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VIA Electronic Filing

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

Re: *Post-Hearing Brief 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 *Post-Hearing Brief*.

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:kjg

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) POST-HEARING BRIEF OF DUKE
Provisions of Solar Energy and Energy) ENERGY PROGRESS, LLC
Efficiency Services Within Fort Bragg)

NOW COMES Duke Energy Progress, LLC (“DEP” or the “Company”), by and through the undersigned counsel, pursuant to the January 6, 2022 *Notice of Due Date for Proposed Orders and/or Briefs* (the “Notice”) issued in the above-captioned docket, and submits its Post-Hearing Brief. Per Chair Charlotte A. Mitchell’s instructions at the conclusion of the November 29, 2021 hearing, DEP’s Post-Hearing Brief addresses the limited question posed by Commissioner Daniel G. Clodfelter at the hearing: whether the Commission has jurisdiction to consider the federal law questions raised in Sunstone Energy Development LLC’s (“Sunstone”) Request for Declaratory Ruling (the “Petition”). As presented in this brief, DEP respectfully submits that the Commission has the authority to address the federal law questions inherent to Sunstone’s request.

I. Introduction

Sunstone’s Petition asks the Commission to issue a declaratory ruling answering three distinct, but related questions. In essence, Sunstone wants to know whether its proposed scheme for the third-party sale of solar energy to residents of Fort Bragg military housing owned by its affiliate, Bragg Communities, LLC (“BCL”), and indirectly to the Department of the Army, will cause it to be considered a “public utility” pursuant to N.C.

Gen. Stat. § 62-3(23) and subject Sunstone to the Public Utilities Act in light of Fort Bragg’s status as a federal enclave. Answering this question necessarily involves an analysis of federal law to determine the scope of the Commission’s own authority under the Public Utilities Act.

Article 1, Section 8, Clause 17 of the United States Constitution grants Congress the power to exercise “exclusive legislation” over federal enclave lands. *Paul v. U.S.*, 371 U.S. 245, 263, 83 S. Ct. 426 (1973). This constitutional grant of exclusive legislative power to Congress “bars state regulation without specific congressional action.” *Id.* In other words, there is a presumption that states have no authority to regulate within an enclave unless there is a “clear congressional mandate” authorizing state regulation. *Hancock v. Train*, 426 U.S. 167, 179 (1976); *see also West River Elec. Ass’n, Inc. v. Black Hills Power and Light Co.*, 918 F.2d 713, 719 (8th Cir. 1990) (“It is well established that in order for Congress to subject a federal enclave to state jurisdiction, there must be a specific congressional deferral to state authority over federal property.”). In this case, the Parties dispute whether 40 U.S.C. § 591(A)—which prohibits the federal government from using federal funds to “purchase electricity in a manner inconsistent with state law”—evinces a “clear congressional mandate” authorizing the Commission to regulate electricity purchased with federal funds within the enclave. Accordingly, to answer Sunstone’s questions and determine whether it has authority to regulate Sunstone’s activities within the Fort Bragg enclave, the Commission must undertake an analysis of 40 U.S.C. § 591 (“Section 591”).

At the hearing in this matter, Commissioner Clodfelter queried whether the Commission has jurisdiction to interpret federal statutes like Section 591 and/or to undertake an analysis of whether federal law preempts Commission regulation under state

law. (Tr. Vol. 1, p. 117) (asking whether “this Commission, which normally issues interpretations of Chapter 62 of the General Statutes of North Carolina has the same broad jurisdiction [to] construe Federal law as does the General Court of Justice.”). For the reasons described in more detail herein, the answer to both questions for the purpose of this proceeding is “yes.”

II. Argument

A. **Commissioner Clodfelter’s Question is Moot if the Commission Finds Sunstone Has Not Presented a Justiciable Case or Controversy**

As a threshold matter, the Commission need not address whether it has subject matter jurisdiction to consider the complex federal statutory and/or constitutional issues presented by Sunstone if it finds, consistent with the North Carolina Court of Appeals’ recent ruling in *State ex rel. Utils. Comm’n v. Cube Yadkin Generation LLC* (“*Cube Yadkin*”),¹ that Sunstone has failed to present a justiciable case or controversy for the Commission’s consideration. DEP’s Pre-Argument Brief included a Request for Reconsideration of the Commission’s May 4, 2021 Order Denying Motion to Dismiss (the “Dismissal Order”) on the grounds that the *Cube Yadkin* decision, which was based on substantially similar facts to those of the instant proceeding, confirms that dismissal of Sunstone’s Petition is appropriate. To date, the Commission has not ruled on DEP’s Request for Reconsideration, but the issue remains ripe for determination. In the interest of judicial efficiency, DEP will not repeat arguments made in its earlier brief here, but reiterates its position that Sunstone is not currently in a “realized adversarial position” sufficient to convey jurisdiction upon the Commission to answer the questions presented.

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.

Because the law is clear that courts may not issue advisory opinions, *Cube Yarkin*, at 8 (“[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”), the Commission can avoid undertaking an analysis of federal law and the federal enclave doctrine of the U.S. Constitution by simply granting DEP’s Request for Reconsideration and dismissing Sunstone’s Petition because no actual controversy exists to confer jurisdiction on the Commission. *Cf, Bragg Development Co. v. Braxton*, 239 N.C. 427 (1954) (dismissing appeal under Declaratory Judgement Act for lack of justiciability where facts presented arose in Ft. Bragg federal enclave).

B. If the Commission Determines Sunstone Has Presented a Justiciable Case or Controversy, the Commission Has Subject Matter Jurisdiction to Adjudicate Questions Arising Out of 40 U.S.C. § 591

State agencies like this Commission have subject matter jurisdiction to adjudicate a relatively narrow universe of federal law. Section 62-60 of the North Carolina General Statutes grants the Commission “all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.” N.C. Gen. Stat. § 62-60; *see also North Carolina Utils. Comm’n v. Norfolk S. R. Co.* 224 N.C. 762, 764 (1944) (“The North Carolina Utilities Commission is a court of general jurisdiction . . . as to subjects embraced within chapter 62 of the General Statutes.”). Because the North Carolina Courts of General Justice have authority to interpret federal law, *Thomas v. North Carolina Dep’t of Human Res.* 124 N.C. App. 698 710-11 (1996) (“state courts have inherent authority . . . to adjudicate claims arising out of the laws of the United States”), it follows that the Commission has corresponding authority to interpret federal law as it relates to the Commission’s mandate under the North Carolina Public Utilities Act to “regulate public utilities . . . in the manner and in accordance with

the policies set forth in [Chapter 62 of the North Carolina General Statutes].” N.C. Gen. Stat. §§ 62-2(b); 62-30.

In keeping with this principle, both state and federal courts have confirmed that state administrative agencies like the Commission are empowered to interpret and apply federal law where it intersects with the administration of the agency’s obligations. *See e.g., BellSouth Telecomms., Inc. v. Sanford*, 494 F.3d 439, 447 (4th Cir.2007) (noting that a state utility commission’s interpretation of federal law “may deserve a measure of respect” based upon “the degree of the agency’s care, its consistency, formality, and relative expertness as well as the persuasiveness of the agency’s opinion”); *Carpenter v. N. Carolina Dept. of Hum. Res.*, 107 N.C. App. 278, 279–80, 419 S.E.2d 582, 584 (1992) (reversing the North Carolina Department of Health and Human Services’ interpretation of Congressional intent in enacting 7 U.S.C. § 2011, *et seq.*).

Indeed, the Commission has a long history of interpreting and applying federal statutes and regulation both in the context of cooperative federalism schemes and in determining the bounds of the Commission’s authority where tension exists between state and federal law, among other things. Under the cooperative federalism framework, the Commission regularly interprets and applies federal law when it implements and takes actions pursuant to federal statutes such as the Public Utility Regulatory Policies Act of 1978 (“PURPA”), 16 US Code § 824a-3(f)(1), or the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996). *See, e.g. State ex rel. Utilities Comm’n v. North Carolina Power*, 338 N.C. 412, 422 (1994) (“[T]he Commission is authorized by Congress to act with regard to arrangements between cogenerators and NC Power.”); *In the Matter of Enft of Interconnection Agreement Between Intermedia Commc’ns, Inc. & Verizon S. Inc., f/k/a Gte S. Inc.*, No. P-504, Sub 8, 2000 WL 36269435, at *1 (N.C.U.C. Oct. 24,

2000) (“The Commission has jurisdiction to . . . determine controversies concerning the interpretation and performance of . . . interconnection agreements under state and federal law[.]”); *In the Matter of Application of Bellsouth Telecommunications Inc. to Provide in-Region Interlata Serv. Pursuant to Section 271 of the Telecommunications Act of 1996*, No. P-55, Sub 1022, 2009 WL 807298 (N.C.U.C. Mar. 23, 2009) (declining request for declaratory judgment on the grounds that the request simply asked the Commission to confirm it would apply applicable law under the federal Telecommunications Act).

Likewise, the Commission regularly considers and interprets federal law as well as Constitutional principles to determine the scope of its own delegated authority under the Public Utilities Act. *See, e.g., In the Matter of Duke Energy Carolinas, LLC’s Advance Notice of Purchase Power Agreement with the City of Orangeburg, South Carolina and Joint Petition for Declaratory Ruling*, No. E-7, Sub 858, 2009 WL 904943 (N.C.U.C. Mar. 30, 2009) (finding that the Commission’s retail ratemaking jurisdiction was not preempted by federal law after analyzing the federal filed rate doctrine and the reach of the Commerce Clause and the Equal Protection Clause); *In the Matter of Application of Friesian Holdings LLC for a Certificate of Convenience and Necessity to Construct a 70-MW Solar Facility in Scotland County North Carolina, Order Denying Certificate of Public Convenience and Necessity* No. EMP-105, Sub 0 (N.C.U.C. June 11, 2020) (finding that Commission’s jurisdiction to determine the public convenience and necessity of certificating a new merchant generating facility was not preempted or limited by the Federal Power Act, 16 U.S.C.S. § 791a, *et seq.*), *aff’d* No. COA20-867 (N.C. Ct. App. Jan. 18 2022); *In the Matter of Mavis B. Kornegay, Post Off. Box 433, Pine Level, N. Carolina 27568-0433 & Ross W. Lampe, President, Guy C. Lee Mfg. Co., Post Off. Box 1457, Smithfield, N. Carolina 27577, Complainants*, No. R-100, Sub 214, 1996 WL 35063443, at *1 (July 30, 1996) (finding

that the federal ICC Termination Act of 1995 did not preempt the Commission’s jurisdiction over cases involving private rail crossings). While this type of Commission precedent has typically focused on whether federal law preempts state law under the Supremacy Clause, the inquiry at issue here—whether there is a “clear congressional mandate” allowing state regulation inside a federal enclave—is a related analysis that requires the Commission to consider the scope of its authority to regulate public utility activity in the face of tension between state and federal law.²

Here, Section 591 very clearly intersects with the Commission’s delegated authority to regulate public utilities in North Carolina pursuant to the Public Utilities Act. *See* N.C. Gen. Stat. § 62-30 (“The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation[.]”) Section 591(A)—which provides that “[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”—serves as an exception to the otherwise exclusive jurisdiction of the federal government to govern within a federal enclave under Article 1, Section 8, Clause 17 of the United States Constitution. Put another way, there is a presumption that the state and, correspondingly, the Commission have no authority within the enclave in the absence of a federal statute

² While North Carolina law is clear that administrative agencies like the Commission have no authority to independently consider the constitutionality of a statute, *In re Central Tel. Co.*, 167 N.C. App. 14, 25, 604 S.E.2d 680, 686 (2004), there is considerable precedent confirming that the Commission has the authority to consider constitutional questions regarding the scope of its own authority. In addition to the Supremacy Clause cases cited *supra*, the Commission regularly considers whether its ratemaking decisions do not amount to a “taking” and otherwise comport with the United States Constitution. *See In the Matter of Application of Duke Energy Carolinas, LLC, for Adjustment of Rates & Charges Applicable to Elec. Util. Serv. in N. Carolina*, No. E-7, Sub 989, 2013 WL 5783801, at *17–18 (N.C.U.C. Oct. 23, 2013).

evinced a “clear congressional mandate” granting the state authority to regulate activities that are otherwise within its jurisdiction. *Paul v. United States* 371 U.S. 245, 263 (1963) (“the grant of ‘exclusive’ legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight bars state regulation without specific congressional action”).

To answer the questions posed by Sunstone and determine the extent of its power, or lack thereof, to regulate within the Fort Bragg enclave, the Commission must necessarily analyze and interpret Section 591. Though the specific federal enclave questions presented by Sunstone may be one of first impression for the Commission, the required federal statutory analysis is not unlike the preemption analysis this Commission has many times undertaken to assess the extent of its own authority and falls squarely within its obligation to regulate utilities in the State³ under the Public Utilities Act. For all of these reasons, the Commission’s judicial powers under N.C. Gen. Stat. Section 62-60 necessarily extends to consideration of Section 591.

C. The Order of Analysis Need Not Reach More Complex Constitutional Questions to Decide the Issues Presented by Sunstone

Should the Commission find that Sunstone has presented a justiciable case or controversy, the Commission should evaluate whether the issues presented can be determined by resolving potentially conflicting state and federal law versus wading into complex Constitutional questions. *United States v. Georgia Public Service Comm'n*, 371 U.S. 285, 287 (explaining that a “[d]irect conflict between a state law and federal

³ For the avoidance of doubt, the State’s action of ceding Ft. Bragg to the United States did not cause Ft. Bragg to cease being part of North Carolina. See *Howard v. Commissioners of Sinking Fund*, 344 U.S. 624, 626-27 (1953) (finding that land ceded to United States under federal enclave clause “did not cease to be a part of [the State]” as “[a] state may conform its municipal structures to its own plan, so long as the state does not interfere with the exercise of jurisdiction within the federal area by the United States.”).

constitutional provisions raises of course a question under the Supremacy Clause but one of a broader scope than where the alleged conflict is only between a state statute and a federal statute that might be resolved by the construction given either the state or the federal law.”). DEP believes the legal questions presented by Sunstone requires the Commission to interpret the scope of Section 591. As such, the order of analysis need not reach more complex constitutional questions beyond the Commission’s specialized regulatory expertise. *See PUC of California v. United States*, 355 U.S. 534, 539 (1958) (finding doctrine of primary administrative jurisdiction did not bar the United States from relief in federal courts, in view of the fact that the issue presented was “a constitutional one that the [California Public Utilities] Commission could hardly be expected to entertain”).

Indeed, as a general rule, the Commission should begin its analysis addressing the state law question before it—in this case, whether Sunstone’s proposed activities at Fort Bragg would otherwise render it a “public utility” under the North Carolina Public Utilities Act. To the extent the Commission determines that Sunstone has presented a Constitutional question for the Commission’s consideration, it has a *duty* to consider state (and federal) law questions first. As the Supreme Court of the United States has held, courts have a “duty to avoid deciding constitutional questions presented unless essential to the proper disposition of a case.” *Harmon v. Brucker*, 355 U.S. 579, at 581. For the same reasons, the Commission should answer state law questions, about which it has particular expertise, before tackling federal law in circumstances where the federal law question may be avoided through resolution of state law issues.

III. Conclusion

The Commission need not reach consideration of any federal question if it finds, for the reasons set out in DEP’s Pre-Argument Brief and Request for Consideration, that

no justiciable case or controversy exists, and consideration of Sunstone’s Petition is therefore improper under the Declaratory Judgement Act. Should the Commission find that Sunstone has presented a justiciable case or controversy, however, the Commission has the authority to consider and interpret the federal law at issue because Section 591 so clearly intersects with the Commission’s delegated authority under the Public Utilities Act to regulate public utilities within the State.

Respectfully submitted this 7th day of February, 2022.

/s/E. Brett Breitschwerdt

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Post-Hearing Brief*, 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 7th day of February, 2022.

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