the Commission that it seems clear, and it may be something that Sunstone agrees with, at this point, that the import of the Department of Defense's position here is that as it

pertains to the electric commodity within procuring the electric commodity, that that is subject to Section 8093.

And that requires the Federal Government to comply with State law, setting aside the exceptions that Commissioner Clodfelter identified a few minutes ago, so I do think that's important and that's what's been identified highlighted on pages 4 through 6.

We spoke about the fact that the policy objectives were not necessarily limited to abandonment, but were, under North Carolina law, I think, the third-party sales exception and the Commission's -- or excuse me, the Court of Appeals guidance in NC WARN hasn't been applied to say that that extends both to the potential for abandonment, but also for the potential for a retail extra competition to adversely impact traditional monopoly utility framework, and so that's something that I do think aligns when you frame up how State law should be applied and taken into account in applying Section 8093.

So Section 8093 says that in applying -- in procuring the electric commodity, the Federal Government, the Department of Defense, specifically,

should take into account and not take action inconsistent with State law.

And so in North Carolina, that includes ensuring that you're not just abandonment of the utility by a competing supplier, but also third-party sales where rooftop Solar projects, like the NC WARN project, would be reducing the load that would be served by Duke Energy Progress.

And that power would then be served by a competing third-party supplier, which would potentially reduce -- that the Court of Appeals said would result in insufficient service and result in higher rates for customers, so that's a concern that we've identified in our pleadings as well.

I'd like to spend a little bit of time addressing some of the discussion about the fact that this procurement is not specific to the Federal government purchasing the electricity and that Sunstone is a private entity.

And that as characterized by Sunstone's reply comment, Section 8093 is actor-specific and applies only to purchasing power by DOD and other department agencies, and does not apply to Sunstone and BCL here as their private agencies or private

entities, excuse me, operating within the Federal enclave.

DEP thinks this argument is misplaced and the facts presented by Sunstone's petition demonstrate that Section 8093 should extend to the proposed third-party PPA between Sunstone and BCL.

First, we continue to think it will lead to an absurd result to conclude that Sunstone, as an independent power producer proposing to sell power at retail, and BCL is a private eligible entity that's its sole purpose, as authorized by Congress, is to partner with the Department of Defense to provide military housing for the Federal government, would not be subject to the same congressional mandates to adhere to State public utility law as the Department of Defense itself. It simply doesn't make sense.

We've not found any case law to support that because Sunstone is a QF or an exempt wholesale generator, and BCL is an eligible entity specifically focused on providing public housing within the military bases that they would not be subject to the same provision.

It doesn't intuitively make sense while the Section 8093 is focused on Department's Agency's

instrumentalities. Those are big, broad areas of the Government, and this is a very small, limited -- the concept of eligible entity is a limited purpose housing entity.

And so if that's the Army's position, then they haven't made that known through any documents, memos, or case law that we've seen over the last 20 years, and that would certainly have informed DEP's position in the case, but that has not occurred.

So I think the other point that we touched on a little bit earlier --

COMMISSIONER CLODFELTER: Are you moving to another point?

MR. BREITSCHWERDT: I can pause there if --

COMMISSIONER CLODFELTER: I would have a question about the point you just made about -- if you're about to move to another one.

MR. BREITSCHWERDT: Please.

COMMISSIONER CLODFELTER: Okay. Mr. Breitschwerdt, so you want us to extend 8093(a) to cover purchases of electricity by an on-base contractor such as BCL, but you don't want us to extend 2294(a) to include purchase of electricity by an on-base contractor such as BCL. Is there any

inconsistency you see in the way you're reading the two statutes?

8093(a) is pretty specific. It applies to a department agency or instrumentality of the Federal government purchasing electricity, and you say, well, we need to understand that more generally as it's also including on-base contractors like BCL.

MR. BREITSCHWERDT: I think that --

COMMISSIONER CLODFELTER: If I said back to you 2294(a) also authorizes the purchase of electricity by the Department, from on-base contractors who are providing and generating that electricity, why shouldn't I also expand that to include on-base contractors purchasing electricity like BCL? Shouldn't that be consistent in my reading of the Statute?

MR. BREITSCHWERDT: It's a fair characterization. I think the distinguishing fact here that is under the general provision of 8093, it was focused on -- it was initially developed in an appropriations provision, so they were focused on who would be paying dollars out and what purchases would be required. And so that's how it came to be enacted, and that's ultimately how it's been applied.

The exemption for on-base generation preceded that and was more generally applicable to the Department of Defense purchasing or entering into contracts for a generation that was sited on military bases.

And so, historically, I think a lot of that generation was owned by the military, and so it intuitively made sense that that type of arrangement would be limited in scope.

I don't -- I can't articulate a good rationale for why the inconsistency would be appropriate here, except to say that Section 8093 contemplates applying State law.

And under State law, the third-party sale of electricity between two -- well, between two -- under -- between two legal entities of power purchase agreement, as we have here, as was presented at NC WARN, third-party sales case, is unlawful, so that's how I can answer that question.

So the second point I'd like to make about the --

CHAIR MITCHELL: All right, Mr. Breitschwerdt, start wrapping it up.

MR. BREITSCHWERDT: Understood. The second

point to make about the proposed purchase of electricity is that -- ultimately, the project is going to impact the amount of power purchased by DEP or from DEP by Fort Bragg Department of Public Works, and so there's impacts to the amount of power that's being purchased, even though it's technically indirectly being impacted.

We talked earlier about the fact that the power will flow back onto Fort Bragg -- load on Fort Bragg and will have impacts to the amount of power that Department of Public Works ultimately purchased from Fort Bragg.

The third point, just very briefly, is that we talked about the basic allowance for housing, earlier, and our understanding is that's paid by the Treasury to Sunstone.

There is an election, but that election results in the power -- the funds being paid to BCL, and BCL then uses that fund to pay for both the -- own and operate the on-base housing, but also to pay for the electricity that's consumed in that on-base housing.

So, in effect, they're purchasing electricity from the Department of Public Works who is

purchasing it from DEP. So by implication, it's indirect, but they are impacting the purchase of electricity from -- BCL's operations is indirectly purchasing electricity from DEP.

So under Section 8093, we think that results in the applicability of the State law even though they are not technically a department agency or instrumentality.

So I just close by saying thank you for the Commission's time today. As we've stated in our brief to the Commission, we believe that the Commission should dismiss the petition on justiciability grounds. And if the Commission decides to hear the petition on the merits, we think that the appropriate result is that Section 8093 applies.

It applies to North Carolina Public Utilities Law. And, in doing so, a third-party sales arrangement, as Sunstone presented in its position here, would -- like the NC WARN third-party sale, would be unlawful and should be denied by the Commission. Thank you.

CHAIR MITCHELL: Mr. Breitschwerdt, one question, and then I'll check in with others to see. Just so I'm clear, kind of following up on a point I

think I just heard you just make. Is it Duke's position that BCL is department agency or instrumentality of the Federal government?

MR. BREITSCHWERDT: It is a uniquely defined private eligible entity that, as you read the definition of eligible entity, it is partnering with the Department of Defense.

So it is a separately defined concept, but it's a very small, unique especially purposed entity that its sole purpose is to partner with the Department of Defense to provide on-base military housing.

So we think it's -- itself not a department agency or instrumentality by definition. However, its sole purpose is to facilitate the military's mission and operations.

And so, in effect, it should be treated as part of the Department of Defense for purposes of the applicability of Section 8093.

CHAIR MITCHELL: Thank you. Commissioner Duffley.

COMMISSIONER DUFFLEY: So could you answer Commissioner Brown-Bland's question about how the Commission should look at the policies that were being

advanced with Section 8093, and how that abuts or comes into conflict with the goals of 2922(a).

MR. BREITSCHWERDT: Our policy objectives of Section 8093, which we're focused on --

COMMISSIONER DUFFLEY: The abandonment issues. And so we've heard Sunstone argue the goals of 2922(a) were to promote, you know, self-generation and promote renewable energy, and they argued that it's only taking a small piece of the pie, okay.

And so Commissioner Brown-Bland, in her question, asked well, the pie with technology and technological advances could grow and the pie could be not just 18 percent but could be 80 percent.

So could you just kind of discuss your views on how the Commission should look at that issue.

MR. BREITSCHWERDT: Absolutely. And I think -- and I probably did this inartfully, but I was trying to analogize to the North Carolina Court of Appeals' decision of NC WARN where they identified the risk of allowing unregulated competitive supply, which would have a much broader impact, potentially, if it was replicated.

And I appreciate what Sunstone represented, is that they're only developing this first 25-Megawatt

project within or up to 25-Megawatt project, but that's a significant amount of load that would be reduced from the purchase for Duke Energy Progress.

And so the concern is that if this is -- this on-base generation is allowed in a broad and unregulated way, then it would have the effect of shifting cost and resulting in duplication of DEP's generation service, because the Company's going to have to backstop, at least in this example of a Solar facility, the on-base Solar system, because DEP's -- and DEP's customers, generally, their peak demand is winter mornings when Solar's not available.

So I think that the on-base generation Statute was initially enacted in the early 80's when, I think, Mr. Risinger spoke to this when the military was focused on geothermal and more targeted, limited on-base generating resources.

And now, with the expansion of Solar and other technologies, the risk is that it significantly expands beyond what was initially contemplated in a way that has adverse effects on the retail customers, and so that's why Section 8093's policy, as I've provided to the Commission, was really focusing on aligning the State regulatory framework.

And so whether it's full abandonment through competitive supply or just limited, partial reduction in load, I think those concerns are equally aligned.

COMMISSIONER DUFFLEY: Thank you.

CHAIR MITCHELL: Additional questions?

COMMISSIONER BROWN-BLAND: Just a bit of a follow-up. So, again, looking at the two statutes together, the 8093, the 22 -- or 2922, I think, how do you read those in tandem so that each makes -- neither is necessarily superfluous. Both are given meaning or are they naturally in conflict, in your mind?

MR. BREITSCHWERDT: Well, as I think as Commissioner Clodfelter identified Section 2922(a), allowing for on-base contracts for generation up to 30 years is an exception to the generally applicable requirements in Subsection (a) of Section 8093, so they do need to be read together.

And the import of doing that is that if there's a contract between the base and the on-base generating facility, then that exception would apply, but that's not what we have presented here.

CHAIR MITCHELL: All right. Anything further for Mr. Breitschwerdt?

COMMISSIONER DUFFLEY: Just one more

question. Could you tell me, again, do you think BCL is an instrumentality or it's something other than an instrumentality under 8093?

MR. BREITSCHWERDT: I think they fit within the general parameters of being a partner of the Department of Defense. And I haven't fully researched whether the definition of instrumentality is sufficiently broad to encompass a private, eligible entity, but that could be the case.

And our key point is that the definition of eligible entity means that they are a sole purpose entity essentially responsible for partnering with the Department of Defense to build on-base housing.

And so, as such, they should be treated in the same way as the Department of Defense for purposes of implementing the general policy objectives and requirements of Section 8093 to purchase power by the Federal government consistent with State law and regulation.

COMMISSIONER DUFFLEY: Okay, but you do not believe that that same type of connection should be applied when looking at 2922(a)?

MR. BREITSCHWERDT: I haven't sufficiently investigated it, and I understand the Commission's

point in trying to draw the consistency of those two statutes in the same way. But at this point, the general policy and principal is that this would be a third-party saleable electricity.

They've presented a Letter of Intent that would effectuate a proposed power purchase agreement. And that, consistent with what was presented at NC WARN, is unlawful under North Carolina's Public Utility Law.

So I think the primary objective of Section 8093 was to align Federal procurement of electricity across the Federal government with State regulation of utilities and whether that -- and, essentially, if you're under an RTO and you can go purchase from any wholesale provider that you want, and use that at retail, that would be allowed, but in North Carolina, it works for a vertically integrated jurisdiction.

The objective of 8093 was to apply those limitations on the monopoly provision of the utility service or electric utility service in the same manner for Federal customers as it's applied for other customers.

COMMISSIONER DUFFLEY: Okay. So I hear you saying that it's treated differently, and that's the

way that in North Carolina, can align 8093 and 2922(a). Is that correct?

MR. BREITSCHWERDT: I think that -- yes.

COMMISSIONER DUFFLEY: Okay. Thank you.

COMMISSIONER McKISSICK: Just to follow up on Commissioner Duffley's questions and questions also asked by other Commissioners. So you cannot really point to authority that's definitive in stating that BCL is a related Government entity. I mean, is there any authority that you can definitively cite or state that supports your contention?

MR. BREITSCHWERDT: The only authority that's been pointed to by Sunstone is to cite to the fact that under the U.S. Code, they're defined as an eligible entity, which they assert means they're not a department agency or instrumentality.

But, I think, our view is when you read the definition of eligible entity, it says they're partnering with the Department of Defense for the sole purpose. It doesn't say sole purpose, but for the purpose of providing military housing and achieving the goals of the Military Housing Privatization Initiative.

And so, in that sense, they should be

subject to the same requirements as the Department of Defense because they're operating within a Federal enclave, essentially on behalf of, and in partnership with, the Federal government.

COMMISSIONER McKISSICK: Okay. Let's switch gears for a second. In terms of the justiciability issue, it's been pointed to the fact that the ground lease exists. Do you think that's a sufficient bases for distinguishing this from Cube Yadkin, in some respects?

MR. BREITSCHWERDT: So the ground lease exists between BCL and the Army.

COMMISSIONER McKISSICK: Yes.

MR. BREITSCHWERDT: Our new contracts between the Army and Sunstone, who's the petitioner, and would be the entity that construct the generation. So the fact that the ground lease exists between BCL and the Army, for purposes of implementing their roll as to housing provider, to me, doesn't lend any credence to the fact that they would then be able to -- that Sunstone would have rights under that ground lease. There's still a condition preceded to moving forward with the generation project that the ground lease be amended.

At this point, they're kind of lumping BCL's rights and to provide to Sunstone to say we can build this Solar project on the roof and in the areas of the ground lease because that ground lease exists between BCL and the Army, but what the ground lease also says and what their initial approval, portfolio approval -- it may have been the initial conceptual approval -- said is that the ground lease would need to be amended to provide -- it cannot be assigned without the Department's acceptance and would need to be amended.

So, at this point, Sunstone has no rights under the ground lease, and I think that is -- places them more similarly to the situation of Cube Yadkin than if they were able to move forward unencumbered, let's say, because they weren't building a project within the Federal enclave of the Army.

COMMISSIONER McKISSICK: So would it be your contention that if there was a contract, even if it was a contingent contract, that this issue would be ripe for consideration rather than non-justiciable, at this time?

MR. BREITSCHWERDT: Yes. I think that's what the Court said in Cube Yadkin, that the parties, instead of going to the courts for legal advice, they

draft contracts that incorporate contingencies and ensure that if events don't progress, as they're contemplated, then they can get out of that contract, and so that's where I read the report to be saying in Cube Yadkin.

COMMISSIONER McKISSICK: Let me ask you this. You mentioned the basic housing allowance and that it goes -- specifically, you said it did not go to the service member. Is that what you're saying? You said that you went back and researched it, and it did not go to a service member, who would, in turn, use it to pay for housing; that it would actually go to BCL?

MR. BREITSCHWERDT: So my understanding is the Treasury pays the basic allowance on housing to BCL. Now, there's an election by the service member to live within BCL housing versus living off-base.

And by making that election and living in BCL-provided housing, they're effectively electing to have Treasury pay BCL to provide that housing. That payment for Treasury is then used to pay for the electricity from Department of Public Works.

COMMISSIONER McKISSICK: So the service member makes the selection to do so?

MR. BREITSCHWERDT: That's correct, but the payment is from Treasury. The Federal funds are paid by Treasury to BCL. That's our understanding of the transaction.

COMMISSIONER McKISSICK: So is that not like the service member making the election that rather than go to them, they just pay direct to BCL? I mean, they're making election to do that. I mean, I guess they could receive it and then pay it back themselves?

MR. BREITSCHWERDT: Yeah. Based on the information we have for Discovery and otherwise, I don't know what the election means. It just means that they're electing to live in BCL's provided housing and making the -- I mean, I'm not aware based on the information we have and what we've seen in Discovery and what's in the record that there's an option not to elect.

So put it another way, if a service member elects to live on base in BCL provided housing and they are making that election. So they're not electing to pay -- they're not electing to have Treasury pay the funds directly versus having the election to have Treasury pay the funds to the service member, and then the service member pays BCL.

If you live in BCL housing, you kind of are automatically making that election. Treasury's paying BCL, which practically makes sense, so they're making it more efficient to provide the on-base housing and making it more simplified for -- to me, it's like lives in the dorms when you're in college.

You essentially are paying the university to provide the housing, and you're paying it directly versus if you live off campus in an apartment.

You then have the funds and you pay the off-campus apartment out of your own checking account. That checking account just doesn't occur, at least is our understanding, in the scenario where the Treasury is paying BCL directly.

COMMISSIONER McKISSICK: Do you know, if for purposes of income, income being any net creation of wealth, would it be treated as the service member's income?

MR. BREITSCHWERDT: I don't have any insight on that.

COMMISSIONER McKISSICK: Okay. Thank you.

CHAIR MITCHELL: Any additional questions for Mr. Breitschwerdt?

(No response)

CHAIR MITCHELL: All right. At this point, we are going to take a five-minute break, so we'll go off the record. We'll be back on at 4:05 and we will hear from Mr. Risinger.

(Whereupon, a break was taken)

CHAIR MITCHELL: Mr. Risinger, you're up.

MR. RISINGER: So just briefly a couple of grace notes, and I'm happy to -- I'm not going to use my full five. I'm happy to answer any questions the Commission has.

I just wanted to address the issue that Commissioner McKissick and Commissioner Duffley raised about the agency instrumentality issue.

The Federal Department of Justice has taken the position in sort of semirelated litigations that the privatized entities that are owner/operators of housing on military bases across the country are not agency's instrumentalities, and they site ineligible entity as being different than an agency of the Government, so I just wanted to add that grace note on DOJ.

I did want to add one point on the 2000 DOD memo. And, just for the record, I've referred to it as the Dworkin (phonetic) memo because the guy who

wrote it was my mentor when I was young associate, so he's on the record today.

We would disagree with the proposition that the DOD memo, the design of the DOD memo was so that State Utilities Law generally was meant to be hand and glove. And there were -- you know, it was a freer process I think as counsel's describing.

That's not what the DOD memo says. It says: "The States may regulate the Federal government in any" -- "The States may not regulate the Federal government in any respect absent an unequivocal waiver of sovereign immunity."

And in respect to this exception, they say, "There's nothing in this section to indicate that "purchase electricity," in quotes, should be read in any way other than its plain language."

So we think that the DOD memo was perfectly consistent with, you know, the design of the Statute. And there have been a couple questions about sort of reconciling, you know, what's going on in the Statute, and abandonment, and generation.

And just to kind of try to tie that thread off, I mean Sunstone's position is that those are, in theory, reconciled because the abandonment ideas

behind 8093 are designed to prevent the Federal Government from shopping to other external providers in a way that would then mess over, you know, a provider like Duke, another external provider, you know, in the state, but it's not meant for the behind-the-meter issues.

And I think that -- we think that is represented by the drafting of 8093 that specifically provides for the Government to be able to contract directly with an entity to provide energy on site.

So I don't think, you know, in theory, there's a lot of dissidence between the idea of not wanting to allow the Federal government to, you know, squirrel away Duke Energy's, you know, demand by contracting with somebody outside, but still preserving the opportunity, that internal generation that's blessed by the Statute, still might reduce their load, I think was the phrase counsel used, and I think that's frankly envisioned by the plain text of the Statute.

Um, the only other thing -- the only other point for us is with regard to -- there are a couple of issues that, you know, kind of arise to an issue of sequencing, which the Commission sometimes gets to --

has to address when they issue an order and they say, "Well, come back and give me" -- you say, "Come back and give me a filing later to let me know this happened or that happened or that happened."

I mean, you know, in this setting, you know, if the Commission were to grant Sunstone's request, I mean, in a sequencing kind of return filing, you know, we could come back and make a filing with regard to -- that the system engineering study and the design of the facility, you know, confirms that there's not going to be backfeed.

I mean, you know, that would be, you know, one example of a filing that we can come back and make, or that counsel also mentioned the final leg, the major decision approval, that the Federal government will issue the third leg of approvals that they issued for this base-specific progress.

You know, we can make a subsequent filing to confirm that that happened as well, but so that was just, you know, on a conditional filing issue, you know, the way the Commissions addressed other issues. That's all I have. I'm happy to entertain your questions.

CHAIR MITCHELL: Questions, Commissioner

Duffley.

COMMISSIONER DUFFLEY: Thank you for mentioning the major decision approval. When do you expect to receive that approval?

MR. RISINGER: Well, in sequence, after the engineering -- the system engineering study.

COMMISSIONER DUFFLEY: But do you have a general estimate?

MR. RISINGER: I mean given that we're kind of in limbo here, you know, a year. I was getting ready to say within a year. That's what the --

COMMISSIONER DUFFLEY: Okay. Thank you. And can you explain, and you might have already answered this today. Why have you not entered into any type of contract with contingencies or do you think you have?

MR. RISINGER: Who entering -- I want to make sure I understand, Commissioner, which entities you're talking about entering into a contract?

COMMISSIONER DUFFLEY: So your entity entering in with BCL.

MR. RISINGER: With BCL?

COMMISSIONER DUFFLEY: Yes. Have you entered into a contract with them?

MR. RISINGER: So I'll try to do a better job than -- I didn't do a good job before.

COMMISSIONER DUFFLEY: Like I said, you might have said it before.

MR. RISINGER: I'm going to try to do better this time. So the relationship between Sunstone and BCL is the one that's in the Letter of Intent issue, and the --

COMMISSIONER DUFFLEY: Right. So that's the Letter of Intent.

MR. RISINGER: That's the Letter of Intent. And so those parties, looking at the series of contracts they've entered in other places, we've provided the Commission, under confidential cover, a contract that was entered, for instance, at Riley, for the second phase of Fort Riley in Kansas, and so all those parties have looked at all those contracts, and we have represented that to the Commission.

And then the Letter of Intent says oh, yeah, that Riley contract that you told us that we were going to enter, we've entered a Letter of Intent that says here's the attachment that's, in sum and substance, similar to the Riley contract, and that's the one we would enter.

COMMISSIONER DUFFLEY: Okay. That's all I have.

CHAIR MITCHELL: Commissioner McKissick.

COMMISSIONER McKISSICK: Yeah. In light of Cube Yadkin, is there some reason why you didn't go further and just have the Letter of Intent to point to in terms of having a real agreement between Sunstone and BCL?

MR. RISINGER: I mean, I think, Commissioner, that gets to the -- I mean, at least our broader feeling about what's at work in Cube Yadkin and the extent to which we, at least, hopefully -- we legitimately believe that we're different in what's going on in Cube Yadkin essentially saying hey, I'd like to maybe engage in these sort of things, and us saying well, we're going to engage in the things that we've engaged in all these other times with this party who wants us to do it.

I mean the answer to the Letter of Intent question is we thought that was a -- you know, in response to Cube Yadkin, a sign in addition to all the other things that distinguish us factually from Cube Yadkin that were not like Cube -- we're not like Cube Hydro in that oh, yeah, we're going to shop for

tenants or we're going to hope that the business plan works out this way, and we'll deal with all that after you give us the landlord/tenant exemption.

You know, we view that as another indicia that distinguishes us like the other four or five things that we think distinguish us from Cube Hydro's posture in that case, Commissioner.

COMMISSIONER McKISSICK: And I understand the distinctions you've made, and I think you made them very artfully in a way that it's very succinct, but would it not have eliminated that as a potential issue if some type of agreement could not have been entered into even if it was a contingent one, in light of the posture of the case?

MR. RISINGER: Right. I mean, the Letter of Intent says between those parties. It's essentially the kind of potential arrangement that Commissioner Duffley was talking about.

We're going to go do this. Here's our agreement to show the Commissioner we're actually going to go do this, just like we did it at Riley, just like we did it at Meade, just like we did it at Aberdeen. I mean, I think the Letter of Intent is kind of a continuance of sort of that linear line of

activity that those bases carry to Bragg.

COMMISSIONER McKISSICK: I guess another question is, is there any reason why you've not obtained a document from the Army stating exactly what its thoughts and beliefs are, as it concerns the issues in this case?

MR. RISINGER: Well, so let me try to answer that in a couple ways.

COMMISSIONER McKISSICK: Sure.

MR. RISINGER: And you holler at me if I don't get there, okay?

COMMISSIONER McKISSICK: Right.

MR. RISINGER: The Army's communications to us are we're the sovereign of this entity, of this, you know, parcel of land. And we're not required, you know, to get permissions from the Commissioner or somebody else, and we're not required to come in and raise our hand and say yeah, we're in favor of this.

The Army communicates to us we've approved these projects, we've approved the portfolio, we want you to do this just like we want you to do the other six.

And if you have an issue, which we do with facing the prospect of imminent litigation with, you

know, Duke, given -- I mean, our conversations with Duke beforehand were, you know, cordial and professional.

I mean, this was not one of those things where the State bar says it was a cordial conversation and they thought about it. They really did.

Duke just said if you want clarity on this issue and protection from something or, you know, we might later do it against you or sue you, you gotta go to the Commissioner or go to court. So it's an all above-board conversation so the Army doesn't feel it's a part of that process.

The Army feels that, you know, us facing the threat of litigation from Duke is our business to go seek a Declaratory Ruling to ward off, you know, the fear of that, if we have a fear of that.

The Army views that -- I mean, frankly, that they have the authority as the sovereign at Fort Bragg to do it, and they have done it in these other places, and so, I mean, that is the Army's position as it's communicated to us. Does that fairly answer your question?

COMMISSIONER CLODFELTER: In those other places, in Kansas, is there a territorial assignment

law comparable to that in North Carolina?

MR. RISINGER: In Kansas, yeah, there is, you know, a version of monopoly jurisdiction, and that franchisee has cooperated with us, as has the franchisee in Louisiana, and that's not -- and we're not saying, oh, you know, bad on Duke for not cooperating with us.

That's why we initiated the dialog with them to see if this wouldn't have to happen, to see if, you know, they were willing to cooperate with us because they shared our view of the statute and how it should be interpreted. And if they don't share that, as they obviously don't, then, you know, we find ourselves here.

COMMISSIONER McKISSICK: And I guess my thoughts are simply this: Considering the posture of this case, I think Duke had sought to bring in the Army as a party. That motion was denied. I think you, on behalf of your clients, you didn't have any objections to bringing them in, you just wanted the Commission to bring them in.

In light of all of that that transpired, is there a reason why once that issue emerged, there wasn't some definitive document, be it an affidavit or

something to support your contentions, that could have been provided to your client that would have, at least, shared the Army's thoughts on the issues that are pertinent in this proceeding?

And then I can get into each and every one of those issues, but rather than to say it in identifying each and every one, just something that provided clarity and potentially support. Absent the fact that you might not have been able to obtain one, I mean, can you help me with that?

MR. RISINGER: Sure. And -- I mean, I apologize that my answer is kind of the same one that I was trying to give before, that the Army doesn't feel like it's their fight.

The Army feels like it has a sovereign dominion over the land and the Army feels like you work with us, you work with the privatized federally regulated distribution network on the system. You interconnect with them, you work that out.

And if you're unable to secure the cooperation of, you know, a utility in Kansas or Louisiana or North Carolina, that's an issue for you, not for us, and that's the fairest thing I can say without speaking for the Army, which I can't.

COMMISSIONER McKISSICK: I understand. Thank you.

COMMISSIONER DUFFLEY: And then one follow-up. You're talking about linear actions?

MR. RISINGER: Um-um.

COMMISSIONER DUFFLEY: Do you need a decision by the Commission before you obtain the major decision approval? I mean, will you present that as part of your approval process, what this Commission determines, or are those not interdependent?

MR. RISINGER: Well, the Army, granting a major decision approval, is not really related to the Commission but related to the product of the system engineering and the interconnection with the federally regulated distribution system on the base.

I mean, this proceeding is directly related, as you know, as we said on brief, and then the petition too, the issue of whether meeting the unavoidability of litigation, right?

I mean, are we going to, as we believe, inevitably face the challenge if we'd gone and built it as opposed to doing what we did, you know, as we said on brief, that situation is a little bit like the NC WARN issue where Duke said no, no, no, NC Ward, you

really did this wrong. You went and built instead of waiting and getting the Commission to, you know, give you, you know, support for the idea of what you wanted to do here.

And I think our feeling is that the appropriate thing to do -- I mean, it was to come to the Commission and seek the relief that we've sought from the Commission. Whether that ends up in the Court of Appeals like Cube Yadkin, certainly a possibility, but that seems to us the prudent possibility to try to put to rest, you know, the issue of dispute with a franchise folder.

COMMISSIONER DUFFLEY: So our decision will not be part of the decision for the -- you won't present this decision to the major decision approval.

MR. RISINGER: Yeah. The major decision approval is kind of inherently of itself with relation to the project, but I mean in sequencing, we're unlikely to get there, you know, under threat of litigation, you know, because of this sort of the environment. Does that make sense?

COMMISSIONER DUFFLEY: Yes. Thank you.

COMMISSIONER BROWN-BLAND: So when you had your exchange a minute ago with Commissioner

McKissick, and you expressed the Army's feelings about their sovereignty and whether this was their fight or not, in your opinion, and, you know, your personal knowledge, did the army convey -- actually, do you think the Army actually conveyed that to you or is that your interpretation of your dealings?

MR. RISINGER: Um, fair. I'm trying to think about how I'm allowed to word that. Um, the Army has communicated to us through -- to Sunstone, so I'm speaking on behalf of the knowledge of Sunstone, not my personal knowledge as counsel.

The knowledge of Sunstone with regard to the proceeding in the docket is that the Army favors the project in the same way that it -- for the reasons that it approved the portfolio that includes Aberdeen and Meade, and Riley and Bragg, and Polk, it supports the project for the same reasons that it approved it.

Sunstone has received no contrary guidance, you know, from the Army that it has any different view than it has ever had in the process of approving of those projects.

The Army has, you know, not in a -- has informally communicated to us that if you have a dispute with a local, you know, utility, that's your

fight and not ours. I'm trying to be as fair as I can based on what I -- we can say on behalf of the entity.

COMMISSIONER BROWN-BLAND: All right. And then is Sunstone -- what's your position on whether Sunstone is obligated, in any way, to move forward with this project should Sunstone get the ruling from this Commission that it wants?

MR. RISINGER: Well, I mean, the -- Sunstone is ready to do the project and is going to do the project, you know, if it is relieved of the threat of litigation.

Look, I mean, Duke was very candid before us and candid here today in saying we oppose, we think it violates our franchise territory. That's a dispute between one company and the statutorily franchised monopoly, and that's a big deal, and --

COMMISSIONER BROWN-BLAND: But as it stands today, is there an obligation on Sunstone's part to move forward?

MR. RISINGER: I mean, the obligation is the Letter of Intent that's been exercised to say we're going to do it just like we did it at Riley, and Meade, and Aberdeen, and those places, you know, when we put to rest the concerns of the franchise holder in

the area.

COMMISSIONER BROWN-BLAND: And then my last question is DEP has put forward other actions or decisions that need to be made by the Army before this matter might be one that involves actual -- or could potentially involve actual litigation.

And so they mentioned the major decision and then they mentioned other actions like having to agree to amend the lease, the ground lease with BCL, those kind of things.

If you recall, does Sunstone agree -- not necessarily on the controversy part of that, but do you agree that those decisions are yet to be made or do need to be made ultimately by the Army?

MR. RISINGER: Commissioner, you described, you know, a series of events that will need to happen, but Sunstone's position is that they are, you know, outside and not contributory to the issue of whether, you know, any portions of the State Public Utilities Act apply inside the enclave.

I mean, Sunstone's position -- those things are going to happen, but they're governed by a different set of rules, and contracts, and relationships that are at issue in the question before

the Commission.

COMMISSIONER BROWN-BLAND: I understand, but those things -- you don't take issue with the fact that those things do need to occur.

MR. RISINGER: Yeah, no. I mean the Army's going to issue a major decision approval, and we're going to conduct -- in cooperation, Sandhills is going to conduct a system impact study.

We're going to cooperate with them, and we're going to deal with Sandhills on, you know, the name plate, size, and, you know, the upgrades that might be necessary to handle the size project we have, so I don't challenge those at all. We don't challenge those.

COMMISSIONER BROWN-BLAND: Thank you.

CHAIR MITCHELL: Commissioner Duffley.

COMMISSIONER DUFFLEY: Just one last question. Let's take a hypothetical. I'm just trying to see where it goes, whether the decision is one way or the other.

Let's take a hypothetical that the Commission rules in favor of Duke. And so what happens next? I thought I heard you say that the Army believes that it can fully contract with you.

So what happens next? Is it really on Sunstone to determine whether it wants to move forward with the litigation or do you move forward and risk litigation?

MR. RISINGER: Yeah. That's a totally fair question, and the answer is it's totally on us. If the Commission rules against the relief requested Sunstone's made, we're off to the Court of Appeals on our piece of it.

And as it has always been, it's the risk of lengthy protracted litigation with the franchise holder. From a business perspective, that is the issue, and so perhaps we'll have two tracks.

For instance, taking a hypothetical, if the Commission rules against Sunstone, and Sunstone takes that to the Court of Appeals, and Sunstone also says okay, we're just going to go take a business risk because we're right, then we face litigation from Duke.

And the whole idea of coming to the Commission and taking this path is try to limit, you know, the exposure so we can actually, you know, get a consensus position on what part, if any, of State law actually applies inside this enclave, and can we

develop it inside the enclave the way the Federal Government thinks we can and the way the statute is written.

COMMISSIONER DUFFLEY: Okay. Thank you for that.

COMMISSIONER CLODFELTER: To that point, I'm sorry, and I apologize to all the parties that this didn't sort of dawn on me earlier, but as the afternoon has progressed and the more we hear about this, what State law question are we being asked to determine? Isn't every question before us a question of Federal law?

MR. RISINGER: Yeah.

COMMISSIONER CLODFELTER: Yeah. Every question before us is a question of Federal law, not State law.

MR. RISINGER: Commissioner, you got me in an inartful statement. The only issue that's really State law is how much of State law does Federal law allow inside the enclave.

COMMISSIONER CLODFELTER: That is a Federal question.

MR. RISINGER: That's a Federal question.

COMMISSIONER CLODFELTER: That is not a

State question. That is a Federal question.

MR. RISINGER: That's correct.

COMMISSIONER CLODFELTER: And so I know that the General Court of Justice in North Carolina does have jurisdiction to consider Federal questions. I mean, they could be removed to Federal Court, obviously, or they can be commenced in Federal Court.

But it occurs to me that I ought to, at least, ask someone. Maybe this has to be done in a post-hearing briefing, but I'm not sure whether this Commission, which normally issues interpretations of Chapter 62 of the General Statute of North Carolina, has the same broad jurisdiction that construe Federal law as does the General Court of Justice. I just don't know.

I mean, it occurred to me that rather than going to the Court of Appeals, you should probably be in Federal District Court. It's the Federal courts that decide whether Federal law preempts State law, and these are Federal statutes.

MR. RISINGER: Certainly, Federal statutes are certainly fair. And I think from the standpoint of the State law component, as sort of arbiter and policer of the Public Utilities Act, the Declaratory

relief request to the Commission was designed to get an assurance from the Commission, you know, that this is not a State law, you know, thing for us. That was the purpose of the request.

COMMISSIONER CLODFELTER: Well, I'll be looking for some enlightenment, probably from our staff, to the extent which we have jurisdiction to decide pure questions of Federal law --

MR. RISINGER: And we'd be delighted to supply a post-hearing briefing.

COMMISSIONER CLODFELTER: -- as I'm sure we do. As I say, I apologize to all the parties for not really focusing on what's at stake here, but there's no State law question in this case.

COMMISSIONER BROWN-BLAND: On that point, does there still remain, in your opinion, the issue of whether there's a public utility here? Is that a State law question?

MR. RISINGER: Yeah. The issue of --

COMMISSIONER BROWN-BLAND: They're all combined and affected the Federal and State. They have something to do with each other. But to the extent of whether or not there's a public utility, if that question needs to be answered, that's a State law

question, isn't it?

MR. RISINGER: Yeah, it is, but, I mean, our position would be that the Commission doesn't have the same question before it that it did in NC WARN. In NC WARN, it had a different question to say is the provision to the church, this entity, NC WARN acting as a public utility, and our position is that, you know, in the way we framed the request, that State law doesn't allow, you know, for that decision to be made inside an enclave, so you're hitting right on the issue, Commissioner.

COMMISSIONER McKISSICK: One quick question. In some of the other instances where similar projects have been pursued, and, obviously, I've heard that some of them didn't get contested, but did any of them end up in Federal Court as opposed to being resolved by Utilities Commissions or do you know?

MR. RISINGER: Yeah, within the portfolio -- I can only speak, Commissioner to --

COMMISSIONER McKISSICK: From the portfolio --

MR. RISINGER: -- to the portfolio that we're talking about.

COMMISSIONER McKISSICK: Yeah.

MR. RISINGER: Kansas and Louisiana were worked out by cooperative discussions with the local utility in this.

COMMISSIONER McKISSICK: Right.

MR. RISINGER: And in Maryland, it's a different regulatory regime.

COMMISSIONER McKISSICK: Right.

MR. RISINGER: So we have not ended up in Federal Court and those places.

COMMISSIONER CLODFELTER: Baltimore Gas & Electric decision was Federal District Court too.

MR. RISINGER: BG&E is a Federal court decision.

COMMISSIONER McKISSICK: But that's been distinguished, both of it being used as authority, but distinguish it on a separate basis, right?

MR. RISINGER: Yeah. I mean, our position is that BG&E says similarly to what the 2000, you know DOD memo says. BG&E says well, Congress said you can regulate, you know, purchases of electricity by the Federal government and that's it, and you don't get anything else inside the enclave other than that because that's all that Congress said you get. I mean, that's Sunstone's position of what BG&E says.

COMMISSIONER McKISSICK: And that was in District Court and it didn't go to the Court of Appeals, so it's --

MR. RISINGER: I think it was affirmed. I'm not sure, but I think it was affirmed.

COMMISSIONER McKISSICK: You think it was affirmed?

MR. RISINGER: I think.

COMMISSIONER CLODFELTER: With or without opinion?

MR. RISINGER: I think without, but I'm happy to submit that. I don't know.

COMMISSIONER CLODFELTER: We can get it.

MR. RISINGER: I don't -- I don't know.

COMMISSIONER McKISSICK: It would be insightful to help -- I mean, I was thinking since it was at the District Court level, it really didn't have the same precedential value, you know, as a precedent, but thank you.

MR. BREITSCHWERDT: Madam Chair, I'm not on camera. Could I just respond in one minute to a concern raised Commissioner Clodfelter's question?

CHAIR MITCHELL: You may.

MR. BREITSCHWERDT: You know, I think a

concern we would have would be courts pointing their fingers at each other and Federal Court saying, well, you know, whether the North Carolina Commission has authority or not is a decision for them.

I think we run into danger, and I do think while it is the governing law, is Federal law, I think that this Commission can interpret its own jurisdiction under that Federal statute, and that would be the only thing I would add there.

I understand the point that you're making, but I do understand, am concerned that a Federal Judge would say whether this -- that as a Federal Judge, I'm not going to say whether a State Commission does or does not properly determine its jurisdiction in this context.

COMMISSIONER CLODFELTER: If we were the General Court of Justice or the Court of Appeals or the Supreme Court, I would agree with you. I just want to be sure that as a special commission, we have the same authority.

MR. BREITSCHWERDT: Understood. And that was the point I wanted to make. Thank you.

CHAIR MITCHELL: All right. Anything further for the petitioner?

(No response)

CHAIR MITCHELL: Mr. Risinger, you may step down.

MR. RISINGER: Thank you.

CHAIR MITCHELL: I think I'm going to call for proposed orders here, 30 days from Notice of the transcript. I also would like for parties, both of y'all, to brief the question posed by Commissioner Clodfelter on Federal jurisdiction. Get them in before 30 days if you'd like to, but do your best to get them in by then. Anything before we adjourn?

(No response)

CHAIR MITCHELL: Hearing nothing, we're adjourned. Thanks, everybody.

C E R T I F I C A T E

I, TONJA VINES, DO HEREBY CERTIFY that the proceedings in the above-captioned matter were taken before me, that I did report in stenographic shorthand the Proceedings set forth herein, and the foregoing pages are a true and correct transcription to the best of my ability.

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Tonja Vines