McGuireWoods LLP
501 Fayetteville St.
Suite 500
Raleigh, NC 27601
Phone: 919.755.6600
Fax: 919.755.6699
www.mcguirewoods.com

E. Brett Breitschwerdt
Direct: 919.755.6563

McGUIREWOODS

bbreitschwerdt@mcguirewoods.com

November 15, 2021

VIA Electronic Filing

Ms. Shonta Dunston, Chief Clerk
North Carolina Utilities Commission
Dobbs Building
430 North Salisbury Street
Raleigh, North Carolina 27603

Re: Pre-Argument Brief and Request for Reconsideration of Duke Energy Progress, LLC
Docket No. SP-100, Sub 35

Dear Ms. Dunston:

Enclosed for filing in the above-referenced proceeding on behalf of Duke Energy Progress, LLC is its *Pre-Argument Brief and Request for Reconsideration of Duke Energy Progress, LLC.*

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

Very truly yours,

/s/ E. Brett Breitschwerdt

EBB:sbc

Enclosure

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 Provisions of Solar Energy and Energy Efficiency Services Within Fort Bragg	)	PRE-ARGUMENT BRIEF AND REQUEST FOR RECONSIDERATION OF DUKE ENERGY PROGRESS, LLC

NOW COMES Duke Energy Progress, LLC ("DEP" or the "Company"), by and through the undersigned counsel, pursuant to the North Carolina Utilities Commission's ("NCUC" or "Commission") October 20, 2021, *Order Scheduling Oral Argument, Requesting Briefing, and Requiring Responses to Commission Questions* issued in the above-captioned docket ("Scheduling Order"), and submits its Pre-Argument Brief and Request for Reconsideration to the Commission. Per the Scheduling Order's instructions, DEP's brief addresses how the North Carolina Court of Appeals' recent decision in *State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC* ("Cube Yadkin")[1] impacts the Commission's prior jurisdictional determination in its May 4, 2021 Order Denying Motion to Dismiss ("Dismissal Order").[2] DEP submits that the *Cube Yadkin* decision, which was based on substantially similar circumstances to those in the instant proceeding, confirms that dismissal of Sunstone's Request for Declaratory Ruling (the "Petition") is appropriate

[1] No. COA20-46, 2021 N.C. App. LEXIS 479 (N.C. Ct. App. Sept. 7, 2021). Upon information and belief, the time for Cube to appeal the Court of Appeals' decision to the Supreme Court of North Carolina has now run.

[2] *See Order Denying Motion to Dismiss*, Docket No. SP-100, Sub 35 (May 4, 2021) (denying DEP's motion to dismiss for failure to meet the requirements of the North Carolina Declaratory Judgement Act).

for lack of jurisdiction under North Carolina's Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq*. ("Declaratory Judgment Act"). DEP therefore respectfully requests that the Commission reconsider its Dismissal Order and now dismiss Sunstone's Petition.

BACKGROUND

On December 9, 2020, Sunstone Energy Development LLC ("Sunstone") filed a corrected Petition requesting that the Commission affirmatively rule that (1) Fort Bragg is not subject to the North Carolina Public Utilities Act ("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) ("Petition").

DEP moved to dismiss Sunstone's Petition on February 25, 2021 ("Motion to Dismiss"), arguing in pertinent part that Sunstone's Petition did not present a justiciable current case or controversy under the Declaratory Judgment Act, and, instead, seeks an impermissible advisory opinion from the Commission. The Commission denied DEP's Motion to Dismiss on May 4, 2021, and directed the parties to file comments on the merits of the Petition, which the parties did on June 8, 2021 (DEP) and July 20, 2021 (Sunstone).

Shortly after comments were filed, the Court of Appeals issued its *Cube Yakin* decision on September 7, 2021, which applied the Declaratory Judgment Act to facts that are substantially similar to the facts at issue in this proceeding. As explained below, the *Cube Yadkin* decision provides updated guidance on the requirements a petitioner must satisfy to establish an actual controversy that confers jurisdiction for a reviewing court or the Commission to issue a declaratory ruling under the Declaratory Judgment Act. Given

the clarity provided in the *Cube Yadkin* decision and the key factual similarities between the contractual and developmental status of the proposed project in *Cube Yadkin* and Sunstone's proposed project[3] here, DEP respectfully requests that the Commission reconsider its prior Dismissal Order and now dismiss Sunstone's Petition for failure to present a justiciable case or controversy under the Declaratory Judgment Act.[4]

ARGUMENT

I. The *Cube Yadkin* Decision Confirms that No Justiciable Case or Controversy Exists in the Absence of Legal Duties and Rights that "Would Unavoidably Lead to Litigation."

In its *Cube Yadkin* Decision, the Court of Appeals reiterated longstanding precedent confirming that courts lack jurisdiction to consider requests for declaratory judgment in the absence of an "unavoidable" dispute. *Cube Yadkin*, at 7. In particular, the Court of Appeals held that while a declaratory judgment may be used to determine the construction of a statute, "neither the Utilities Commission nor the appellate courts of this State have the jurisdiction to review a matter which does not involve an actual controversy. *Cube Yadkin*, at 6 (quoting *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C.*, 149 N.C. App. 656, 657–58, 562 S.E.2d 60, 62 (2002)). "To satisfy the jurisdictional requirement

[3] DEP's use of the term "Proposed Project" refers to Sunstone's preliminary plans for developing an up-to 25 megawatt ("MW") solar facility that may be located near on-base housing owned by Bragg Communities, LLC ("BCL") at Fort Bragg and is intended to furnish electricity to BCL.

[4] N.C. Gen. Stat. § 62-80 (authorizing the Commission to amend, alter, or rescind its prior order); *State ex rel. Utilities Comm'n v. North Carolina Gas Service*, 128 N.C. App. 288, 293-294, 494 S.E.2d 621, 626, rev. denied, 348 N.C. 78, 505 S.E.2d 886 (1998) (internal citations omitted) (explaining that the Commission may modify its order "due to a change of circumstances requiring it for the public interest."); *See State ex rel. Utilities Comm'n v. Mountain Elec. Coop.*, 108 N.C. App. 283, 423 S.E.2d 516 (1992) (noting that the after the Commission found it had jurisdiction over the issues in the proceeding, it later reconsidered and affirmed its prior determination that the issues were within its jurisdiction); *see also* N.C. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"); *see also McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (explaining that a "Court reviews challenges to its jurisdiction de novo and may do so for the first time at any stage of the proceedings").

of an actual controversy, it must be shown in the [petition] that litigation appears unavoidable." *Id.* (quoting *Wendell v. Long*, 107 N.C. App. 80, 82–83, 418 S.E.2d 825, 826 (1992)). "[A] party may only request a judgment declaring a particular interpretation of a statute if they are 'directly and adversely affected' by application of the statute to their actual circumstances." *Id*. (internal citations omitted).

Applying this law to the facts at issue, the Court of Appeals found that Petitioner Cube Yadkin Generation, LLC ("Cube") "has no present interest in the resolution of its question." *Id.* at 7. By way of background, the Petitioner in *Cube Yadkin* owned four hydroelectric generation facilities and created a hypothetical scheme where it would serve as a landlord at a nearby former manufacturing site it did not control and lease space to potential hypothetical commercial tenants, and supply electricity to those tenants from its hydroelectric facilities as well as purchase significant additional electricity from the wholesale market to meet the potential tenants' energy needs. Before acting on any part of this plan, Cube met with the Public Staff and then petitioned the Commission for a declaratory ruling that it would qualify for exemption from public utility regulation under the landlord/tenant exemption pursuant to N.C. Gen. Stat. § 62-3(23)(d). This Commission found that "Cube's proposed landlord/tenant arrangement . . . would cause Cube to be a public utility[,]"and Cube subsequently appealed that ruling to the Court of Appeals. *Id.* at 30.

In finding that no justiciable controversy existed, the Court of Appeals noted that Cube did not currently own the Badin Business Park, nor did it present any evidence that it would be able to acquire the property. *Id.* Even though Petitioner's hydroelectric generating facilities "*could* be used to provide electric energy in ways that *would* provoke

an adversarial relationship with Duke[,]" there was no "unavoidable" controversy because "[t]hose facilities are not currently used in those ways." *Id.* at 8 (emphasis in original). Cube's presentation of "encouraging affirmations from potential tenants" was insufficient to correct that deficiency. *Id.*

The Court of Appeals cautioned that "[a] declaratory judgment is not a vehicle in which litigants may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs" and concluded that Cube improperly "asks this Court to serve as its general counsel, advising whether its plan to purchase real property and embark on a particular business venture is a legal use of its time and resources." *Id.*

Importantly, the Court of Appeals explained that litigation is not unavoidable where an impediment exists and must be removed before litigation may occur. Placing significant weight on the prospective and non-binding nature of Cube's business plan, the Court explained that "[b]ecause Cube may never be able to proceed with its Proposed Plan, and has nothing binding it to moving forward on that Proposed Plan, there is 'a lack of practical certainty that litigation w[ill] commence if a declaratory judgment [is] not rendered' in this case." *Id.* at 9 (citing *Am. Civ. Liberties Union of N.C., Inc., v. State*, 181 N.C. App. 430, 433, 639 S.E.2d 136, 138 (2007)).

The Court of Appeals found Cube "intend[ed] *to make formal efforts* to acquire the . . . land it intends to develop and lease *only after* the Commission approve[d] its [new business model]." *Id.* However, because Cube had not yet purchased property or begun providing electric service that could have implicated the statutory regulation exemption set forth in Section 62-3(23)(d), "the controversy that [Petitioner] has asked our Courts and the Commission to decide simply does not yet exist." *Id.* The Court of Appeals emphasized

that Cube "is not in a realized adversarial position to Duke [as] . . . Cube has no legal duties that demand it conduct acts in compliance which would unavoidably lead to litigation with Duke." *Id.* at 8.

In short, both the opinion and concurrence by Judge Dietz found that no actual controversy existed to confer jurisdiction to the Court or the Commission and vacated the decision of the Commission.

II. Like the Petitioner in *Cube Yadkin*, Sunstone is Not in a "Realized Adversarial Position" and, Thus, has Not Presented a Justiciable Case or Controversy.

The facts at issue in the instant proceeding are directly analogous to those presented by Cube and found by the Court of Appeals to present an insufficient basis to confer jurisdiction on any court to issue a declaratory judgment. As detailed below, Sunstone's Proposed Project, like Cube's, remains hypothetical in nature, and Sunstone is under no legal obligation to pursue it given that Sunstone has yet to enter into a single contract necessitating the project's development. In addition, there exist many impediments to Sunstone's development of its Proposed Project that must be removed before litigation may occur, including further action between Sunstone, BCL, and the Army under the Ground Lease as well as the Master Services Agreement ("MSA"). In the absence of any legal obligation to proceed with the Proposed Project, and given the significant obstacles requiring resolution, the controversy Sunstone has asked this Commission to consider is far from "unavoidable," and Sunstone has nothing binding it to move forward on the Proposed Project. For the reasons set forth in more detail below, Cube is not currently in a "realized adversarial position" sufficient to convey jurisdiction upon the Commission to answer the questions presented.

a. Sunstone's Proposed Project is Preliminary and Sunstone has No Legal Obligation to Pursue It

First, the hypothetical and preliminary nature of Sunstone's Proposed Project mirrors that of Cube's development plans. In *Cube Yadkin*, the Court of Appeals found that Cube had "no legal duties that demand it conduct acts in compliance which would unavoidably lead to litigation[.]"[5] The same is true of Sunstone: Sunstone has no present interest in the resolution of its Petition because its Proposed Project is speculative, has not been fully designed or studied from an interconnection standpoint, and lacks any specific development milestones or contractual rights to develop the project. Perhaps most importantly, like Cube, Sunstone does not have any legal duties or obligation to any party associated with the proposed arrangement. Simply put, Sunstone is not in a realized adversarial position to DEP as Sunstone has not acquired any contractual rights or obligations related to the Proposed Project or otherwise fulfilled the numerous pre-requisite steps in the development process necessary to begin generating and selling electricity that would result in a violation of DEP's exclusive franchise rights and lead to litigation.

Similar to *Cube Yadkin*, the facts presented in the Petition, through discovery, and in Sunstone's November 9, 2021, Responses to Commission Questions[6] demonstrate that the "the alleged controversy . . . [is] based solely on proposed action" by Sunstone. *Town of Pine Knoll Shores v. Carolina Water Serv.*, 128 N.C. App. 321, 323, 494 S.E.2d 618 619 (1998) ("Pine Knoll Shores"). In short, Sunstone only has prospective plans to construct a yet-to-be-designed solar project and does not have a timeline for development

[5] *Cube Yadkin* at 11.

[6] *Sunstone Energy Development LLC's and Duke Energy Progress, LLC's Verified Responses to Commission Questions*, Docket No. SP-100, Sub 35 (filed Nov. 9, 2021) ("Responses to Commission Questions").

nor the necessary legal rights (*i.e.,* counterparty consent under BCL's Ground Lease) or approvals (*i.e.*, interconnection studies and agreement from Sandhills Utility Services ("Sandhills Utility")) to construct this potential generating facility. Sunstone also has not entered into a contract for sale of power to any retail customer, yet it is asking the Commission to make a determination about whether a hypothetical, prospective third-party sale of electricity would constitute public utility activity subject to Commission regulation. This is a quintessential "advisory opinion" premised on future conduct by Sunstone and DEP that would potentially lead to litigation. *See Pine Knoll Shores*, 128 N.C. App. at 322-23, 494 S.E.2d at 619 (finding that trial court cannot render advisory opinions under the Declaratory Judgment Act, and, therefore, did not have jurisdiction to decide declaratory judgment petition where petitioner alleged only that they "anticipate some future action to be taken by defendants that would result in a violation" of agreement) (emphasis added); *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 628, 518 S.E.2d 205, 207 (1999), disc. review denied, 351 N.C. 186, 541 S.E.2d 709 (1999) (explaining that "future or anticipated action of a litigant does not give subject matter jurisdiction to our courts under the Declaratory Judgment Act").

Put another way, the "controversy" alleged by Sunstone is that it thinks "proposed [future] action[s]" it may take as part of its prospective business venture could create a question of law regarding whether this Commission would have authority to regulate its operations under North Carolina law as a public utility. However, the numerous hypothetical actions and prospective plans that Sunstone would have to undertake to develop the project create an untenable foundation upon which to construct an actual and unavoidable current controversy.

The Petition itself highlights the lack of an "actual controversy" by failing to demonstrate that Sunstone has taken any meaningful steps to solidify its purported plans for the Proposed Project. The Petition contains almost no information or detail about the proposed generation facility, important timelines and milestones, or agreements between the relevant parties to clearly articulate a case or controversy. Sunstone instead only provides scant detail about a prospective energy services arrangement in its Petition that it "may" enter into, at some point in the future, with its affiliate, BCL, and requests that the Commission provide its blessing today that this potential future action can proceed without Commission regulation.

Sunstone's Response to Question 1 in the Responses to Commission Questions confirms that Sunstone's business venture remains preliminary, and that the contractual and developmental status of the project has still not changed. After detailing Sunstone's similar business ventures in other jurisdictions—which have no bearing on the yet-to-be-realized status of the Proposed Project—Sunstone concedes that it has not entered into any of the necessary contractual agreements to develop the project and that the development status of the project has not changed. Sunstone states that the "only change in circumstance" is that Sunstone "plan[s] to enter a Fort Bragg-specific Letter of Intent that affirms its intention to execute the Proposed Project consistent with its inclusion in the Army-approved portfolio."[7] In other words, the only "change" is that Sunstone is pursuing, but has not yet obtained, a preliminary Letter of Intent ("LOI") with the Army to authorize development of the Proposed Project.[8] That Sunstone is still planning towards a LOI that

[7] Responses to Commission Questions at 2-3.

[8] *Id.*

likely would not be binding on either Sunstone or the Army is strong evidence regarding the hypothetical nature of the Proposed Project. Sunstone admits as much by claiming only that the LOI would "affirm its intention" and *not* commit or otherwise bind it to execute the Proposed Project.[9]

In *Cube Yadkin*, the Court of Appeals noted that Cube's purported commitment to execute its proposed plan was limited to "[p]reliminary contact" and "active negotiations" with "a number of potential tenants" that Cube believed "could" result in lease agreements.[10] Similarly, here, Sunstone's representation that it "plans" to enter into a non-binding LOI to execute its Proposed Project at best indicates that it is engaged in discussions related to the Project. The Court of Appeals found this type of representation to be insufficient to create a justiciable controversy in *Cube Yadkin*, and the Commission should find the same here. Indeed, the undisputed facts demonstrate very clearly that Sunstone, like Cube, "has no present interest in the resolution of its question." *Cube Yadkin* at 7. Absent a legal obligation to proceed with its Proposed Project, the purported "controversy" Sunstone has asked the Commission to decide is *not* unavoidable, and the Commission, as the Court of Appeals did before it, should refrain from acting as Sunstone's "general counsel, advising whether its plan to . . . embark on a particular business venture is a legal use of its time and resources." *Id.* at 8. Given the clear reasoning set forth by the Court of Appeals, DEP respectfully requests the Commission to reconsider its Dismissal Order and dismiss Sunstone's Petition for failure to allege a justiciable case or controversy.

[9] *Id.*

[10] *Cube Yadkin* at 7 ("Cube concedes that it has not yet entered into any leasing contracts creating a landlord/tenant relationship, does not currently have any ownership interest in real property in the [proposed site for project], and is not under contract to acquire any real property [at the proposed site].").

b. Numerous Impediments Exist and Must Be Removed Before Sunstone Could Pursue its Proposed Project and Litigation Could Occur.

In addition to the preliminary and hypothetical nature of the Proposed Project and the lack of any legal obligation to develop it, there are numerous impediments that would need to be removed for Sunstone to move forward with its Proposed Project. As the Court of Appeals held, "litigation is not unavoidable where an impediment exists and must be removed before litigation may occur." *Cube Yadkin* at 9. Accordingly, any of the below described impediments would be sufficient to create "a lack of practical certainty that litigation will commence if a declaratory judgment is not rendered" demonstrating the lack of a justiciable controversy. *Id.* at 10.

i. <u>BCL/Sunstone must obtain a Major Decision approval from the Army to proceed with the Proposed Project</u>

Although Sunstone obtained preliminary "concept" acceptance of its Proposed Project over five years ago as part of a proposed multi-state portfolio of seven solar projects from the Army in 2015 and Fort Bragg in 2016,[11] Sunstone has failed to provide the Commission *any* recent information from the Army that this Proposed Project is supported by the Army or that the Army agrees with its legal arguments that it is exempt from Commission regulation.[12] In its Response to Commission Question 2, Sunstone acknowledges that the Army will require "a separate Major Decision approval" before its Proposed Project at Fort Bragg could proceed and that "[t]he Major Decision approval for the Proposed Project has not yet been issued."[13]

[11] *See* Responses to Commission Questions at 4-5.

[12] DEP argued that the Army was a necessary party to this proceeding. The Commission determined that the Army was not a necessary party because Sunstone is not directly contracting with the Army. Dismissal Order, at 4.

[13] Response to Commission Questions at 5.

While Sunstone insists that the requisite approval is "anticipated," its supporting Exhibit 4 to the Responses to Commission Questions—the August 2015 Memorandum from the Deputy Assistant Secretary of the Army providing approval "in concept" of a proposed Portfolio Solar Project, including the Proposed Project at Fort Bragg (the "2015 Army Memorandum")—underscores that the Army must execute a Major Decision "to determine approval of [the Fort Bragg] project." The 2015 Army Memorandum further notes that "[w]hile the Army supports the portfolio approach, installations not able to meet [the list of twelve] conditions [set forth in the Memorandum] are subject to removal from consideration for installation of Photovoltaic Systems." *Id.* In other words, Sunstone has received nothing more than an "in concept" approval of a seven-project portfolio of proposed solar installations, including the Proposed Project at Fort Bragg, spanning six states. It has *not* received concrete approval of its Proposed Project from the Army, nor has it indicated any timeline in which the Major Decision is likely to issue or if it can satisfy the twelve conditions set forth in the 2015 Army Memorandum.

In addition, neither the 2015 Army Memorandum nor the March 2016 Letter from Fort Bragg's Chief of Housing Division (the "2016 Fort Bragg Letter") renders any opinion regarding the legality of Sunstone's proposal under applicable North Carolina law. As DEP explained in its Motion to Dismiss, the Federal Acquisition Regulations implementing Section 8093 of the Continuing Authorization Act of 1988 clearly establish that the Army "shall determine, with advice of legal counsel . . . [or by] consultation with the state agency responsible for regulating public utilities, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant

to state statute, state regulation, or state-approved territorial agreements." 48 CFR § 41.201(e). Sunstone has not provided any evidence or allegation that the Army has undertaken the required legal analysis to determine whether Sunstone's Proposed Project and corresponding operations would unlawfully compete with DEP in violation of North Carolina law and/or this Commission's precedent.

The absence of a Major Decision approval and the Army's formal legal opinion that Sunstone's Proposed Project would not unlawfully compete with DEP serve as impediments to the justiciability of the case.

ii. The Army must agree to amend Ground Lease with BCL in order for Sunstone to proceed with the Proposed Project

Another yet-to-be-resolved issue with the Proposed Project is whether Sunstone has received the required authorization from the Army to site its Proposed Project within Fort Bragg. While Sunstone may argue that is has the ability to pursue a leasehold interest from its affiliate, BCL, or to enter into a power purchase agreement with BCL, based on its response to Question 2 in the Responses to Commission Questions, Sunstone has not made any notable progress and has no legal rights to develop its Proposed Project at this time. Sunstone points to BCL's Ground Lease with the United States of America[14] and argues that the Ground Lease covers the area where the Proposed Project will be located. However, what Sunstone fails to do is provide any proof that it has received the requisite approval to *actually* site the Proposed Project. Specifically, Section 9(a) of the Ground Lease prohibits BCL from "sublet[ting] any part of the Project" or granting "any interest, privilege, or license whatsoever in connection with this Ground Lease without prior written

[14] The Ground Lease is included as Exhibit 2 to the Responses to Commission Questions.

approval of the Secretary." The Army's 2016 Fort Bragg Letter introduced by Sunstone confirms that the ground lease between BCL and the Army would need to be amended for a proposed solar project to be installed.[15] Sunstone, however, has failed to provide any recent, documented support for the Proposed Project by the Army so BCL's obtaining the required written approval from the Army to lease property to Sunstone for the Proposed Project is anything but certain.

Sunstone has presented no evidence that it has taken any steps to obtain the Army's (or, for that matter, BCL's) agreement to lease the site for the Proposed Project and, as a result, the Proposed Project remains a purely hypothetical venture. Like Cube, Sunstone has "shown no evidence that it owns the legal right to lease the real property required to fulfill its [proposed project]" and "has shown no evidence that it would be able to acquire that real property."[16]

iii. The Army must also agree to amend the MSA and backstop BCL's energy needs in order for Sunstone to develop its Proposed Project

Similar to the Ground Lease, the MSA highlights another legal requirement to develop the Proposed Project that Sunstone has failed to meet. Sunstone has claimed that under the MSA, BCL may seek alternative electricity suppliers, such as the Proposed Project, and negotiate directly with them to furnish electricity for the on-base housing. What Sunstone fails to show, however, is that BCL has terminated the MSA so that BCL may seek alternative electricity suppliers. Sunstone even admits in its response to Question 2 in the Responses to Commission Questions that under the MSA, BCL can "elect to seek

[15] Responses to Commission Questions, Exhibit 5 at SUN00011 ("e. Amend the Ground Lease between BC and the Army to include renewable energy language.").

[16] *Cube Yadkin* at 15.

an alternate source for the service or services *and terminate [the MSA]* in accordance" with the MSA's terms. To DEP's knowledge, BCL has not, nor does it intend to, terminate the MSA.

In fact, all indications are that BCL is not terminating the MSA and instead, BCL is planning for the Army (and DEP) to continue to deliver DEP power to BCL under the MSA (through Sandhills Utility) to meet BCL's partial electricity requirements as a "backstop" to Sunstone's proposed solar facility. Of course, because Sunstone has failed to even submit an Interconnection Request to begin the process of studying the generation profile and the potential impacts of the Proposed Project on Sandhills Utility's system and DEP's system as an Affected System,[17] BCL's electricity needs are not certain. In other words, to pursue alternative energy suppliers such as the Proposed Project, BCL would have to terminate the MSA, but would still need Sandhills Utility to provide electricity (from DEP) because the Proposed Project would not meet BCL's demand. It remains unclear whether the Army is agreeable to continuing to provide this "partial requirements" service under the MSA.

BCL's failure to terminate or amend the MSA so that it may seek alternative electricity suppliers and Sunstone's failure to even begin the pre-requisite interconnection study process both serve as impediments to the justiciability of this case.

[17] As evidenced by its response in Question 6 to the Responses to Commission Questions, Sunstone continues to provide hypothetical future proposals rather than taking any actual action: "Sunstone will work with Sandhills, to perform a detailed System Impact Study," "the study would identify the system upgrades," and "the System Impact Study will also consider." Sunstone has not actually taken any steps to begin the interconnection study process. Further, Sunstone's response to Question 3 suggests that "BCL will be the contracting party with Sandhills Utility for an Interconnection Agreement." No information is provided on why or how BCL will be the designated Interconnection Customer if Sunstone owns and operates the planned generating facility, but this representation is not consistent with standard industry practice.

III. Sunstone continues to seek an advisory opinion from the Commission.

Sunstone's Petition should be dismissed for lack of jurisdiction because the Declaratory Judgment Act "does not license litigants to fish in judicial ponds for legal advice." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) ("Sharpe") (*citing Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949)). Petitioners that seek a declaratory judgment must show that "an actual controversy exist[s] both at the time of the filing of the pleading and at the time of the hearing." *Id.*, 317 N.C. at 586, 347 S.E.2d at 30. Sunstone's Petition regarding a hypothetical Proposed Project that may be constructed at some point in the future that has yet to execute a single agreement compelling the project's development does not meet this "actual controversy" standard.

As eloquently coined by the Court of Appeals in *Cube Yadkin*, Sunstone's Petition asks the Commission to "stand in as legal counsel and offer an advisory opinion that carries the force of a binding legal judgment." *Cube Yadkin* at 12. However, the Declaratory Judgment Act "does not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." *Sharpe*, 317 N.C. at 583-84, 347 S.E.2d at 29 (internal citations omitted).

As pointed out in the Dismissal Order, the Commission has liberally and routinely provided guidance through declaratory orders in the past,[18] and *Cube Yadkin* does not mean that the Declaratory Judgment Act cannot be a useful tool to the Commission in future proceeding. However, it may only be used where a petitioner presents the Commission an

[18] Dismissal Order, at 2.

"actual controversy" and has taken specific actions which impose a legal obligation on the petitioner to perform or which permits the petitioner to act without impediment(s) that must be removed before litigation may occur. Sunstone's hypothetical solar project and potential future arrangement to sell power to BCL fails to meet the standards established by the Court of Appeals in *Cube Yadkin.*

CONCLUSION

The North Carolina Court of Appeals' decision in *Cube Yadkin* makes clear that it is inappropriate for a judicial body in this State to issue advisory opinions. Here, Sunstone has admitted that it has not executed any contract or otherwise legally obligated itself to proceed with its Proposed Project, nor has it undertaken any of the necessary studies or acquired regulatory approvals related to the Project. In other words, as in *Cube Yadkin*, "[t]here is nothing to make it appear reasonably certain that if the courts agree with [Sunstone] and declare [its Proposed Project exempted from regulation] that [Sunstone] will engage in the covered activities rather than 'put the opinion on ice to be used if and when occasion might arise.'" *Cube Yadkin* at 10 (quoting *Sharpe*, 317 N.C. at 589-90, 347 S.E.2d at 32). Accordingly, DEP respectfully requests that the Commission follow the clear guidance set forth in the *Cube Yadkin*, reconsider its Dismissal Order, and dismiss Sunstone's Petition for failure to bring a justiciable controversy before the Commission.

Respectfully submitted this 15th day of November, 2021.

/s/ E. Brett Breitschwerdt

Jack E. Jirak
Deputy General Counsel
Duke Energy Corporation
PO Box 1551 / NCRH 20
Raleigh, North Carolina 27602
Tel. 919.546.3257
jack.jirak@duke-energy.com

E. Brett Breitschwerdt
Tracy S. DeMarco
Nick A. Dantonio
McGuireWoods LLP
501 Fayetteville Street, Suite 500
PO Box 27507 (27611)
Raleigh, North Carolina 27601
Tel. 919.755.6563 (EBB)
Tel. 919.755.6682 (TSM)
Tel. 919.755.6605 (NAD)
bbreitschwerdt@mcguirewoods.com
tdmarco@mcguirewoods.com
ndantonio@mcguirewoods.com

Attorneys for Duke Energy Progress, LLC

CERTIFICATE OF SERVICE

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

This, the 15th day of November, 2021.

/s/ E. Brett Breitschwerdt

E. Brett Breitschwerdt
McGuireWoods LLP
501 Fayetteville Street, Suite 500
PO Box 27507 (27611)
Raleigh, North Carolina 27507 (27601)
Telephone: (919) 755-6563
bbreitschwerdt@mcguirewoods.com

Attorney for Duke Energy Progress, LLC