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February 7, 2022

VIA Electronic Filing

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

Re: Proposed Order of Duke Energy Progress, LLC
Docket No. SP-100, Sub 35

Dear Ms. Dunston:

Pursuant to the North Carolina Utilities Commission's ("Commission") January 6, 2022, Notice of Due Date for Proposed Orders and/or Briefs, enclosed for filing with the Commission in the above-referenced proceeding is Duke Energy Progress, LLC's ("DEP") *Proposed Order*.

DEP's Proposed Order is written in the alternative and presents the Commission with two alternative options: (1) grant DEP's request for reconsideration in its November 15, 2021 *Pre-Argument Brief and Request for Reconsideration* ("Request for Reconsideration") and dismiss Sunstone Energy Development LLC's ("Sunstone") Request for Declaratory Ruling ("Petition") on the grounds that no justiciable case or controversy currently exists; or (2) consider and issue a declaratory order addressing the merits of Sunstone's Petition.

The introductory sections of the Proposed Order through Section II applies to either approach. Section III of the Proposed Order assumes that the Commission will grant DEP's Request for Reconsideration and dismiss Sunstone's Petition on justiciability grounds. The Commission may disregard Section IV of the Proposed Order if it rules in this manner and simply adopt Ordering Paragraph 1. If the Commission determines that it has jurisdiction and can consider the merits of Sunstone's Petition, then Section III and Ordering Paragraph 1 should be modified to reflect denial of the Request for Reconsideration and adopt, as written, Section IV and separately identified Ordering Paragraphs 1 through 3.

Certain information referenced at pages 28-29 was designated by Sunstone as confidential and filed under seal in the proceeding. Therefore, DEP has redacted this information in the enclosed Proposed Order and is separately filing information designed confidential by Sunstone under seal.

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

Sincerely,

/s/E. Brett Breitschwerdt

EBB:kjg

Enclosures

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	)	PROPOSED ORDER OF DUKE ENERGY PROGRESS, LLC

BY THE COMMISSION: This matter comes before the North Carolina Utilities Commission ("NCUC" or the "Commission") on the Request for Declaratory Ruling ("Petition") filed by Sunstone Energy Development LLC ("Sunstone") on December 8, 2020. According to the Petition, Sunstone seeks to enter into a contract with Bragg Communities, LLC ("BCL")—a 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—to provide solar energy and energy efficiency services to housing units on the federal Army base of Fort Bragg. Before proceeding with this proposed business arrangement, 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).

Fort Bragg is an Army installation located near Fayetteville, North Carolina. Because the federal government purchased the land from the state of North Carolina in 1918, Fort Bragg is a federal enclave under Article I, Section 8, Clause 17 of the United States Constitution.[1]

Fort Bragg is entirely located within Duke Energy Progress LLC's ("DEP") franchised service territory, which was assigned by the Commission to DEP's predecessor utility under North Carolina's Territorial Assignment Act. DEP is obligated to generate and provide 100% of the electricity required to serve Fort Bragg, and has been providing electric service to meet Fort Bragg's electric needs for over a century. To provide this service, DEP transmits electricity to six DEP transmission substations and four distribution-to-distribution deliveries located at the edge of Fort Bragg to its customer—the Fort Bragg Department of Public Works ("Fort Bragg DPW"). The electricity is then distributed throughout the base by Sandhills Utility Services, LLC ("Sandhills Utility"), which owns the federally-regulated, privatized distribution system within Fort Bragg.

According to the Petition, Sunstone plans to construct a combination of ground mount and rooftop solar facilities that will generate up to 25 megawatts ("MW") of electricity ("Proposed Project").[2] The approximately 27,000,000 kWh of electricity that could be generated annually by the planned solar generating facilities constitutes approximately 8.75% of Fort Bragg's estimated annual electricity demand and would partially meet the electricity needs of BCL and, indirectly, DEP's retail customer, Fort

[1] *See* Petition at ¶ 22 (citing N.C. Gen. Stat. § 104-7).
[2] Petition at ¶ 2; Exhibit 1 to DEP Initial Comments.

Bragg DPW.[3] Sunstone is purportedly "seeking to enter into an energy services agreement to provide solar energy and energy efficiency services exclusively to on-base, privatized military housing at Fort Bragg that is owned and managed by BCL."[4] Under this potential arrangement, Sunstone represents that it would "furnish energy and energy efficiency services to BCL (customer) . . . [which] services would include production of solar energy on base, and delivery exclusively to on-base military housing."[5]

The Petition explains that the operation of, and business relationships between Sunstone and BCL, two private unregulated entities, will follow prudent industry practices and suggests that the prospective energy services agreement between Sunstone and BCL will allow Sunstone to furnish and sell partial requirements electric service to BCL.[6] In response to the Commission's October 20, 2021 *Order Scheduling Oral Argument, Allowing Argument, and Requiring Responses to Commission Questions* ("October 20 Order Scheduling Argument and Requiring Verified Responses"), Sunstone provided a sample form of solar energy services contract pursuant to which Sunstone would generate and deliver solar energy and BCL would compensate Sunstone for the metered electric output of the proposed solar energy facility.[7] Sunstone also clarified that the ground-mounted solar comprising approximately 20 MW of capacity will not be interconnected directly to BCL's on-base housing load. Power will be delivered onto Sandhills Utility's on-base distribution system such that power generated by Sunstone will be consumed by the Army facilities and operations within Fort Bragg. However, Sunstone explains that bi-

[3] Petition at ¶¶ 11-12.
[4] Petition at ¶ 2.
[5] Petition at ¶ 7.
[6] Petition at ¶ 7.
[7] Sunstone Energy Development LLC's and Duke Energy Progress, LLC's Verified Responses to Commission Questions, at 2, Confidential Exhibit 1.

directional metering will be used to measure the electricity delivered by Sunstone to Fort Bragg DPW and such power will be credited against BCL's usage under a yet-to-be-developed amended Municipal Services Agreement ("MSA") with the Army.

In sum, the Petition seeks for the Commission to issue a declaratory ruling that Sunstone's proposed arrangement to enter into a contract to sell and deliver electricity directly to BCL and indirectly within Fort Bragg for compensation will not subject Sunstone to regulation as a public utility under the State's Public Utilities Act and will not violate DEP's exclusive franchise rights to provide retail electric service to the Army within Fort Bragg.

I. Procedural History of Proceeding

On December 9, 2020, Sunstone filed its corrected Petition for Declaratory Judgement under North Carolina's Declaratory Judgement Act.

On January 12, 2021, the Commission issued its Order Requesting Comments.

On January 13, 2021, DEP filed a Petition to Intervene, which was granted by the Commission on January 21, 2021.

On February 5, 2021, DEP filed a Motion for Extension of Time to file comments, which was granted by the Commission on February 9, 2021.

On February 25, 2021, DEP filed its Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgment Act ("Motion to Dismiss"), arguing that Sunstone's Petition does not present a justiciable current case or controversy and, instead, seeks an impermissible advisory opinion from the Commission.

On February 26, 2021, the Public Staff filed a letter stating that it reviewed Sunstone's Petition and did not intend to file comments at this time.

On March 12, 2021, Sunstone filed a Response to Motion to Dismiss of DEP, arguing that it has indeed met the jurisdiction requirements under the North Carolina Declaratory Judgment Act.

On May 4, 2021, the Commission issued its Order Denying Motion to Dismiss and required parties to file comments addressing the issues raised in Sunstone's Petition by June 8, 2021.

On June 8, 2021, DEP filed its Initial Comments ("Initial Comments"). On the same date, the Public Staff filed a letter stating that it did not intend to file comments in this proceeding.

On July 20, 2021, Sunstone filed its Reply Comments ("Reply Comments").

On October 20, 2021, the Commission issued its Order Scheduling Argument and Requiring Verified Responses.

On November 9, 2021, DEP and Sunstone jointly filed their Responses to Commission's Questions.

On November 15, 2021, DEP filed its Pre-Argument Brief and Request for Reconsideration of the Commission's Order Denying Motion to Dismiss and Sunstone filed its Pre-Hearing Brief.

On November 29, 2021, oral arguments were held at the Commission.

On February 7, 2022, the parties each filed post-hearing briefs and proposed orders as requested by the Commission.

II. Summary of Petition and Parties' Comments

A. Sunstone's Petition

Sunstone's Petition explains that in conjunction with the Proposed Project, it is seeking to enter into an energy services agreement with BCL to provide both solar energy as well as energy efficiency services to BCL. Sunstone explains the military personnel living at BCL can elect to have their basic allowance for housing from the United States Treasury Department sent directly to BCL to cover basic rent and utility obligations, such as electricity costs.[8] The Petition states that pursuant to 10 U.S.C. § 2872a, the Army may "furnish utilities and services, including electric power, to military housing located on a military installation" and at Fort Bragg, the Army has entered into an MSA with BCL to provide these services for military personnel living on-base.[9] The Petition also claims that under the MSA, BCL can negotiate with private providers for utility services.[10] The Petition acknowledges that DEP is the primary supplier of electricity to Fort Bragg and that once it reaches the substations at Fort Bragg's border, the electricity is distributed throughout the base by Sandhills Utility.[11] The Petition states that neither BCL, nor any service member living on-base at BCL housing, is a customer of DEP as Fort Bragg DPW contracts with DEP and BCL contracts with Fort Bragg DPW.[12]

Sunstone estimates that 25% of the total energy consumption at Fort Bragg is from the on-base housing and the Proposed Project is anticipated to reduce the on-base housing electric demand by 35%, resulting in a total decrease in Fort Bragg DPW's demand of

[8] Petition at ¶ 4.
[9] Petition at ¶ 6.
[10] Petition at ¶ 6.
[11] Petition at ¶ 8.
[12] Petition at ¶ 9.

8.75% from DEP.[13] The Petition states that the planned solar generating facilities comprising the Proposed Project could generate 27,000,000 kWh of electricity annually that would partially meet the electricity needs of BCL and, indirectly, DEP's retail customer, Fort Bragg DPW.[14] The Petition claims that all of the solar energy and energy efficiency benefits to BCL would occur "behind the meter" between Sandhills Utility's system and DEP's system and there would be "no back feed" beyond the Sandhills Utility distribution system.[15]

The Petition describes the Army approval in 2015 for Sunstone and BCL's affiliate company, Corvias, to develop and execute a renewable energy portfolio solar project at seven Army installations located in six states. Sunstone claims that this portfolio of solar energy projects is consistent with United States Department of Defense ("Department of Defense") energy policy.[16] The Petition also highlights the floating solar energy project being developed by DEP on behalf of the Army at Camp Mackall as another similar example of an on-base solar energy project furthering the Department of Defense's energy policies and objectives.[17]

The Petition also presents a legal analysis of the exclusive federal jurisdiction in federal enclaves under the U.S. Constitution Article I, § 8, clause 17, and the three limited exceptions to this exclusive jurisdiction.[18] The Petition argues that none of these exceptions apply in this proceeding and, therefore, the North Carolina Public Utilities Act does not apply to Sunstone nor its Proposed Project.[19] Particularly relevant here, the Petition

[13] Petition at ¶¶ 10-12.
[14] Petition at 5.
[15] Petition at ¶ 13.
[16] Petition at ¶¶ 14-17, 37.
[17] Petition at ¶¶ 18 and 36.
[18] Petition at ¶¶ 20-25.
[19] Petition at ¶ 21.

analyzes the third exception to exclusive federal jurisdiction in an enclave: when Congress has given "clear and unambiguous" authorization for state regulation over the "generation, purchase and/or sale of electricity" in federal enclaves.[20] Specifically, the Petition argues that "clear and unambiguous" authorization is a high standard and points to case law it purports evidences this high standard where courts have determined there was no "clear and unambiguous" authorization in other context of environmental and workers' compensation rules.[21] The Petition then acknowledges that a federal appropriations statute, now codified at 40 U.S.C. § 591, requires a federal agency to "follow applicable state laws when purchasing electricity with congressionally appropriated funds, but argues that in this instance, the Army is not purchasing electricity with federally appropriated funds.[22]

Sunstone cites to *West River Elec. Ass'n, Inc. v. Black Hills Power and Light Co.* and explains in the petition that Section 591 was intended to "protect against utility abandonment by [ ] federal customers" and only applies to "federal departments, agencies or instrumentalities," and that BCL does not fall into any of those categories because it is an "eligible entity" under 10 U.S.C. § 2871(5).[23] 918 F.2d 713, 719 (8th Cir. 1990) ("*West River*"). The Petition also argues that the Proposed Project would not result in an "abandonment" of DEP but instead would only slim the demand profile of BCL's load.[24]

B. DEP Initial Comments

In its June 8, 2021 Initial Comments, DEP argued that the Commission should find and declare that Commission regulation would apply to Sunstone's proposed arrangement

[20] Petition at ¶ 26, citing *Hancock v. Train*, 426 U.S. 167, 179 (1976).
[21] *See* Petition at ¶¶ 27-29, citing *id.*; *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).
[22] Petition at ¶¶ 30-31.
[23] Petition at ¶¶ 32-34.
[24] Petition at ¶ 35.

for the generation and sale of electricity to BCL and government end-users within Fort Bragg.[25] DEP argued that the Commission has jurisdiction over the Proposed Project and should find that the Proposed Project constitutes unlawful public utility activity primarily because (1) the Proposed Project seeks to engage in unregulated retail sales of electricity that this Commission and the Supreme Court of North Carolina have found violates the exclusive franchise rights of DEP and (2) Congress has provided clear and unambiguous consent to state regulation of electricity purchases at Fort Bragg as evidenced by case law and Department of Defense guidance.[26] DEP argued that the fact that the Proposed Project involves private parties within a federal enclave should not afford those private parties greater rights than the federal government.[27]

DEP also argued that the Proposed Project would constitute *de facto* public utility services that violates DEP's exclusivity rights to serve Fort Bragg. DEP stated that the Petition does not cite to North Carolina state court or Commission precedent that arrives at the same legal conclusion Petitioners are essentially asking the Commission to declare: that an unregulated independent power producer generating electricity and then selling that electricity to a third party within a federal enclave is not subject to regulation under North Carolina's Public Utility Act nor is it impeded by state law that assigns exclusive franchise rights to particular electric utilities.[28] DEP asserted that the Proposed Project runs directly counter to recent holdings by North Carolina courts and this Commission that third-party sales of this nature are prohibited. The recent North Carolina Court of Appeals decisions in *NC WARN* highlighted the State's important policy with respect to the regulation of

[25] DEP Initial Comments at 1.
[26] DEP Initial Comments at 6.
[27] DEP Initial Comments at 20-23.
[28] DEP Initial Comments at 6-7.

electric utilities providing service to the public in North Carolina by acknowledging the broader policy implications of organizations like NC WARN encroaching on DEP's exclusive franchise rights: "if [NC WARN] were allowed to generate and sell electricity to cherry-picked non-profit organizations throughout the area or state, that activity stands to upset the balance of the marketplace." *State ex rel. Utils. Comm'n v. NC WARN*, 255 N.C. App. 613, 619 (2017), *aff'd per curium* 371 N.C. 109 (2018) ("NC WARN").[29] The North Carolina General Assembly has also taken action since the Court's *NC WARN* decision in order to reinforce electric public utilities' exclusive franchised service rights and North Carolina's well-established ban on third-party sales of electricity. *See* N.C. Gen. Stat. § 62-126.5(c).[30]

Based on North Carolina law and the State's regulatory framework designed to promote the inherent advantage of regulated public utilities in the interest of the public, DEP urged the Commission to assert jurisdiction over the Proposed Project with respect to electricity sales and find that the Proposed Project violates DEP's exclusive franchise rights.

DEP also argued that Congress has provided clear and unambiguous consent to state regulation of electricity at Fort Bragg. Specifically, DEP stated that the relevant federal statutes and regulations evidence Congress' waiver of sovereign immunity with respect to state law governing purchases of the electric commodity by the Department of Defense. DEP argued that the plain meaning of 40 U.S.C. § 591—the federal statute at issue in this proceeding—leaves little room for multiple interpretations and that Congress has determined that the federal government must comply with state law regarding the retail

[29] DEP Initial Comments at 8-9.
[30] DEP Initial Comments at 9.

sale and purchase of the electric commodity.[31] Specifically important here, DEP explains that Section 591 requires the federal government to comply with electric utility franchises and assigned service territories in obtaining electricity. Moreover, the Federal Acquisition Regulations forbid the Department of Defense from purchasing electricity in any manner inconsistent with state law governing electric utility service and require the Department of Defense to "consult with the state agency" responsible for regulating public utilities to ensure the Department of Defense's electricity purchases are not inconsistent with state law. *See* 48 C.F.R. §§ 41.201(d)(1) & (e).[32]

DEP also pointed to case law and Department of Defense guidance that provides further support for the argument that Congress has provided clear and unambiguous consent to state regulation of electricity purchases and argued that the case law relied on by the Petitioners was outdated and not aligned with current Department of Defense policy and case law. Specifically, DEP explains that *West River* is not controlling law in North Carolina, and is only outdated authority.[33] Instead, DEP cites to *Baltimore Gas & Elec. Co. v. United States*, a March 2001 decision by the U.S. District Court for the District of Maryland which distinguished between the provision of the electric commodity and the privatization of a federal enclave's distribution system, and found that with respect to the former, federal law waived exclusive jurisdiction through Section 591. 133 F. Supp. 2d 711 (D. Md. 2001) (*"BG&E"*).[34] DEP notes that the *BG&E* Court found that Section 591 codifies the rule that "federal statutory provisions and regulations require that the Army must follow state law and regulations, including utilities regulations and franchise

[31] DEP Initial Comments at 11-12.
[32] DEP Initial Comments at 13.
[33] DEP Initial Comments at 17.
[34] DEP Initial Comments at 15-16.

agreements, in its purchase of the commodity electricity." *Id.* at 739. DEP also explains that a 2000 Department of Defense General Counsel's opinion, which concluded that Section 591 "waives the sovereign immunity of the United States with the respect to the acquisition of the electricity commodity" was persuasive in the Court's decision.[35]

DEP also countered Sunstone's contention that even if Section 591 waives exclusive jurisdiction with respect to electricity sales to the federal government, Section 591 does not apply to private entities such as Sunstone and BCL operating within a Federal enclave. DEP argued that such an outcome is an absurd result and inconsistent with case law, explaining that it is inconceivable that Congress would have intended to allow a contractor to the federal government to take actions within a federal enclave that Congress determined the federal government itself cannot.

C. Sunstone Reply Comments

In Sunstone's Reply Comments, Sunstone argued for a more narrow framing of Section 591 than DEP and stated that Section 591 only allows state regulation of purchases of electricity by the federal government using federally appropriated funds. Sunstone argued that DEP's comments and the language of Section 591 do not support a waiver to allow state regulation inside a federal enclave of the construction, maintenance, and operation of an energy-producing facility that a state commission may regulate outside a federal enclave.[36] Sunstone stated that there is only one question presented by the relevant exception to the federal enclave doctrine DEP raises—that Section 591 is a "clear and unambiguous" waiver of exclusive federal jurisdiction: "[d]oes the proposed provision of electricity by Sunstone to [BCL] within the Fort Bragg enclave constitute a purchase of

[35] DEP Initial Comments at 16.
[36] Sunstone Reply Comments at 3.

electricity by the federal government using federally appropriated funds?" Sunstone contends that the answer to this question is "no" and points to case law, its interpretation of Section 591, and federal policy regarding enclaves to support its position.

Sunstone argues that DEP's comments attempt to recharacterize projects under the Army's Solar Portfolio as a purchase of the electricity commodity by the federal government in order for Section 591 to apply.[37] Sunstone argues that this characterization is inaccurate because BCL is not a federal department, agency, or instrumentality that is subject to Section 591 and the Proposed Project is not a purchase of electricity by the federal government with appropriated funds.

Sunstone also challenges the applicability of DEP's policy arguments relating to the Public Utilities Act's prohibition on unregulated third-party sales of electricity, arguing that the 8.75% of Fort Bragg's annual load that would be served by the Proposed Project does not constitute "abandonment of an existing supplier," which is what Section 591 is designed to protect again.[38] Instead, Sunstone argues that the "abandonment" argument advanced by DEP is inaccurate because the Fort Bragg DPW would still acquire more than 90% of its electricity from DEP and that does not constitute "abandonment". Sunstone argued that the requests in its Petition would not, in any way, violate or infringe upon DEP's territory or exclusive right to provide energy at Fort Bragg's metered delivery point as the sale and delivery of electricity at that meter will still be exclusively by DEP.[39]

[37] Sunstone Reply Comments at 13.
[38] Sunstone Reply Comments at 16-17.
[39] Sunstone Reply Comments at 17-18.

D. DEP's Request for Reconsideration of Motion to Dismiss

On September 7, 2021, after the parties had filed comments and reply comments in this proceeding, the North Carolina Court of Appeals ("Court of Appeals") issued a decision in *State ex rel. Utils. Comm'n v. Cube Yadkin Generation LLC*. No. COA20-46, 2021 N.C. App. LEXIS 479 ("*Cube Yadkin*"). 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 North Carolina Declaratory Judgment Act ("Declaratory Judgment Act").

As a result of the decision, the Commission issued an order on October 20, 2021, scheduling oral arguments and allowing for the filing of pre-argument briefs limited to the issue of whether and, if so, how the *Cube Yadkin* decision impacts the jurisdictional question previously decided by the Commission's May 4, 2021 Order Denying Motion to Dismiss.

On November 15, 2021, DEP filed its Pre-Argument Brief and Request for Reconsideration and Sunstone filed its Pre-Argument Brief. DEP argued in its Brief that the Court of Appeals reiterated the longstanding precedent that confirmed courts lack jurisdiction to consider requests for declaratory judgment in the absence of an "unavoidable" dispute. *Cube Yadkin*, at 7. In particular, DEP noted that 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."[40] *Cube Yadkin*, at 6 (quoting *State ex rel. Utilities Comm'n v. Carolina Water Serv., Inc. of N.C.*,

[40] DEP Pre-Argument Brief at 3.

149 N.C. App. 656, 657–58, 562 S.E.2d 60, 62 (2002)). DEP also noted that 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 "ask[ed] 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, DEP argued, the Court of Appeals explained that litigation is not unavoidable where an impediment exists and must be removed before litigation may occur. DEP highlighted that the Court of Appeals placed significant weight on the prospective and non-binding nature of Cube's business plan, as 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)).

Applying the facts in *Cube Yadkin* to the present case, DEP argued that, like the petitioner in *Cube Yadkin*, Sunstone is not in a realized adversarial position and has therefore not presented a justiciable case or controversy.[41] DEP stated that the facts at issue in this proceeding are directly analogous to those presented by *Cube Yadkin* where the Court of Appeals found that the facts present an insufficient basis to confer jurisdiction on any court to issue a declaratory judgment. DEP analogized that Sunstone's Proposed Project, like Cube's, remains hypothetical in nature, and Sunstone is under no legal

[41] DEP Pre-Argument Brief at 6.

obligation to pursue it given that Sunstone has yet to enter into any binding contracts necessitating the project's development.[42]

In addition, DEP explained that there are several impediments to Sunstone's development of the 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 MSA that governs the provision of utility services between Fort Bragg DPW and BCL. DEP argued that the absence of any legal obligation to proceed with the Proposed Project, and given the significant obstacles requiring resolution, the controversy Sunstone has asked the Commission to consider is, like *Cube Yadkin*, far from "unavoidable," and Sunstone has nothing binding it to move forward on the Proposed Project.

DEP also highlighted the preliminary nature of the Proposed Project and that Sunstone has no legal obligation to pursue the project because it has no contractual rights or obligations related to the Proposed Project. DEP argued that, in short, "Sunstone only has prospective plans to construct a yet-to-be-designed solar project and does not have a timeline for development 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]) to construct this potential generating facility."[43]

Sunstone, on the other hand, argued in its pre-hearing brief that its Proposed Project is different than the project in *Cube Yadkin* because there is an active controversy between Sunstone and DEP. Sunstone argued that a primary factor in the *Cube Yadkin* analysis concluding there was no "active controversy" was the Court's observation that Cube did

[42] DEP Pre-Argument Brief at 6.
[43] DEP Pre-Argument Brief at 7-8.

not own or have an interest in the land it proposed to develop.[44] Sunstone points out that the Court of Appeals noted that Cube "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." *Cube Yadkin*, at 3. Sunstone distinguished the current case, however, by noting that Fort Bragg is a federal enclave in which Congress has exclusive legislative jurisdiction with the consent of the State of North Carolina and pointed out BCL's current Ground Lease with the United States that includes the areas where the Proposed Project will be sited and generate electricity. Sunstone argued that the Court of Appeals' decision in *Cube Yadkin* was influenced by the fact that Cube lacked an ownership or leasehold interest in the proposed project site, whereas here the Proposed Project is part of an Army-approved solar portfolio that is ongoing, and already has resulted in installation of solar energy capability at other federal government installations in other States.

Sunstone also argues that here, unlike in *Cube Yadkin*, litigation is unavoidable.[45] Sunstone explained that Sunstone and DEP have a clearly delineated legal debate about whether North Carolina utilities law has any application to the Proposed Project. Sunstone explained that it initiated discussions with DEP in advance of commencing work on the Proposed Project to explain its plans and seek DEP's cooperation and that DEP informed Sunstone that because DEP believed there was no affirmative authority that a private power generator in a federal enclave is not subject to State utilities law, DEP would oppose Sunstone's request for a declaratory ruling from the Commission.[46]

[44] Sunstone Pre-Hearing Brief at 2-3.
[45] Sunstone Pre-Hearing Brief at 7-9.
[46] Sunstone Pre-Hearing Brief at 4-5.

E. Commission Questions Regarding Issues Presented for Declaratory Ruling

In its October 20 Order Scheduling Argument and Requiring Verified Responses, the Commission also directed the parties to file verified, written responses to six questions related to the development of the Proposed Project and relationships between the Proposed Project, BCL, Fort Bragg DPW, and DEP ("Commission Questions").

Sunstone responded to five of the Commission Questions. In response to the Commission's first question regarding contractual and developmental status of the project, Sunstone discussed its development of other projects in other jurisdictions and responded that the only change in circumstance from Sunstone's last filing in this docket is its plan to enter a Fort Bragg-specific Letter of Intent with BCL affirming its intention to execute the Proposed Project.[47] In response to the second Commission question regarding "executed obligations, service agreements, leases, or contracts" related to the Proposed Project, Sunstone summarized the contracts between BCL and the Army that existed prior to the development of the Proposed Project, such as the Ground Lease, the MSA, and 2016 Army memorandum recommending approval to develop a solar project at military housing at Fort Bragg.[48] Sunstone also noted, however, that a required, separate Major Decision approval from the Army for the Proposed Project has not yet been issued.

Commission Questions 5 and 6 focused on the electricity flow from the Proposed Project and how the generation from the Proposed Project will be accounted for. In response to Commission Question 5, where the Commission asked for details on the bi-directional metering Sunstone intends to use to measure power generated by the Proposed

[47] Commission Questions at 2.
[48] Commission Questions at 3-4.

Project and how excess generation is treated, Sunstone responded that it intends for bi-directional meter to be used to meter the generation within the monthly billing cycle and then BCL, Sunstone, or an assigned party will send a monthly report to Fort Bragg DPW. Then, the generation will be credited on the monthly bill from Fort Bragg DPW to BCL, reducing the consumption charged to BCL based on the electricity generated by the Proposed Project.[49] Sunstone also stated that it does not anticipate a circumstance in which the amount to be credited by Fort Bragg DPW would exceed BCL's monthly usage and notes that in rare cases the generation will be curtailed within the monthly billing cycle to ensure there is no overgeneration.[50] Finally, in response to Commission Question 6 regarding potential back feed from the Proposed Project onto DEP's system, Sunstone stated that the Proposed Project "will be designed and sized to prevent back feed" and that Sunstone will work with Sandhills Utility to perform a System Impact Study and address through project design potential back feed issues.[51]

DEP also responded to Commission Questions 3 and 5 explaining DEP's customer relationship with Fort Bragg DPW and also explaining that based on historical metering data, "the proposed ground mount facility could potentially feedback on the [DEP] system."[52] DEP highlighted instances in 2020 where the estimated generation from the Proposed Project could exceed the demand at certain Fort Bragg delivery points which would result in back feed onto DEP's system and require protection devices.[53]

[49] Commission Questions at 6-7.
[50] Commission Questions at 7.
[51] Commission Questions at 8-9.
[52] Commission Questions at 9.
[53] Commission Questions at 9-10.

III. Discussion and Conclusions

A. Order of Analysis

Sunstone has presented its Petition to the Commission under the Declaratory Judgment Act. N.C. Gen. Stat. § 1-253 *et seq.* The Declaratory Judgement Act provides "[c]ourts of record within their respective jurisdictions the power to declare rights, status, and other legal relations . . . and such declarations shall have the force and effect of a final judgment or decree." 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."). This includes the power to issue declaratory judgments where the petitioner and the subject matter of the declaratory relief requested are properly before the Commission—meaning that they arise within the limited scope of the Commission's authority to act in a judicial capacity for the purpose of adjudicating issues under state and federal law that relate 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; *see also 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").

In this Order, the Commission is tasked with declaring Sunstone's rights and/or status as they relate to the Proposed Project under both state and federal law. The Commission approaches its analysis by first addressing the state law questions before it: (1) whether Sunstone's Petition presents a justiciable case or controversy ripe for the Commission's consideration; and, if so (2) whether Sunstone's proposed activities at Fort Bragg would otherwise render it a "public utility" under the North Carolina Public Utilities Act. By first addressing state law questions grounded in the Public Utilities Act—about which the Commission has considerable expertise and clear authority to determine its jurisdiction and regulatory authority—the Commission seeks to avoid unnecessarily adjudicating complex federal statutory and/or constitutional questions. Indeed, the Commission has a *duty* to consider state (and federal) law questions before reaching any question implicating the United States Constitution. 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, 581, 78 S.Ct. 433 (1958).

Sunstone's Petition asks the Commission to answer three distinct but related questions. Answering the questions in the order presented by Sunstone would necessarily require the Commission to initially engage with the more complex federal law and constitutional questions presented by the Petition based on the location of Sunstone's Proposed Project within the Fort Bragg federal enclave. The Commission does not find this to be the appropriate order of analysis to be undertaken here. Instead, the Commission will answer the state law questions at issue relating to the justiciability of the Petition and whether Sunstone's proposal will cause it to be considered a public utility under N.C. Gen.

Stat. § 62-3(23) (Petition Request for Declaratory Relief #3) before addressing the federal law questions raised by Sunstone's Petition (Petition Request for Declaratory Relief #1 and 2).

B. Justiciability of Sunstone's Petition Under the Declaratory Judgment Act

Petitioners seeking 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." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 586, 347 S.E.2d 25, 30 (1986); *see also Town of Pine Knoll Shores v. Carolina Water Serv.*, 128 N.C. App. 321, 321, 494 S.E.2d 618, 618 (1998) ("actual controversy between the parties must exist at the time the complaint is filed in order for the court to have jurisdiction to render a declaratory judgment"); *Ludlum v. State*, 227, N.C. App. 92, 94, 742 S.E.2d 580, 582 (2013) ("jurisdiction under the Declaratory Judgment Act may be invoked only in a case in which there is an actual or real existing controversy between parties"). Indeed, North Carolina courts have long recognized that "[t]he Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Sharpe,* 317 N.C. at 584, 347 S.E.2d at 29 (citing *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949)). Courts have also made clear that the 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). In order to "satisfy the jurisdictional requirement of an actual controversy, it is necessary that the litigation appear unavoidable. Mere apprehension or the mere threat of an action or a

suit is not enough." *Id.*, 317 N.C. at 589, 347 S.E.2d at 32 (citing *Gaston Bd. Of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

In its recent *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. 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." *Id.*, 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)). The Court of Appeals went on to make clear that "[t]o satisfy the jurisdictional requirement 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).

As discussed earlier in this Order, the Commission denied DEP's original Motion to Dismiss, finding that Sunstone's Petition presented a justiciable case or controversy under the Declaratory Judgment Act. However, the Commission has authority to amend, alter, or rescind its Orders under N.C. Gen. Stat. § 62-80 "due to a change of circumstances requiring it for the public interest" *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), and its well within the Commission's purview to reconsider a prior determination that it has jurisdiction at the time of issuing a

final order to address issues presented to the Commission for declaratory ruling. *State ex rel. Utilities Comm'n v. Mountain Elec. Coop.*, 108 N.C. App. 283, 423 S.E.2d 516 (1992). Here, the Commission's denial of DEP's Motion to Dismiss was based in part on its prior determination that the Petitioner in *Cube Yadkin*, which involved similar circumstances, had presented a justiciable controversy ripe for the Commission's decision.[54] Four months after denying DEP's Motion to Dismiss, however, the Court of Appeals vacated the Commission's decision in *Cube Yadkin*, finding that the Petitioner *had not* presented a justiciable controversy sufficient to confer jurisdiction on the Court or Commission to consider the questions the Petitioner posed.[55] Given the Commission's reliance on its now-vacated *Cube Yadkin* decision in denying DEP's Motion to Dismiss, the Commission finds that this "change in circumstance" renders it in the public interest to reconsider the Order Denying Motion to Dismiss as requested by DEP.

Considering DEP's Request for Reconsideration, the Court of Appeals' recent vacating of the Commission's decision in *Cube Yadkin* and corresponding authority, along with the parties' pre-argument briefs and the entire record, the Commission now determines that Sunstone has not presented a case or controversy that is ripe for a determination under the Declaratory Judgment Act and hereby grants DEP's renewed Motion to Dismiss Sunstone's Petition. Upon further review of the record in this proceeding, the Commission finds that this result is consistent with the Court of Appeals' reasoning in *Cube Yadkin* and prior determinations of North Carolina courts considering analogous factual scenarios.

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[54] *See* Order Issuing Declaratory Ruling, *Petition for Declaratory Ruling by Cube Yadkin Generation, LLC*, No. M-100, Sub 152 (N.C.U.C. Sept. 4, 2019).

[55] *Cube Yadkin*, at 2 ("[W]e hold that Cube has failed to present a justiciable controversy and vacate the Commission's order.").

Here, the facts presented in the Petition and established through discovery demonstrate that Sunstone "has no present interest in the resolution of its question [and] effectively asks this Court to serve as its general counsel," advising whether its prospective plans to construct a yet-to-be-designed solar project that currently has no timeline for development "is a legal use of its time and resources." *Cube Yadkin*, at 8; *see also 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 "the alleged controversy . . . [is] based solely on proposed action") (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").

Sunstone has not obtained, or provided certainty that it can obtain, the necessary legal rights or approvals to begin construction nor has it entered into any contract for sale of power to any retail customer. In other words, the controversy alleged by Sunstone was at the time of its Petition and remains today hypothetical, prompted by the "mere apprehension" that a "proposed [future] action" it may take could create a question of law regarding its status as a public utility under North Carolina law and this Commission's ability to regulate Sunstone. The Commission thus determines that the Petition does not present an actual, currently existing legal controversy for the Commission's resolution and this Commission cannot issue advisory opinions as Sunstone requests here.

Particularly when viewed through the lens of the Court of Appeals' decision in *Cube Yadkin*, the Petition fails to demonstrate that Sunstone has taken any significant steps

to solidify its purported plans for developing the specific Proposed Project and create any actual controversy ripe for the Commission's decision. In *Cube Yadkin*, the petitioner 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 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). 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). The Court found Cube's presentation of "encouraging affirmations from potential tenants" insufficient. *Id.*

Similarly here, 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. Instead, Sunstone provides general details about its intentions to enter into an energy services arrangement in its Petition that it "may" enter into, at some point in the future, with its affiliate and requests that the Commission decide now that this potential future action can proceed without

Commission regulation. For the reasons discussed below, the Commission finds that Sunstone—like the petitioner in *Cube Yadkin*—has not articulated a justiciable case or controversy.

No Construction Details or Timeline. As DEP points out, the Petition does not provide details about the stage of construction of the project, whether it has acquired land or leasehold rights within Fort Bragg to site the solar facility(s), or other pertinent details for the Commission to adjudicate a current and actual controversy, as required by our Courts under the Declaratory Judgment Act. Through discovery obtained by DEP and subsequently filed with the Commission as well as in Sunstone's own responses to the Commission Questions, Sunstone admits that the Proposed Project remains largely hypothetical as there is no actual designed solar facility (or facilities) and there are no specific dates or milestones for developing the proposed solar generating facilities or providing electricity to BCL. It is the Commission's understanding based on the record that the Proposed Project has not yet undergone any interconnection studies to determine the potential impact of the Proposed Project on DEP's system. Further, the Commission understands that the preliminary Proposed Project will be delivering power beyond BCL's on-base housing onto Sandhills Utility's on-base distribution system and that such power will be consumed by the Army facilities and operations within Fort Bragg. Bi-directional metering will be used to measure the electricity delivered by Sunstone to Fort Bragg DPW and such power will be credited against BCL's usage under a to-be-developed amended MSA with the Army. Sunstone states that there are no agreements between Sunstone and Sandhills Utility addressing the "backfeed"—which Sunstone acknowledges will flow onto

Sandhills Utility's distribution network.[56] Sunstone provided additional clarity in its Response to Commission Questions when it explained that "generation will be credited on the monthly bill from Fort Bragg DPW to BCL, reducing the consumption charged to BCL."[57] Based upon this explanation, the Commission finds that the electricity generated by the ground mounted 20 MW portion of Proposed Project may very well all be consumed by Fort Bragg DPW elsewhere within Fort Bragg and then Fort Bragg DPW pays for that electricity from the Proposed Project via bill credit to BCL.

No Legal Obligation to Complete Proposed Project. The record also demonstrates that Sunstone is under no legal obligation to pursue the Proposed Project given that Sunstone has yet to enter into any contracts necessitating the project's development aside from a non-binding letter of intent ("LOI") between affiliates. Indeed, 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 since the Petition was filed. 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." Responses to Comment Questions, Question 1. On November 15, Sunstone filed with the Commission under seal a conditional LOI between Sunstone and BCL dated November 1, 2021, which **[BEGIN CONFIDENTIAL]**

[redacted]

[56] *See* DEP Initial Comments Exhibits 3 & 4.
[57] Response to Commission Questions at 7.
[58] Sunstone Energy Development, LLC Pre-Hearing Brief filed November 15, 2021, Confidential Exhibit 1, Appendix A.

[redacted] **[END CONFIDENTIAL]** 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, will 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.

Impediments to the Proposed Project Exist. In addition, as DEP makes clear, there exist numerous impediments to Sunstone's development of its Proposed Project that must be removed before litigation may occur. For example, BCL/Sunstone must obtain a Major Decision approval from the Army to proceed with the Proposed Project. The Army must also agree to amend the Ground Lease with BCL in order for Sunstone to proceed with the Proposed Project. And additionally, the Army must agree to amend the MSA and backstop BCL's energy needs in order for Sunstone to develop the Proposed Project. None of these critical path items have been accomplished and Sunstone has provided no timeline or

specific plans addressing when (and whether) it will be able to resolve them. 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 these 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.

In light of the extensive remaining uncertainty, the Commission is persuaded that the Proposed Project has not yet reached a significant point in development to present a current case or controversy for the Commission to decide. Like the Petitioner in *Cube Yadkin*, Sunstone has "no legal duties that demand it conduct acts in compliance which would unavoidably lead to litigation[.]" *Cube Yadkin*, at 11. As noted above, the Proposed Project has not been fully designed or studied from an interconnection standpoint such that Sunstone can identify any specific development milestones, and Sunstone lacks any contractual rights to either develop the Proposed Project or to sell power to any retail customer. The Commission also notes the existence of a number of impediments that would need to be removed for Sunstone to move forward with its Proposed Project.

Sunstone's position in its pre-argument brief that there is a controversy here is not persuasive given that Sunstone has yet to acquire any contractual rights or obligations related to the Proposed Project or otherwise fulfill the numerous pre-requisite steps in the development process necessary to begin generating and selling electricity that would implicate regulation by the Commission or potentially result in DEP filing suit to enjoin such action. *Town of Pine Knoll Shores*, 128 N.C. App. at 323, 494 S.E.2d at 619. Sunstone 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. The Commission finds that Sunstone's request is the type of "advisory opinion" that this Commission is not permitted to rule on. *Id.*, 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).

The Commission notes that, in addition to *Cube Yadkin*, courts that have considered similar fact patterns have routinely dismissed declaratory actions for failure to state an actual existing controversy and improperly seeking an advisory opinion. *See, e.g., Town of Pine Knoll Shores*, 128 N.C. App. 321, 494 S.E.2d 618 (vacating trial court's issuance of declaratory judgement as improper advisory opinion because controversy based solely on a proposed action); *Town of Ayden v. Town of Winterville*, 143 N.C. App. 136, 544 S.E.2d 821 (2001) (finding that a potential future expansion of a town is not enough to give rise to a justiciable controversy). *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 Fort Bragg federal enclave).

In sum, the Commission's authority to provide guidance through declaratory orders may appropriately be used where a petitioner presents the Commission an "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. Given the reasoning set forth by the Court of

Appeals in *Cube Yadkin*, as well as Sunstone's and DEP's respective responses to the Commission Questions and the subsequent briefing by the parties, the Commission has reconsidered its Order Denying Motion to Dismiss and now dismisses Sunstone's Petition for failure to allege a justiciable case or controversy under the Declaratory Judgment Act.

Because the Commission finds that no justiciable case or controversy exists, the three requests for declaratory relief posed by Sunstone are not ripe for the Commission's consideration. Accordingly, the Commission hereby dismisses Sunstone's Request for Declaratory Judgment without prejudice to refiling in the event an "actual controversy" arises.

[*In the event the Commission finds that the Court of Appeals' Cube Yadkin decision has no impact on its Dismissal Order and declines to dismiss Sunstone's Petition, the following analysis applies.*]

IV. Sunstone's Proposed Activities Under the North Carolina Public Utilities Act

As described in Section II.A. above, the Commission finds that the appropriate order of analysis of the issues presented by Sunstone's Petition is to address the third request for declaratory relief—that the Commission find Sunstone's proposed activities will not cause it to be considered a public utility under N.C. Gen. Stat. § 62-3(23)—first as it presents a question of state law, rather than federal law.

For the electric sector, the term "public utility" is defined in subsection a.1 of N.C. Gen. Stat. § 62-3(23), as follows:

> 'Public utility' means a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for ... (1) Producing, generating, transmitting, delivering or furnishing electricity,

> piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term "public utility" shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is for such person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.

Pertinent to the Commission's analysis in this proceeding is whether, as a matter of North Carolina law, Sunstone's Proposed Project and sale of the generated electricity from the Proposed Project to BCL would make Sunstone a "public utility" and constitute a third-party sale of electricity if the Commission finds that the Act applies within the Fort Bragg federal enclave.

The North Carolina Supreme Court has recently answered this question in a very similar scenario, affirming the Commission's determination (and the Court of Appeals' decision) that third-party sales of electricity constituted "public utility" action subject to Commission regulation and violates the franchised electric public utility's exclusive rights to provide regulated electric utility service within its assigned service territory. *See State ex rel. Utils. Comm'n v. NC WARN*, 255 N.C. App. 613, 619 (2017), *aff'd per curium* 371 N.C. 109 (2018) ("*NC WARN"*).

In *NC WARN*, the petitioner requested a declaratory judgment from the Commission that its proposed solar leasing arrangements where it would own solar panels and sell and deliver the power to a church for a lease payment would not cause it to be regarded as a "public utility" pursuant to the Act. The Court of Appeals affirmed the Commission's Order Issuing Declaratory Ruling, finding 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." Docket No. SP-100, Sub 31 (Apr. 15, 2016). The Court of Appeals found that this proposed arrangement would constitute public utility activity subject to regulation under the Public Utilities Act, as NC WARN proposed to "own[] and operate[] 'equipment and facilities' that provides electricity 'to or for the public for compensation.'" *NC WARN*, 255 N.C. App. at 616 (citing N.C. Gen. Stat. § 62-3(23)a).

The North Carolina General Assembly has also taken action since the North Carolina Supreme Court's *NC WARN* decision to reinforce electric public utilities' exclusive franchised service rights and North Carolina's well-established prohibition on third-party sales of electricity. Specifically, in enacting Article 6B of the Public Utilities Act, the Distributed Resources Access Act, N.C. Gen. Stat. § 62-126.1 *et seq.* the North Carolina General Assembly authorized limited, Commission-regulated, solar leasing in the State. However, the General Assembly also enacted N.C. Gen. Stat. § 62-126.5(c) which provides that:

> [a]ny lease of a solar energy facility not entered into pursuant to this section is prohibited and any electric generator lessor that enters into a lease outside of an offering utility's program implemented pursuant to this section or otherwise enters into a contract or agreement where payments are based upon the electric output of a solar energy facility shall be considered a "public utility" under G.S. 62-3(23) and be in violation of the franchised service rights of the offering utility or any other electric power supplier authorized to provide retail electric service in the State. This section does

> not authorize 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. The electrical output from any solar energy facility leased pursuant to this program shall be the sole and exclusive property of the customer generator lessee. (emphasis added).

Applying this statute to the facts presented by Sunstone's Petition, it is clear that Sunstone seeks to enter into a "contract or agreement where payments are based upon the electric output of a solar energy facility" and for its affiliate BCL (and indirectly Fort Bragg DPW) to compensate Sunstone for the electric output of solar energy facilities owned and operated by Sunstone at rates set by Sunstone and not subject to regulation by the Commission. The General Assembly has now made clear through N.C. Gen. Stat. § 62-126.5(c) that attempts to engage in such unregulated third-party sales of electricity are unlawful in North Carolina and violate the franchised service rights of the incumbent electric power supplier authorized to provide retail electric service by the Commission. Sunstone's proposal clearly presents the same type of proposed unregulated third-party sale of electricity determined to constitute public utility activity subject to regulation by the Commission and the Courts in *NC WARN* and now expressly prohibited by the plain language of N.C. Gen. Stat. § 62-126.5(c).

DEP "ha[s] been granted an exclusive right to provide electricity in return for compensation within [its] designated territory and with that right comes the obligation to serve all customers at rates and service requirements established by the Commission." *Id.* at 618. Sunstone, like NC WARN, "desires to serve customers of its own choosing within Duke Energy [Progress]'s territory at whatever rates and service requirements it sets for

itself without oversight." *Id.* In addition to selling power directly to BCL, Sunstone has admitted that BCL "will be credited" by the federal government (*i.e.,* Fort Bragg DPW) for the electricity generated by the Proposed Project that flows onto Sandhills' system.[59] DEP's responses to the Commission Questions further identifies that based upon the proposed size and location of the proposed ground mount facility, power could potentially backfeed on to the DEP system.[60]

The Commission finds that these activities cause Sunstone's proposed arrangement to constitute a proposed unlawful third-party sale of electricity subject to Commission regulation as a public utility because—like NC WARN—Sunstone is proposing to own or operate equipment and to sell electricity "to or for the public for compensation" when it provides electricity to BCL for consumption as well as indirectly under BCL's planned arrangement to furnish power to Fort Bragg.[61]

The Commission's determination is grounded in North Carolina's well-established regulatory policy objectives of promoting the inherent advantage of regulated public utilities to provide reliable electric service at just and reasonable rates authorized by the Commission, *see* N.C. Gen Stat. § 62-2(a)(2), as well as the legislature's purpose in assigning franchised service territories under the territorial assignment provisions of N.C. Gen. Stat. § 62-110.2. The Territorial Assignment Act provides DEP the "right to serve all premises located wholly within the service area assigned to it" in order to "avoid unnecessary duplication of electric facilities." *Id.* It is well established that "North Carolina law precludes retail electric competition and establishes regional monopolies on the sale of

[59] *See* Response to Commission Questions at 7.
[60] *See* Responses to Commission Questions at 9.
[61] *See* DEP Initial Comments Exhibits 4 and 5.

electricity based on the premise that the provision of electricity to the public is imperative and that competition within the marketplace results in duplication of investment, economic waste, inefficient service, and high rates." *NC WARN*, 255 N.C. App. at 617 (citing *State ex rel. Utils. Comm'n v. Carolina Tel. & Tel. Co.*, 267 N.C. 257, 271, 148 S.E.2d 100, 111 (1996)).

The Court of Appeals summarized the intent of this state policy concisely in the *NC WARN* case: "if [NC WARN] were allowed to generate and sell electricity to cherry-pick non-profit organizations throughout the area or state, that activity stands to upset the balance of the marketplace." *NC WARN*, 255 N.C. App. at 616. The Court's further discussion of North Carolina's policy objectives in *NC WARN* track closely to the policy issues presented in the Petition and considered by the Commission in a number of third-party sales cases dating back to National Spinning in 1996. *See Order Denying Petition for Declaratory Ruling*, Docket No. SP-100, Sub 7 (April 22, 1996) ("*National Spinning*"). In *National Spinning*, the Commission held that a proposal to allow an entity to sell steam for use in generating electricity would cause that entity to be a public utility subject to regulation by the Commission because the purchasing customer would be able to bypass the certificated utility that has a monopoly franchise for the area, similar to the bypassing Sunstone's Proposed Project would represent. This would allow unregulated electric suppliers to "cherry-pick" the electric utility's best customers, leaving the regulated utility with stranded investment and costs which would be shifted to other customers.

Issuing Sunstone's requested judgment could, assuming similar proposals arise to serve other federal customers or retail customers within federal enclaves, result in an unjust and unreasonable shifting of costs to other customers and, thereby, thwart the provision of

adequate, reliable and economic utility service, and constrain continued service of electric public utilities in North Carolina on a well-planned and coordinated basis.

Similar to the important policy considerations articulated in *NC WARN* and *National Spinning*, allowing Sunstone to generate and sell partial requirements electricity to BCL and, indirectly, to other customers within Fort Bragg while being backstopped for reliability by DEP's utility system would shift costs to DEP's other customers. The Commission has historically been careful not to authorize a person "not otherwise a public utility" to directly or indirectly bypass the incumbent electric utility and to furnish electric service directly to retail customers (versus selling power at wholesale) without finding that such activity constitutes public utility activity subjecting the provider to regulation.

The Commission also briefly addresses Sunstone's argument that its proposed third-party sales proposal is consistent with the proposed floating solar energy facility being developed by DEP for the Army at Camp Mackall. In its Petition and again in Reply Comments, Sunstone highlights that the Army has recently contracted with DEP and an alternative energy developer, Ameresco, to construct a floating solar energy facility at Camp Mackall, another federal enclave military installation in DEP's assigned service area in eastern North Carolina.[62] Sunstone states that the Army will own and operate the 1.1 MW solar facility upon completion to supplement power supplied from the grid and provide backup power during service outages. Sunstone then critiques DEP for not objecting to the Army owning and operating an on-base solar-generating facility that would reduce base energy usage from DEP while, at the same time, opposing Sunstone's proposed arrangement within Fort Bragg.[63]

[62] Sunstone Reply Comments at 18.
[63] Sunstone Reply Comments at 18.

Based upon the facts presented by Sunstone relating to the project under development at Camp Mackall, the Commission agrees with DEP that the facts presented by the Camp Mackall project to be owned and operated by the Army differs materially from the facts presented by Sunstone's Proposed Project at issue here. This is because the Army will own the generating facility and will use the facility to generate electricity to be consumed by the Army. While, as discussed above, Sunstone presents a third-party sales arrangement, the Camp Mackall project fits within the "self-generation" exemption from regulation under N.C. Gen Stat. § 62-3(23)(a)(1). Accordingly, based upon the limited facts presented to the Commission there seem to be important differences under North Carolina law between Sunstone's Proposed Project and the Army-owned Camp Mackall project that will be owned by the Army and is exempt from Commission regulation as a public utility under the Act. While BCL could have pursued a self-generation project that similarly would be exempt from Commission regulation, Sunstone's Proposed Project, and plans to generate and sell electricity directly to BCL and indirectly to the Fort Bragg DPW through the crediting mechanism constitutes public utility activity under North Carolina law for the reasons previously stated.

C. The Commission's Authority Within a Federal Enclave Under Section 591

Turning now to issues (1) and (2) presented for declaratory ruling in Sunstone's Petition, Sunstone asks the Commission to find that Fort Bragg is a federal enclave not subject to the North Carolina Public Utilities Act and that Sunstone's provision of electricity within the Fort Bragg federal enclave does not subject it to regulation the Public Utilities Act. These issues present questions of federal statutory law and require the

Commission to analyze the extent of its state regulatory authority under federal law and the federal enclave clause of the U.S. Constitution. To address the questions, the Commission specifically must determine whether 40 U.S.C. § 591 waives the federal government's exclusive jurisdiction with respect to regulation of purchases of the electric commodity in a federal enclave and, if it does, to what extent the North Carolina Public Utilities Act applies to the Proposed Project.

As an initial matter, the Commission notes that Sunstone's Petition does not cite to any North Carolina state court or Commission precedent that arrives at the same legal conclusion that Sunstone presents to the Commission for a declaratory ruling. In contrast, as identified by DEP and recognized in the Commission's earlier order denying DEP's Motion to Dismiss in this proceeding, the Commission has previously provided declaratory guidance that a provider of water and wastewater services at Fort Bragg, Pope Air Force Base, and Camp Mackall would fall within the definition of a public utility under N.C.G.S. § 62-3(23). *Order Denying Motion to Dismiss*, at 3, citing *Order on Petition for Declaratory Ruling and Application for Certificate for Public Convenience and Necessity*, Docket No. W-1279, Sub 0 (N.C.U.C. Mar. 18, 2008).

Sunstone's Petition and DEP's comments generally agree that Fort Bragg is a federal enclave which has been ceded by North Carolina to the federal government and that generally the federal government enjoys exclusive jurisdiction in a federal enclave under the U.S. Constitution and federal law. Because Sunstone's proposed activities clearly meet the definition of a public utility subject to regulation under state law, if such regulation extends within the federal enclave, the Commission must determine whether any exception

to the federal enclave doctrine authorizes Commission regulation of public utilities within the Fort Bragg enclave.

Article 1, Section 8, Clause 17 of the United States Constitution grants exclusive federal jurisdiction over federal enclave lands unless one of three exceptions exists: (1) a state law enacted before the cessation continues to apply; *see Koren v. Martine Marietta Servs.*, 997 F. Supp. 196, 202 (D. P.R. 1997); (2) a state retains jurisdiction in certain areas when the federal government purchases land from the state; *see, e.g.*, *State v. Smith*, 328 N.C. 161 (1991); and (3) when there is a "clear congressional mandate" authorizing state regulation. *Hancock*, 426 U.S. at 179; *see also West River*, 918 F.2d at 719 ("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."). Sunstone's Petition and DEP's Comments suggest that the first two exceptions are inapplicable to the facts here. Accordingly, the issue before the Commission is whether Congress has provided "clear and unambiguous" consent to state regulation with respect to the sale of the electric commodity. Specifically 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.

After analyzing the comments, briefing, and other documents in the record of this proceeding, the Commission is persuaded by DEP's argument that Section 591 provides such a "clear and unambiguous" waiver of exclusive federal jurisdiction in a federal enclave with respect to the purchase of the electric commodity within the federal enclave

such that the Commission should find that the Proposed Project is subject to the Public Utilities Act.

The United States Congress enacted Pub. L. 100-202 § 8093 in 1987 as part of the Department of Defense Appropriations Act of 1988, which provided 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, including … (2) electric utility franchises or service territories …" Congress later re-codified § 8093 at 40 U.S.C. § 591 in 2002. According to DEP, and not refuted by Sunstone, since Congress re-codified § 8093 as § 591 in 2002 there has been no indication that the Department of Defense has taken the position that the policy objectives of § 591 to ensure that the federal procurement of electricity adhere to state utility franchise law does not extend to all Department of Defense installations, including federal enclaves such as Fort Bragg. Indeed, DEP highlights that the Department of Defense regulations implementing this section also make this interpretation clear as the Federal Acquisition Regulations applicable to the Department of Defense state that the Department of Defense 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).

To ensure alignment with state regulatory frameworks for the provision of retail electric services, these Department of Defense regulations require the Department of

Defense's contracting officer to ensure federal procurement of electricity is "not inconsistent with state law governing the provision of electric utility service" based on advice of legal counsel, a market survey or by "consult[ing] 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." *Id.* at § 41.201(e).

In the present case, such consultation by the Department of Defense would result in a determination by the Commission that the Proposed Project does in fact violate North Carolina's regulatory framework governing the provision of electric utility service and would cause a violation of DEP's exclusive franchise. Taken together, and for reasons further discussed below, the Commission finds that Section 8093, the statute's re-recodification at § 591, and the Federal Acquisition Regulations provisions requiring Department of Defense to adhere to this statute in its procurement activities demonstrate Congress' intent to defer to state law and state-assigned franchises and territorial assignment rights with respect to purchases of electricity by the Department of Defense. This constitutes a waiver of exclusive federal jurisdiction as far as purchases of the electric commodity to provide service within the federal enclave are concerned.

After reviewing the limited case law presented by DEP and Sunstone, the Commission finds that the more recent cases cited by DEP, specifically *Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721, 737 (D. Md. 2001), *aff'd on other grounds*, 290 F.3d734 (4th Cir. 2002) ("*BG&E"*), supports DEP's assertion that Congress has

provided limited but sufficiently clear and unambiguous consent to state regulation of electricity purchases within federal enclaves, such as Fort Bragg, through Section 591 to ensure they comply with state law.

In *BG&E*, the federal district court for the district of Maryland addressed how Section 591 applies to the purchase of electricity by Fort Meade – an Army installation and federal enclave in Maryland – and distinguished between the provision of the electric commodity and the privatization of Fort Meade's electric distribution system. In *BG&E*, the incumbent utility seeking to own and operate the Army's distribution system within the Fort Meade federal enclave argued that the Department of Defense's competitive solicitation documents allowing unregulated bidders to compete for the privatization contract was improper because it failed to recognize that ownership of on-base distribution system was subject to state utilities law and its franchised service rights authorized by the Maryland Public Service Commission ("Maryland PSC"). BG&E argued it was the only entity authorized by Maryland law and the Maryland PSC to own and operate electric and gas distribution systems in the territory that includes Fort Meade. The U.S. Government Accounting Office ("GAO"), where BG&E initially appealed, rejected this argument. *Id.* at 729. The Maryland district court sided with the GAO and also found that the Maryland PSC was without jurisdiction to regulate the private company selected by the Army to operate the electric and natural gas distribution system at Fort Meade. *Id.* at 739.

With respect to the purchase of electricity, however, the court specifically noted that federal law waived exclusive jurisdiction in this limited area, thereby subjecting the federal government to state utility regulation within the Fort Meade federal enclave. *Id* at 738. Specifically, the *BG&E* court found that Section 591 codifies the rule that "federal

statutory provisions and regulations require that the Army must follow state law and regulations, including utilities regulations and franchise agreement, in its purchase of the commodity electricity." *Id.* The Commission finds this more recent determination by the Maryland federal district court provide persuasive support that Section 591 does indeed waive the federal government's exclusive jurisdiction in federal enclaves with respect to the purchase of the electric commodity.

The *BG&E* court was particularly persuaded by a memorandum dated February 24, 2000, issued by the General Counsel of the Department of Defense entitled "The Role of State Laws and Regulations in Utility Privatization" ("DOD General Counsel Opinion") in reaching its conclusion. The DOD General Counsel Opinion—which DEP has cited to extensively in this proceeding[64]—opined that Section 591 waives exclusive federal jurisdiction only with regard to the purchase of electricity. The DOD General Counsel Opinion specifically finds that Section 591 "waives the sovereign immunity of the United States with respect to the acquisition of the electricity commodity" and concludes that "[t]he Department must comply with state laws and regulations only when it is acquiring the electric commodity."[65] The DOD General Counsel Opinion further concludes that whether the DOD can purchase or obtain electricity from a generating facility is "dependent on state law":

> [a] plain reading of Section 8093's operative statutory language ("… to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service…") necessarily leads to the conclusion that the waiver of sovereign immunity in that section is limited to the

[64] *See, e.g.,* DEP Motion to Dismiss at 6; DEP Initial Comments at 16-17.
[65] *See* DEP Initial Comments Exhibit 7 at 4, 8-9.

purchase of the electric commodity (electric power) excluding distribution or transmission services. *Id.* at 5.

Citing to Section 591, and consistent with the DOD General Counsel Opinion, the Court in *BG&E* concluded that it was "clear that federal statutory provisions and regulations require that the Army must follow state law and regulations, including utilities regulations and franchise agreements, in its purchase of the commodity electricity." *See BG&E*, 133 F. Supp. 2d at 738.

The *BG&E* decision of the Maryland district court was subsequently affirmed by the United States Court of Appeals for the Fourth Circuit without questioning the district court's findings and discussion of the import of Section 591. *See Baltimore Gas & Elec. Co. v. United States*, 290 F.3d 734 (4th Cir. 2002).

Despite ample opportunity, Sunstone has not directed the Commission to more recent precedent from a federal court or more recent Department of Defense guidance on this issue. Therefore, the Commission is persuaded by DEP's argument that *BG&E* represents the most current interpretation of Section 591 that should inform the Commission's consideration of the issues raised by Sunstone's Petition.

The Commission acknowledges that Sunstone points the Commission to an earlier 1990 decision, *West River Elec. Ass'n, Inc. v. Black Hills Power & light Co.*, 918 F.2d 713 (8th Cir. 1990) ("*West River"*), issued by the Eighth Circuit Court of Appeals to support its argument. The Commission finds this case unpersuasive for the reasons cited in DEP's initial comments. First, the *West River* decision predates the *BG&E* decision, the DOD General Counsel Opinion, promulgation of the Federal Acquisition Regulation, and the re-codification of Section 8093 to Section 591, and, therefore, does not seem to represent the

most recent guidance from the courts or the published guidance by the Department of Defense on this issue. Second, the *West River* case is a split decision where the dissent's position appears to be more consistent with the more recent court decisions and Department of Defense guidance, suggesting that courts and the Department of Defense may have moved away from the majority's opinion.

The Commission also finds significant both the *West River* majority and dissenting opinions' discussion of Congress' legislative intent in enacting Section 8093. Specifically, the Commission's determination is informed by the *West River* opinion's significant discussion of Congress' policy objectives to "protect remaining customers of utility systems from having to pay the higher rates by reason of a loss of an existing customer." *Id.* at 718. In *West River*, the majority supported its determination that Section 8093 did not represent a clear and unambiguous specific congressional action authorizing state regulation by pointing to the legislative history of Section 8093 based on legislative history that the Section 591 "was intended to protect against utility abandonment by their federal customers" and in that case it was "undisputed that no abandonment is occurring." *Id.* at 719. The Eighth Circuit Court of Appeal's conclusion was informed by the lower district court's review of the legislative history and factual determination that federal enclave at issue, Ellsworth Air Force Base, was "not already a Black Hills' customer, and [so the district court] concluded that section 8093 was not intended to apply to Ellsworth." *Id.* at 717.

The dissenting opinion also acknowledged that the legislative history of Congress' enactment of Section 8093 related to concerns about "abandonment" of incumbent

suppliers by federal customers but also focused more broadly on the legislative history of Section 8093, explaining:

> Because the legislative history so strongly supports the appellant's arguments [that Section 8093 authorize state regulation], it is worth quoting at length:
>
> The Federal Power Act of 1935 divided regulatory responsibility over the provision of electric service between federal and state regulatory bodies, *specifically leaving retail rate and service regulation to the jurisdiction of the states* and asserting federal jurisdiction over wholesale rate and service regulation. This jurisdiction is vested now in the Federal Energy Regulatory Commission (FERC). *Proposals by federal executive agencies to purchase power competitively, without regard to the separation of state and federal regulatory authority or to the means by which states have divided responsibility for serving customers, is contrary to the regulatory framework Congress, and, derivatively, the states, have so carefully designed*. This provision restores the federal and state regulatory authority over electric utility rates and service.
>
> Generally, retail electric utility service is provided by suppliers authorized to serve within service territories. Authorization to provide service within these areas typically is derived through state law, either by statute or by delegation to a regulatory commission, or through delegation to a political subdivision of the state.
>
> Whether through a service territory, a franchise, a service-related permit, a certificate of public convenience and necessity, a territorial agreement, or other means, retail electric utility service usually is provided by one supplier within any given area. *This provision directs the federal government when procuring retail electric utility service, to abide by these service arrangements just like any other customer of an electric utility*.

Id. at 720-21 (Magill, dissenting) (citing H.R. Rep. No. 410, 100th Cong., 1st Sess. 277 (1987)) (emphasis added); *see also* S. Rep. No. 235, 100th Cong., 1st Sess. 70-72 (1987) (containing the same language and further expressing the primacy other state regulatory framework).

The Commission finds that this more extensive policy discussion from the dissenting opinion in *West River* significant. Congress' recognition of the roles of state and federal regulators and states' delegated responsibility and policy interests in regulating the

framework for the provision of reliable electric service within their borders are key considerations in determining the issues presented in this proceeding. Specifically at issue here, Section 591 requires the federal government to comply with state law regarding the procurement of the electric commodity and to abide by state law governing electric utility franchises or service territories. Accordingly, the Commission finds consistent with *BG&E* that Congress was sufficiently clear and unambiguous in enacting Section 8093 that it intended for the federal government to respect state regulatory authority and to "direct[] the federal government when procuring retail electric utility service, to abide by these service arrangements just like any other customer of an electric utility." H.R. Rep. No. 410, 100th Cong., 1st Sess. 277 (1987).

The Commission also notes that the facts at issue in *West River* are materially different than the facts at issue here because Fort Bragg DPW, including BCL's housing load within Fort Bragg, are currently a retail customer of DEP that would be "lost" in the sense that DEP's load at Fort Bragg would be reduced by 8.75% (27,000,000 kWh annually), if Sunstone were allowed to generate and sell electricity from the Proposed Project in competition with DEP. *See BG&E*, 133 F. Supp. 2d at 737 (explaining that the objective of Section 8093 is to "protect remaining customers of utility systems from having to pay the higher rates by reason of a loss of an existing customer."). DEP has planned and invested in its electricity generation and transmission/distribution infrastructure over decades based on its franchised rights to provide electric service under the State's regulated monopoly utility framework prohibiting unregulated third parties from competing in DEP's territory. The Commission finds North Carolina energy policy and monopoly regulatory

framework is precisely what Section 591 was intended to respect and to protect from federal government disruption.

In sum, the Commission finds that *BG&E* appears to be a more modern statement of the meaning of Section 591, and the Federal Acquisition Regulation, which now incorporates the limitations imposed by Section 591, and further demonstrate that the majority opinion in *West River* is not supported by more recent Department of Defense guidance nor controlling today.

Turing to the facts presented in Sunstone's Petition, Sunstone is proposing to both engage in a third-party sales arrangement with its affiliate, BCL, and to also sell excess energy to the Fort Bragg DPW. Sunstone has informed the Commission that when excess energy is generated by the Proposed Project that is not consumed by BCL, it "may be directed by Sandhills Utility to other on-base users on [Sandhills'] distribution system…" and "BCL will be credited for the energy generated" by the Proposed Project.[66] The Commission also understands that Sunstone's proposed ground-mounted solar generating facility will inject power directly into the Sandhills Utility's system that will then be credited to Sunstone and reduce the consumption charged by Fort Bragg DPW to BCL.[67] As explained earlier in this Order, this arrangement is unlawful under North Carolina's regulatory framework and violates DEP's exclusive franchise considering that Sunstone is effectively attempting to engage in unregulated retail electric competition and is also selling at least some of its generation to the federal government.

The Commission also finds Sunstone's argument that even if Section 591 waives exclusive jurisdiction with respect to electricity sales to the federal government, it does not

[66] *See* DEP Initial Comments at 14, Exhibit 4 Response to Second DEP Data Request 2-5.
[67] *See* Commission Questions at 6-7.

apply to private entities, such as Sunstone and BCL operating within a federal enclave to be unsupported. The Commission finds it implausible that Congress would have intended to allow a Congressionally-authorized "partner" providing on-base military family housing exclusively to the federal government to take actions within a federal enclave that Congress has expressly determined the federal government itself cannot. Sunstone (or its supposed partner, the Army) has failed to identify any controlling or even persuasive legal guidance that would support the Commission arriving at a differing conclusion.

Petitioner seemingly suggests that the federal procurement statute for the acquisition or construction of military family housing under which Sunstone is considered an "eligible entity", 10 U.S.C. § 2871(5), occupies the entire field of utility provisions for military housing. This argument is undercut by the fact that Congress gives the "Secretary" the authority to furnish utilities and services in connection with any military housing "acquired or construed" under the statute and located on a military installation. See 10 U.S.C. § 2872a(a). This statute does not speak to a private party's authority to supply electricity to another private party on a federal enclave. Again, Sunstone has failed to provide the Commission any basis to conclude that such an outcome was intended by Congress nor has Sunstone pointed to any guidance to suggest that the Department of Defense takes a differing view.

Another complex issue is whether the federal government is actually paying for the electricity through appropriated funds when it pays BCL a basic allowance for housing that covers the cost of electricity consumed by federal service members living in BCL's on-base housing. While the manner in which the federal government pays BCL for providing on-base housing for military personnel has not been fully developed in the record of this

proceeding, it is the Commission's understanding that a basic allowance for housing is paid directly by the United States Treasury to BCL with appropriated funds to cover rent as well as utility expenses. Sunstone suggests under this arrangement the federal government itself is not "directly" paying for the electricity generated by the Proposed Project and sold to BCL because the service member must make the intermediate step of electing to have his or her basic allowance for housing go to BCL.[68] This argument ignores where the basic allowance for housing originates: the allowance is paid to BCL by the Department of Treasury through appropriated funds. In other words, the only source of funds used to pay for electricity generated by the Proposed Project will be paid for by the U.S. Treasury Department to BCL and then to Sunstone under the proposed arrangement.

Finally, as discussed above, the facts presented to the Commission suggest the Army will indirectly ultimately be the purchaser of at least *some* of the output of the Proposed Project. It is the Commission's understanding based on the record in this proceeding that the Fort Bragg DPW would receive and effectively purchase under Sunstone's proposed crediting policy excess electricity generated by the solar facility to be consumed on-base, outside of BCL.[69] As a result, this indirect sale to Fort Bragg DPW further undercuts Sunstone's argument that Section 591 is not applicable here because the provision is only applicable to the "purchase of energy by a federal department, agency or instrumentality." The sale of excess electricity generated by the Proposed Project will be delivered by Sunstone to Fort Bragg DPW and Fort Brag DPW will provide compensation in the form of a credit to BCL's electricity bill under the MSA.

[68] Sunstone Reply Comments at 13-14.
[69] Commission Questions at 6-8.

For all of the foregoing reasons, the Commission finds that this arrangement is subject to Section 591 and that Congress has stated clearly and unambiguously through Section 591(a) that purchases of electricity by the federal government, including within federal enclaves, should not be inconsistent with state law governing the provision of electric utility service including electric utility franchises or service territories established pursuant to state statute. Accordingly, the Commission finds that Sunstone's proposal to sell electricity to BCL and indirectly to Fort Bragg DPW would be inconsistent with North Carolina law regulating public utilities in violation of DEP's exclusive franchise.

V. Ordering Paragraphs

[*Reconsideration of Motion to Dismiss Granted*]

1. The Commission finds, after reconsidering its prior Order Denying Motion to Dismiss as well as the recent guidance from the Court of Appeals in *Cube Yadkin*, that Sunstone's Petition does not meet the justiciability requirements of the North Carolina Declaratory Judgment Act and is hereby dismissed.

[*Reconsideration of Motion to Dismiss Denied*]

1. The Commission affirms its prior determination that the Petition presents a justiciable case or controversy and Sunstone is appropriately before the Commission seeking a declaratory order under the North Carolina Declaratory Judgment Act.

2. The Commission is issuing this declaratory order under the unique facts and circumstances presented in Sunstone's Petition and this declaratory ruling should not be interpreted as precedential in future proceedings and is based upon, and limited to, the facts of record in this proceeding.

3. Based on the foregoing and the record, the commission finds and concludes that Sunstone's relief requested in the Petition is denied for the reasons stated in this Order.

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 *Proposed Order 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 7th day of February, 2022.

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