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February 7, 2022

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

RE: Sunstone Energy Development LLC's Proposed Order
Docket No. SP-100, SUB 35

Dear Ms. Dunston:

On behalf of Sunstone Energy Development LLC ("Sunstone"), I enclose for filing in the above-referenced docket the Proposed Order.

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

Thank you in advance for your assistance.

Sincerely,

Brad Risinger

Brad M. Risinger

pbb

Enclosure

cc: All Parties of Record

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. SP-100, SUB 35

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Request for Declaratory Ruling by Sunstone Energy Development LLC Regarding the Provision of Solar Energy and Energy Efficiency Service Within Fort Bragg	)	PROPOSED ORDER ISSUING DECLARATORY RULING

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

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

APPEARANCES:

For Sunstone Energy Development LLC:

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

For Duke Energy Progress, LLC:

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

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

BY THE COMMISSION: On December 8, 2020, Sunstone Energy Development LLC ("Sunstone") filed in the above-captioned proceeding a Request for Declaratory Ruling ("Petition"). Sunstone explains that it seeks to enter into a contract with Bragg Communities, LLC ("BCL") — the private entity that provides privatized, on-base military housing at Fort Bragg pursuant to the United States Department of the Army's ("Army") Residential Communities Initiative ("RCI") — to provide solar energy and energy efficiency services to

housing units on the federal Army base of Fort Bragg ("Proposed Project"). Sunstone requests that the Commission issue a declaratory ruling concluding that (1) Fort Bragg is not subject to the North Carolina Public Utilities Act because it is a federal enclave; (2) Sunstone's provision of energy and energy efficiency services within the federal enclave of Fort Bragg does not subject Sunstone to the Public Utilities Act; and (3) the activities Sunstone proposes to undertake will not cause it to be considered a public utility under N.C. Gen. Stat. § 62-3(23). On December 9, 2020, Sunstone filed a corrected Petition.

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

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

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

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

On May 4, 2021, the Commission issued an Order Denying Motion to Dismiss and concluding that the Army is not a necessary party. The Commission also found good cause to establish new deadlines for the filing of comments from interested parties on the merits of the Petition.

On June 8, 2021, DEP filed the Initial Comments of Duke Energy Progress, LLC ("DEP's Comments"). Also on June 8, 2021, the Public Staff filed a second letter stating that it did not intend to file comments at that time.

On June 15, 2021, Sunstone filed a Motion for Extension of Time in which to file its reply comments to DEP's Comments. On June 23, 2021, the Commission granted the motion.

On July 20, 2021, Sunstone filed the Reply Comments of Sunstone Energy Development, LLC ("Sunstone's Reply Comments").

On October 20, 2021, the Commission issued an Order Scheduling Oral Argument, Allowing Briefing, and Requiring Responses to Commission Questions.

On November 9, 2021, Sunstone and DEP filed Sunstone Energy Development LLC's and Duke Energy Progress, LLC's Verified Responses to Commission Questions.

On November 15, 2021, Sunstone filed the Pre-Hearing Brief of Sunstone Energy Development LLC. Also on November 15, 2021, DEP filed the Pre-Argument Brief and Request for Reconsideration of Duke Energy Progress, LLC.

On November 29, 2021, the matter came on for hearing as scheduled. The Commission called for submission of proposed orders by Sunstone and DEP, as well as post-argument briefing by each on a jurisdictional issue raised by the Commission during the hearing.

On February 7, 2022, Sunstone filed its Proposed Order and Post-Argument Brief on Jurisdictional Issues.

On February 7, 2022, DEP filed its Proposed Order and Post-Argument Brief on Jurisdictional Issues.

Also on February 7, 2022, Sunstone filed as a confidential, post-hearing exhibit in response to questions asked by the Commissioners at the November 29 hearing - a Solar Energy Services Contract between it and BCL for the Proposed Project on Fort Bragg.

SUMMARY OF PARTIES' COMMENTS

SUNSTONE

Sunstone asserts that because all parties agree Fort Bragg is a "federal enclave," the only question the Commission needs to decide is whether the limited waiver of sovereign immunity contained in 40 U.S.C. § 591 (2006) (referred to, hereafter, as "Section 8093") allows the exclusive territorial provisions of state utilities laws to apply to prohibit the Proposed Project. This is because of the long-

standing policy that once an enclave is established, "state law presumptively does not apply to the enclave." *Parker Drilling Management Services, Ltd. v. Newton*, 139 S. Ct. 1881, 1890 (2019).

Sunstone asserts that the only possible waiver of the federal government's sovereign immunity is contained in Section 8093. It provides in full, as set forth below:

> Purchase of electricity
>
> (a) **General limitation on use of amounts**. -- A department, agency, or instrumentality of the Federal Government may not use amounts appropriated or made available by any law to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including --
>
> (1) state utility commission rulings; and
>
> (2) electric utility franchises or service territories established under state statute, state regulation, or state-approved territorial agreements.
>
> (b) **Exceptions. –**
>
> (1) Energy Savings. - This section does not preclude the head of a federal agency from entering into a contract under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287).
>
> (2) Energy Savings for Military Installations. - This section does not preclude the Secretary of a military department from—
>
> (A) entering into a contract under section 2394 of title 10; or
>
> (B) purchasing electricity from any provider if the Secretary finds that the utility having the applicable state-approved franchise (or other service authorization) is unwilling or unable to meet unusual standards of service reliability that are necessary for purposes of national defense.

In interpreting the reach of Section 8093, Sunstone cautions that "[w]aivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *United States Department of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (citations omitted).

Sunstone contends Section 8093 provides a very limited and specific waiver of the Army's sovereign immunity to the extent it purchases electricity with federal funds. It commends the interpretation a Maryland district court afforded to Section 8093 when it rejected a local utility's argument that state rules and regulations (including state-granted franchises) should apply to privatization of utility distribution systems within Fort Meade. *Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721 (D. Md. 2001), *appeal dismissed*, 290 F.3d 734 (4th Cir. 2002). *BG&E* concluded that Congress could have afforded state regulators broad utility jurisdiction over military installations, but "it did not." *Id.* at 744. If the federal government is not buying electricity using federally appropriated funds, Sunstone contends, Section 8093 provides no path to state regulation of the Proposed Project.

Sunstone asserts that the Proposed Project does not fit the fact pattern of the Section 8093 waiver. BCL, Sunstone contends, is not a federal department, agency or instrumentality that is subject to Section 8093. Instead, by federal statute BCL is a private, "eligible entity" under 10 U.S.C. § 2871(5) responsible for renovation, construction, operation, and asset management for privatized, on-base military housing facilities on Fort Bragg pursuant to the RCI. Sunstone argues that

BCL would be the sole offtaker of the energy generated by the Proposed Project, and the sole payor for it.

Sunstone asserts that, with exclusive legislative jurisdiction over its military installations, the Army has chosen a policy of "behind the meter" alternative energy generation that it is free to adopt. Sunstone states that the Department of Defense has employed programs like its multi-base program here, in support of multiple federal objectives, including: (1) procuring or producing at least 25% of energy at DOD facilities from renewable energy sources by fiscal year 2025 and thereafter; (2) procuring solar energy or other renewable forms of energy whenever possible; (3) commitment to develop 1 GW of renewable energy Army-wide by 2025; (4) diversifying energy sources; and (5) addressing resiliency and costs.

Sunstone contends that, in addition to the Proposed Project involving no federal purchase of electricity with federal funds, the language of Section 8093 also provides additional confirmation that "behind the meter" energy generation was not a target of the statute's policy.

It argues that Section 8093 targeted a risk of abandonment of local utilities by federal customers, but that Congress did not see "behind the meter" generation as an abandonment because the statute specifically preserves the ability for the Army to contract for "the provision and operation of energy production facilities on real property under the Secretary's jurisdiction." 10 U.S.C. § 2922a(a)(2). Thus, Sunstone argues that any reduction in overall demand by the Fort Bragg Department of Public Works ("FBDPW") from DEP cannot reflect a Section 8093

"abandonment" because Congress expressly allows a federal agency like the Army to generate energy that could reduce the demand placed on local utility providers.

Sunstone contends that the structure of the Proposed Project does not violate the N.C.G.S. § 62-126.5 bar against "third-party sales." While DEP urges the Commission to assert jurisdiction and find that the Proposed Project violates its exclusive franchise rights, Sunstone contends that the state statute can provide no more state regulatory power *within the Fort Bragg enclave* than Section 8093 allows. Because the waiver in Section 8093 does not operate to allow state utilities regulation inside the enclave, Sunstone argues there is no basis for the Commission to apply *inside* the enclave the third-party sales analysis that it applied *outside* an enclave in *State ex rel. Utils. Comm'n v. NC WARN*, 255 N.C. App. 613, 618-619, 805 S.E.2d 712, 715-716 (2017), *aff'd per curiam*, 371 N.C. 109 (2018).

DEP

DEP contends that the Proposed Project constitutes a *de facto* public utility under State law that violates its exclusive franchise rights. It contends Sunstone proposes that the Commission sanction third-party sales by an unregulated, independent power producer.

DEP contends that recent decisions of this Commission, and of North Carolina appellate courts, dictate that the Proposed Project be considered a "public utility" under N.C.G.S. § 62-3(23)a. DEP contends that third-party sales of electricity constitute action as a "public utility," and points to appellate court rulings that affirmed this Commission's ruling in NC WARN - Docket No. SP-100, Sub 31

(Apr. 15, 2016). DEP points to the logic of NC WARN that "there is no doubt that NC WARN owns and operates equipment (a system of solar panels) which produces electricity and that NC WARN receives compensation from the Church in exchange for the electricity produced by the system." *NC WARN*, 255 N.C. App. at 616, 805 S.E.2d at 714. It further commends the General Assembly's adoption of N.C.G.S. § 62-126.5(c) barring "the sale of electricity from solar energy facilities directly to any customer of an offering utility or other electric power supplier by the owner of a solar energy facility."

While DEP accepts that Fort Bragg is a federal enclave, it contends that Section 8093 effects a waiver of sovereign immunity that allows State regulation of the Proposed Project – thus dooming what it views as a plain third-party sale barred by North Carolina law. It contends that Federal Acquisition Regulations underscore this reading, as they state that DOD must comply with the requirements of § 591 and shall not "purchase . . . electricity . . . in any manner that is inconsistent with state law governing the providing of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements." 48 C.F.R. § 41.201(d)(1).

DEP contends that Congress's intent to prevent abandonment of an existing supplier is directly implicated because the "Proposed Project would effectively carve off a significant portion of Fort Bragg's load to [be] serve[d] with third-party-owned generation."

DEP contends that the Commission can assert jurisdiction over what DEP views as public utility service within Fort Bragg because it has done so in the past. In particular, DEP points out that in Docket No. W-1279, Sub 0, the Commission determined that Old North Utility Services, Inc. ("ONUS"), a North Carolina corporation with water distribution and wastewater collection operations located in Fort Bragg, was a public utility as defined under N.C. Gen.Stat. § 62-3(23)a.2 and Commission Rules R7-2(a) and R10-2(a), and thereby subject to regulation by the Commission.

DEP states that "it is inconceivable" Congress intended to allow Sunstone to act within Fort Bragg in ways that the federal government, itself, cannot. It contends that because the waiver of Section 8093 bars the Army from purchasing electricity outside of the strictures of the Public Utilities Act there is no "jurisdictional exclusivity" that allows the Proposed Project to proceed.

DEP argues that the Proposed Project can result in circumstances in which FBDPW is purchasing excess electricity generated by Sunstone because electrons produced by Sunstone and conveyed to the Sandhills distribution system might be directed to other users on its Fort-Bragg-exclusive grid. Further, DEP contends that the Proposed Project "effectively hides" federal payments for electricity because the Army pays Service Members a housing allowance that they can elect to pay to BCL to cover the full cost of living in on-base housing – including the supply of municipal services such as electricity.

CONCLUSIONS OF LAW

1. The Proposed Project presents a unique fact pattern involving the generation of electricity and provision of electric service inside a federal enclave.

2. The Commission has appropriate jurisdiction and authority to decide the questions presented in the Petition.

3. The Commission has appropriate jurisdiction to decide whether, under the federal statute at issue, there is a path for state utilities law to apply to the Proposed Project.

4. There is no applicable waiver of the federal government's sovereign immunity that would allow state regulation to prohibit the proposed project under the North Carolina General Statutes, Chapter 62.

5. The conclusion that Section 8093 does not apply to allow state regulation to prohibit the proposed project is consistent with federal law and policy.

6. Allowing the proposed project to proceed is consistent with laws applying to the Fort Bragg federal enclave, as well as those State laws that protect DEP's franchised territory.

DISCUSSION AND FINDINGS OF FACT IN SUPPORT OF CONCLUSIONS OF LAW

As a preliminary matter the Commission finds that the material facts relevant to the issues in this docket are uncontroverted. The dispute between Sunstone and DEP arises from how the law is applied to those facts.

I.

The Proposed Project Presents a Unique Fact Pattern Involving the Generation of Electricity and Provision of Electric Service Inside a Federal Enclave

Under a Solar Energy Services Contract between Sunstone and BCL, Sunstone would provide solar energy and energy efficiency services to BCL that include a mixture of ground-mount and rooftop solar installations designed to serve on-base housing owned and operated by BCL at Fort Bragg - a military base located within Cumberland, Hoke, Harnett, and Moore counties that is owned by the United States of America and operated by the United States Army.

Sunstone would construct, and either it or an assignee would operate, the Proposed Project solely within Fort Bragg. The Proposed Project's solar generating facilities would interconnect with the on-base distribution network at Fort Bragg which is one-hundred percent (100%) owned, operated and maintained by Sandhills Utility Services, LLC ("Sandhills"). The Sandhills electric distribution system is federally regulated and is not, and has never been, subject to regulation by the Commission.

BCL has a Ground Lease with the United States of America with an initial 50-year term that includes the areas within Fort Bragg on which military housing facilities exist or may be constructed. The Proposed Project would be constructed and operated solely within the areas of Fort Bragg in which BCL has a leasehold interest.

The Proposed Project is part of a series of solar-energy-generation facilities on Army bases across the country approved by the Army in August 2015 under which Corvias Solar Solutions, LLC (a joint owner of Sunstone) would construct facilities to provide electricity to the private entities that own and operate on-base housing at Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill and Fort Riley. The Army refers to this initiative as a Portfolio Project. The Portfolio Project already has resulted in installation of solar energy capability at Aberdeen Proving Ground (7.1 megawatts ("MW") of rooftop and ground mount), Fort Meade (8.7 MW, rooftop), and Fort Riley (10.5 MW, rooftop). As of the hearing is this matter, Sunstone expected an additional development

phase at Fort Riley (1.7 MW, rooftop) would be energized in December 2021, and a System Impact Study is underway at Fort Polk.

At each military base, Sunstone enters a contract to provide solar energy and energy efficiency services to the privatized entity that owns and operates on-base housing. Sunstone has now entered twelve such agreements with these privatized on-base housing providers, including one for the Proposed Project entered with BCL. The contract for the Proposed Project includes conditions that arise from its execution prior to a Commission decision regarding the relief requested in the Petition.[1]

The Proposed Project also has received an independent approval from the Army that is apart from its status as a component of the Army's nationwide Portfolio Project. The Army's process then requires a final, Major Decision Approval that would follow a System Impact Study conducted in conjunction with Sandhills. The Proposed Project aims to produce up to 25 MW. Sunstone acknowledges that the System Impact Study may determine that a smaller, nameplate capacity for the Project is appropriate to ensure that there is no backfeed to DEP's grid, and that the impact study may also call for Sunstone to fund improvements to the Sandhills distribution system.

Sunstone states that the Project, like others in the Portfolio Project at other Army bases, will be designed so that there is no backfeed onto the local grid –

[1] Sunstone noted at oral argument that it had a letter of intent in place with BCL (provided to the Commission and DEP under a confidentiality provision) to enter a contract to provide solar energy and energy efficiency services similar in form and substance to those entered at other installations in the Army's Portfolio Project. After oral argument, but before this decision, Sunstone provided to the Commission a fully executed contract with BCL – with conditions related to the outcome of this docket.

here, that of DEP. FBDPW is a retail customer of DEP, which provides electricity to FBDPW at substations located at the perimeter of Fort Bragg. DEP currently furnishes all, or nearly all, of the power demand from FBDPW at the meters at those substations. As noted above, beyond those meters, the Sandhills distribution network is responsible for the distribution of electric service on the base and is not subject to regulation by the Commission.

Sunstone and DEP representatives met and conferred before the Petition was filed, and Sunstone was unable to secure DEP's support, or cooperation in, the Proposed Project. DEP communicated to Sunstone that if it desired clarity about whether the Project was subject to any provision of State utilities law it would need to seek that from the Commission or a court. DEP, an intervenor in this docket, contends that because Fort Bragg is located within its exclusive franchised territory, the Project violates its state-granted monopoly.

Sunstone and DEP agree that Fort Bragg is a federal enclave. U.S. Const. art. I, § 8, cl. 17. Generally, federal enclaves are not subject to regulation by any state. *Hancock v. Train*, 426 U.S. 167, 178 (1976). There are three exceptions to this general principle:

> (1) the State law was in effect at the time the property was acquired by the federal government and does not conflict with a federal purpose, *Tetra Tech Tesoro, Inc. v. JAAAT Tech. Servs.*, LLC, 794 S.E.2d 535, 541 (2016) ("Federal enclave law incorporates state law in effect at the time the land becomes part of the federal enclave but not 'future statutes of the state' enacted afterward.") (citing *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940));

> (2) the State has expressly retained jurisdiction over particular areas of law, such as criminal law, *State v. DeBerry*, 224 N.C. 834, 836 (1945); or
>
> (3) the federal government has made a "clear and unambiguous" authorization that the enclave be subject to state law, *Hancock*, 426 U.S at 179.

Collectively, the rule and its limited exceptions are commonly referred to as the "Federal Enclave Doctrine."

The record reflects that when the United States acquired the land from North Carolina on which Fort Bragg would be constructed and operated, the Public Utility Act's regulatory scheme was not in effect. Moreover, while North Carolina has acted to reserve jurisdiction over certain subject matters in federal enclaves, the record reflects that it has not done so with regard to the generation, purchase and/or sale of electricity within the confines of Fort Bragg.

BCL is a private entity that has leased land within the Fort Bragg enclave from the United States and it owns, operates and maintains a military housing function that Congress expressly allowed the Secretary of Defense to place under control of a private entity. 10 U.S.C. § 2872. BCL does not receive funding from the Army, Department of Defense, or any other federal agency that finances or offsets its planned purchase of the electricity generated by the Proposed Project. Service Members can elect to use a Basic Allowance for Housing (BAH) (37 U.S.C. § 403) that they receive from the Army to pay for the full cost of living in BCL's on-base housing, inclusive of rent and municipal services like electricity. But a Service Member may also elect to use his or her BAH toward the costs of off-base accommodations and municipal services. The record reflects that the BAH is a

payment made to a Service Member by the Army over which the Service Member has possession, control, and authority to disburse as he or she sees fit.

The record reflects that military housing at Fort Bragg currently accounts for approximately 18% of FBDPW's energy demand that is met by electricity supplied by DEP. The Project, if built with a 25 MW nameplate capacity, intends to generate only 35% of the electricity needs of BCL's on-base military housing. Thus, the Proposed Project's energy generation would leave DEP as the principal supplier of the electricity demand by FBDPW.

These facts create a unique scenario that is specific to military installations in the State of North Carolina, and the Commission's decision in this docket, therefore, would not serve as a precedent for the generation of electric power or provision of electric service in other areas or other situations.

II.

The Commission has Appropriate Jurisdiction to Decide the Questions Presented in the Request for Declaratory Relief

The dispute presented by Sunstone's Petition is well within the ambit of the Commission's authority in using the Declaratory Judgment Act "when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002).

This conclusion is drawn with due regard for the recent decision of the Court of Appeals in *State ex rel Utils. Comm'n v. Cube Yadkin Generation, LLC*, --- S.E.2d ---, 2021 WL 4057218 (N.C. App. 2021). There, the court confronted a

unique set of circumstances under which Cube Yadkin Generation, LLC ("Cube") had identified a possible use for existing hydroelectric facilities that no longer had a long-term customer to serve, but for which the court found Cube lacked a meaningful business construct into which a positive Commission ruling would fit. Thus, the court concluded that "with no evidence that [Cube] would be able to acquire that real property," and nothing solid to report about potential tenants, its petition amounted to a request about whether its "particular business venture is a legal use of its time and resources." (*Id.* at **3-4, ¶¶ 12, 15).

The Commission's consideration of the Proposed Project is not laden with the uncertainty the Court of Appeals identified in Cube's speculative business plan. Instead, it presents a readily identifiable controversy that upon resolution will apply directly to whether the United States Army can allow a private, on-base energy provider to supply solar energy to a privatized operator of residential housing wholly within the bounds of a federal enclave.

A primary factor in the *Cube Yadkin* holding that there was no "active controversy" was the court's observation that Cube did not own or have an interest in the Badin Business Park land it proposed to develop. Cube, the court noted, "intends to make formal efforts to acquire the very land it intends to develop and lease *only after* the Commission approves of its Proposed Plan." (*Id.* *3, ¶ 11) (emphasis added). Here, though, BCL has a Ground Lease with the United States, subject to an initial term running to 2053, and the solar energy and energy efficiency services Sunstone would afford to BCL would be generated and provided wholly within areas subject to the Lease.

In *Cube Yadkin*, the Court of Appeals found that Cube had "no present interest in the resolution of its question" – whether its proposed activities in supplying power to future tenants of a revitalized Business Park would qualify for a landlord-tenant exemption from regulation as a "public utility." *Cube Yadkin*, *3, ¶ 12. The court found it insufficient for purposes of demonstrating a justiciable controversy that steps Cube might take "*would* provoke an adversarial relationship with Duke," noting that the dispute Cube presented for declaratory resolution "simply does not yet exist." (*Id.* *3, ¶ 12) (emphasis in original).

Sunstone's "adversarial relationship with Duke" already exists. In its capacity as sovereign over the Fort Bragg enclave, the United States (through the Army) has elected to advance its alternative energy objectives by allowing a private party to generate and sell solar energy and provide energy efficiency services to a private entity that owns and controls Fort Bragg's on-base housing. The existence of the federally approved Portfolio Project, itself, marks a notable difference between the Proposed Project and that presented in *Cube Yadkin*. There is nothing speculative about the Army's plans, the completed and in-progress projects at other military installations under that Portfolio, or about the Fort Bragg component of those plans. Moreover, an executed contract between BCL and Sunstone further confirms the existence of an actual dispute between Sunstone and DEP. Indeed, as DEP acknowledged at oral argument, a contract – even one that incorporates contingencies – presents a different fact pattern than that present in *Cube Yadkin* where Cube's position was discounted by the court for a lack of concrete development steps.

DEP intervened in this action because the Petition "implicate[d] DEP's service rights pursuant to the Public Utilities Act," and asserted at oral argument that the Project would directly violate its franchised territory rights under State law. In its Petition, Sunstone does not seek input from the Commission about how to structure its business or legal affairs. Instead, it presents an integrated, Army-approved national program of military installation solar developments that includes the Proposed Project. The Petition asks for a determination of whether DEP's objections about the reach of its franchised territory can derail Sunstone's efforts to generate and sell solar energy inside a federal enclave with the blessing of the federal government – the sovereign which holds exclusive legislative jurisdiction over that enclave.

While certainly within its rights to not endorse or cooperate with Sunstone's Proposed Project, DEP's position in this docket establishes that Sunstone's Petition seeks "[n]either academic enlightenment [n]or practical guidance concerning their legal affairs." *Cube Yadkin*, *2, ¶ 9 (quoting *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949). Sunstone seeks declaratory judgment about the meaning of a statute that "'directly and adversely affect[s]' . . . [its] actual circumstances." *Id.* (quoting *Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 373, 375, S.E.2d 455, 458, *rev. denied* 371 N.C. 450 (2018).

Cube Yadkin, and the Commission, articulate a similar standard in such situations. The Court of Appeals requires that "litigation appears unavoidable" to meet the "actual controversy" requirement (*id.*), and the Commission holds that the declaratory judgment sought must be "necessary to avoid future litigation." (Order,

May 4, 2021) (quoting *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974). Sunstone and the intervening franchise holder, DEP, have a clearly delineated legal debate about whether State utilities law has any application to the Proposed Project – as evidenced both in their respective comments and at the hearing before the Commission. The record fairly supports the Commission's conclusion that with (i) the advanced state of the Army's Portfolio Project, (ii) a contract between Sunstone and BCL in place, and (iii) DEP resolute in its position regarding its franchised territory, further litigation appears unavoidable if the Commission does not resolve the issues advanced in the Petition.

III.

The Commission has Appropriate Jurisdiction to Decide Whether, Under the Federal Statute at Issue, there is a Path for State Utilities Law to Apply to the Proposed Project

Because Fort Bragg is a federal enclave, it is subject to state regulation only to the extent that Congress expressly allows. The Supreme Court has observed that once an enclave is established, "state law presumptively does not apply to the enclave." *Parker Drilling,* 139 S.Ct. at 1890. *See also DOE v. Ohio*, 503 U.S. at 615 (1992) ("any waiver of the National Government's sovereign immunity must be unequivocal... Waivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.") (citations omitted); *Hancock*, 426 U.S. at 178 ("Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent

there is a "clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous.") (citations omitted); *G ex rel RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 304 (4th Cir. 2003) (*quoting EPA v. State Water Res. Control Bd.*, 426 U.S. 200, 211 (1976)) ("Federal installations are subject to state regulation only when and to the extent that congressional authorization is clear and unambiguous.").

Sunstone's request for declaratory relief, and the intervention concerns presented by DEP, revolve around whether a limited waiver of the federal government's sovereign immunity over federal enclaves applies to the facts and circumstances of the Proposed Project. Because the waiver language is contained in a provision that contains other items relevant to this analysis, it is set forth here, in full:

> Purchase of electricity
>
> (a) **General limitation on use of amounts**. -- A department, agency, or instrumentality of the Federal Government may not use amounts appropriated or made available by any law to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including --
>
> (1) state utility commission rulings; and
>
> (2) electric utility franchises or service territories established under state statute, state regulation, or state-approved territorial agreements.
>
> (b) **Exceptions. –**
>
> (2) Energy Savings. - This section does not preclude the head of a federal agency from entering into a contract under section 801 of the National Energy Conservation Policy Act (42 U.S.C. 8287).

> (2) Energy Savings for Military Installations. - This section does not preclude the Secretary of a military department from—
>
> (A) entering into a contract under section 2394 of title 10; or
>
> (B) purchasing electricity from any provider if the Secretary finds that the utility having the applicable state-approved franchise (or other service authorization) is unwilling or unable to meet unusual standards of service reliability that are necessary for purposes of national defense.

40 U.S.C. § 591 (2006) (referred to, hereafter, as "Section 8093").

Section 8093 allows state regulation of purchases of electricity by the federal government using federally appropriated funds – i.e. the purchase of electric power at the metered substations from a regulated utility. Sunstone contends that Section 8093 does not apply to the facts and circumstances of the Project, and thus there is no applicable waiver that would allow for application of state utilities law to the Proposed Project's activities in a federal enclave. On the other hand, DEP argues that Section 8093 does apply and that the Commission should declare that the Proposed Project violates the territorial monopoly DEP holds under "electric utility franchises or service territories established under state statute." 40 U.S.C. § 591(a)(2).

The Commission regularly is called upon to analyze situations in which state utilities law operates in adjacent spaces to federal law. Here, an analysis of Section 8093 is determinative of the reach of the Public Utilities Act and the Commission's jurisdiction to apply it to the Project. The Commission, by statute, has the same authority to construe the federal law at issue as would a state court of general

jurisdiction. N.C.G.S. § 62-60. *See e.g.*, *North Carolina Utilities Comm'n v. Atl. Coast Line R. Co.*, 29 S.E.2d 912, 283 N.C. 1944) ("The Utilities Commission is by statute . . . constituted a court of record with the powers of a court of general jurisdiction as to all matter properly before it.").

In a similar setting in 2002, the Commission even initiated a proceeding "*for the purpose of* investigating [ ] NCUC's jurisdiction with respect to wholesale contracts at native load priority and the extent to which that jurisdiction either complements or conflicts with FERC's jurisdiction in that field[.]" *State ex Rel. Utils. Comm'n v. Carolina Power Light*, 359 N.C. 516, 520, 614 S.E.2d 281, 284 (2005) (emphasis added).

In allowing a waiver that envisions application of state law in the field regulated by Section 8093, the statute is an example of legislation "where Congress has indicated its awareness of the operation of state law in a field of federal interest and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them." *CTS Corp. v. Waldburger,* 573 U.S. 1, 18 (2014) (citations omitted). The Commission acts well within its authority to examine the federal statute at issue, and determine whether the terms of the federal statute allow state regulation of the Proposed Project.

IV.

There is No Applicable Waiver of the Federal Government's Sovereign Immunity That Would Allow State Regulation to Prohibit the Proposed Project under the North Carolina General Statutes Chapter 62.

In its Reply Comments, Sunstone has appropriately framed the basic question that is before the Commission regarding whether Section 8093 applies:

> Does the proposed provision of electricity by Sunstone to Bragg Communities, LLC within the Fort Bragg enclave constitute a purchase of electricity by the federal government using federally appropriated funds?

It does not, and thus Section 8093 provides no basis for application of state utilities laws – including provisions that protect the regional monopoly DEP holds in the area of the State in which Fort Bragg is located.

It is well settled that the waiver of sovereign immunity contained in Section 8093 must be construed narrowly, according to its terms. *See e.g.*, *DOE v. Ohio*, 503 U.S. at 615; *Hancock*, 426 U.S. at 178; *Fort Bragg Dependent Schools*, 343 F.3d at 304.

Here, Section 8093's text allows for a waiver *only* where the federal government is purchasing electricity using appropriated funds -- – i.e. the purchase of electric power at the metered substations from a regulated utility. The record shows no such facts or circumstances implicated in this case. Here, BCL would purchase energy produced by Sunstone wholly within the Fort Bragg enclave over which the federal government has exclusive jurisdiction. Each are private entities, and no federally appropriated funds would be used by BCL to support its purchase. To conclude that Congress nonetheless meant for the waiver to apply more broadly, and perhaps allow for an application of state utilities laws in a broader set of circumstances, the Commission would be undertaking a legislative task from which it is understandably barred. Our prior ruling in the *ONUS* docket (W-1279, Sub 0, Mar. 18, 2008) does not, as DEP suggests, afford the Commission such authority. *ONUS* did not examine the "federal enclave doctrine," nor does its fact

pattern of an entity requesting to be considered a "public utility" bear on the decision here about whether a waiver of sovereign immunity is present.

As a district court in the Fourth Circuit has observed, Congress could have granted state regulators broad-based jurisdiction over military installations in drafting Section 8093, but "it did not." *BG&E*, 133 F. Supp. 2d at 744. The Commission must apply the statute as it was enacted. *See e.g.*, *Jama v. Immigration & Customs Enf't,* 543 U.S. 335, 341 (2005) ("[W]e do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.") (citation omitted).

V.

The Conclusion that Section 8093 Does Not Apply to Allow State Regulation of the Proposed Project is Consistent with Federal Law and Policy.

The Commission's conclusion that Section 8093 does not apply to allow it, or state utilities law, to regulate the Proposed Project does no disservice to the text of the statute or the policies which underlie it.

The legislative history of Section 8093 shows that it was designed so that the customers of local power suppliers are protected from the consequences of abandonment by federal customers. *See BG&E*, 133 F.Supp.2d at 735 (*citing* S.Rep. No. 235, 100th Cong., 1st Sess., at 70 (1987) (Section 8093 intended to prevent situations in which "Federal customer[s] were allowed to leave local utility systems[.]"). Section 8093 prevents the Department of Defense from bypassing the utility at its metered substations, but it does not establish a federal legislative entitlement for DEP to provide *all* of the power needed by the base. The interest

it does protect is that a franchised provider such as DEP is shielded from having a federal purchaser move to a competing supplier at its meter(s); i.e., a statutory bar on abandonment.

The record demonstrates that after the Project's operations commence FBDPW would still acquire the vast majority of its electricity from DEP.

The record further reflects that Congress, in enacting Section 8093, did not consider the type of "behind the meter" generation at issue here to constitute an abandonment of a local supplier. The legislative history plainly shows that Congress, in drafting Section 8093, did not envision that energy generation *within* a federal enclave was an abandonment of a local supplier even if the demand placed on that supplier was decreased by that generation. By enacting Section 8093,

> [T]he Committee does not intend to restrict the ability of military departments to enter into contracts under 10 U.S.C. 2394. That section permits military departments to contract for the provision and operation of cogeneration and other energy production *as an alternative to Utility service*.

S.Rep. No. 235, 100th Cong., 1st Sess. 70-72 (1987) (emphasis added). The codified version of Section 8093 enumerates an exception that the law "does not preclude the Secretary of a military department from . . . entering into a contract under section 2394 of title 10." 40 U.S.C. § 591(b)(2)(A) (10 U.S.C. §2394 was recodified as § 2922a in 2006). Under 10 U.S.C. § 2922a, the Secretary of the Army "may enter into contracts for periods of up to 30 years":

> for the provision and operation of energy production facilities on real property under the Secretary's

> jurisdiction or on private property and the purchase of energy produced from such facilities.

10 U.S.C. § 2922a(a)(2). The latitude afforded under subsection (a)(2) is not, by statute, dependent upon a finding or showing that a local utility is unwilling or unable to provide the amounts of power required by the federal user. Moreover, DOD interprets § 2922a as applying "to any type of energy production facility, not just geothermal or renewable energy." Office of the Assistant Secretary of Defense, *Guidance on Development of Energy Projects*, November 3, 2016, https://www.acq.osd.mil/eie/Downloads/IE/Guidance%20on%20Development%20of%20Energy%20Projects_3Nov2016.pdf. As DOD explained:

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

Id.

Finally, as noted earlier in this order, Sunstone's Proposed Project at Fort Bragg is, in fact, part of a series of solar-energy-generation facilities on Army bases across the country approved by the Army in August 2015 under which Corvias Solar Solutions, LLC (a joint owner of Sunstone) would construct facilities to provide electricity to the private entities that own and operate on-base housing at Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill and Fort Riley. This effort, in furtherance of the Army's policy goals, has already resulted in installation of solar energy capability at Aberdeen Proving Ground (7.1 megawatts ("MW") of rooftop and ground mount), Fort Meade (8.7 MW, rooftop), and Fort Riley (10.5 MW, rooftop). No information was presented in

this docket that DEP's position had been advanced by any utilities or the regulatory commissions in judicial or administrative proceedings in any of the states where these projects have been or are being developed.

VI.

Allowing the Proposed Project to Proceed is Consistent with Laws Applying to the Fort Bragg Federal Enclave, as Well as Those State Laws that Protect DEP's Franchised Territory

The Commission's conclusions in this docket work no meaningful change to the relationships that federal and state laws have ascribed to the interested actors here: the Army, FBDPW, Sandhills, DEP, Sunstone, and BCL.

As a federal enclave, Fort Bragg is only subject to state laws where "an authorization of state regulation is found [and] to the extent there is a 'clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'" *Hancock*, 426 U.S. 167, 178 (1976). Section 8093 affords a narrow waiver for application of the Public Utilities Act if the Army or FBDPW is purchasing electricity using federally appropriated funds. The Proposed Project at issue here does not satisfy the waiver and remains an activity within a federal enclave that is subject to federal law.

Federal law allows the Army to contract directly with Sunstone to construct and operate a solar facility within Fort Bragg. Indeed, the record here shows an example of this by the United States contracting with DEP (and a DEP affiliate) to build a solar facility for it at Camp Mackall that the Army owns and operates. The Army's choice to approve Sunstone's efforts to build solar facilities at military installations across the country, and sell generated energy to the privatized owners

and operators of on-base housing, does not bring the Project under this Commission's jurisdiction.

Congress passed the Military Housing Privatization Initiative ("MHPI") contained in the National Defense Authorization Act for Fiscal Year 1996, and the Army implemented this directive through its Residential Communities Initiative. These federal laws and policies created a role for "eligible entities" like BCL to own and operate military housing formerly operated by the service branches. The Commission finds no basis in law or policy for it to conclude that these private businesses that operate within federal enclaves like Fort Bragg can nonetheless be considered to ***be*** the federal government when purchasing electricity generated by solar power generators like Sunstone. To do so would involve a state commission in the rewriting of federal laws and policies expressly designed to place in the hands of private entities responsibilities Congress sought to remove from the Army's purview.

The distribution of electric power on Fort Bragg will continue to be provided by Sandhills, a private entity which is not, and never has been, regulated by the Commission or subject to state utilities laws, in light of Fort Bragg's status as a federal enclave.

DEP's rights as a franchised operator under State law are unchanged by this ruling. DEP maintains the monopoly territory assigned under Chapter 62 of the General Statutes, and with it the retail sales channel it has long fostered with FBDPW. Section 8093 continues to provide DEP with protection from abandonment by FBDPW under the circumstances delineated by Section 8093's

legislative history. However, that federal statute has never protected DEP from reduced demand that might be occasioned by "behind the meter" energy generation on Fort Bragg (similar, in effect, to DSM/EE programs on the base). The narrow waiver in Section 8093 is not met here, such that the Proposed Project is not subject to state regulations – including those urged by DEP that might be used to bar Sunstone from developing the Proposed Project. Finally, as noted in the finding supporting our first conclusion in this Order, given the very specific federal law applicable to this project and these unique circumstances, this decision neither serves as precedent for electric energy generation or sales in other contexts nor to erode well-established state law or policy regarding retail electric service by regulated utilities in North Carolina.

CONCLUSION

Based on the foregoing and the record in this docket, the Commission finds and concludes that the narrow waiver of sovereign immunity contained in Section 8093 does not apply, and thus the Public Utilities Act's territorial franchise provisions do not apply to prohibit the development of the Proposed Project. As a result, the declaratory relief requested by Sunstone is granted.

IT IS, THEREFORE, ORDERED AS FOLLOWS:

1. That Sunstone's Request for Declaratory Relief is granted.

2. Energy generation activities behind the meters at which Fort Bragg acquires power from DEP are only subject to state utilities law as authorized by the federal government.

3. That the activities of Sunstone or its assignees in furtherance of the Proposed Project are not subject to the Public Utilities Act because the conditions in Section 8093 meriting waiver of the United States' sovereign immunity over the Fort Bragg enclave are not present.

4. That neither the activities of Sunstone nor its assignees in furtherance of the Proposed Project will cause them to be considered a public utility under N.C.G.S. § 62-3(23).

ISSUED BY ORDER OF THE COMMISSION.

This the ___ day of _____, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A. Shonta Dunston, Chief Clerk