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Feb 25 2021

February 25, 2021

VIA Electronic Filing

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

Re: Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgement Act
Docket No. SP-100, Sub 35

Dear Ms. Campbell:

Enclosed for filing in the above-referenced proceeding on behalf of Duke Energy Progress, LLC is its *Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgement Act* ("Motion").

Portions of the Motion and certain exhibits to it contain information designated by Sunstone Energy Development LLC as confidential and, therefore, are being filed under separate cover and under seal.

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

Very truly yours,

/s/E. Brett Breitschwerdt

EBB:kjg

Enclosure

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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	)	**MOTION TO DISMISS FOR**
Sunstone Energy Development LLC	)	**FAILURE TO MEET**
Regarding the Provision of Solar Energy	)	**REQUIREMENTS OF NORTH**
and Energy Efficiency Service within	)	**CAROLINA DECLARATORY**
Fort Bragg	)	**JUDGEMENT ACT**

NOW COMES Duke Energy Progress, LLC ("DEP" or the "Company"), by and through the undersigned counsel, pursuant to Rule R1-7 of the rules and regulations of the North Carolina Utilities Commission ("NCUC" or "Commission") and the Commission's February 9, 2021, *Order Granting Extension of Time*[1] and respectfully moves the Commission to dismiss Sunstone Energy Development LLC's ("Sunstone") Request for Declaratory Judgment ("Petition") submitted under the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 *et seq.* ("Declaratory Judgement Act").

Sunstone's Petition does not present a justiciable current case or controversy and, instead, seeks an advisory opinion from the Commission. Such opinions are not permitted under the Declaratory Judgement Act and therefore the Petition should be dismissed. The Commission should also dismiss the Petition under the Declaratory Judgement Act for

[1] DEP recognizes that the Commission has established its own procedural rules and does not strictly apply the North Carolina Rules of Civil Procedure. *See Order Denying Motion to Compel*, Docket No. E-100, Sub 101 (April 1, 2020). To the extent the Commission seeks to apply them here, the Petition should be dismissed pursuant to Rules 12(b)(1) and 12(b)(7) of the North Carolina Rules of Civil Procedure ("N.C. R.C.P.").

failure to join the United States Department of the Army ("Army") as a necessary party directly affected by the Petition.

In the alternative, to the extent the Commission determines that it may hear the Petition on the merits, DEP respectfully requests that the Commission join the Army to participate in the proceeding. Indeed, there is no indication from the Petition that the Army is even aware Sunstone has filed the Petition, which seeks to invoke the Army's federal sovereign immunity within Fort Bragg to further Sunstone's own private interests.

If the Commission determines that the Petition should not be dismissed, DEP also requests that the Commission afford all parties no less than twenty (20) calendar days from the date of its Order on this Motion to provide substantive comments on the Petition.

In support of this Motion, DEP shows the Commission the following:

BACKGROUND AND INTRODUCTION

On December 9, 2020, Sunstone—a Delaware limited liability company with its principal place of business in New York—filed its corrected Petition with the Commission seeking a declaratory judgment under North Carolina's Declaratory Judgment Act holding that Sunstone may construct and operate facilities to generate and furnish electricity to retail customers in Fort Bragg, a federal enclave, without subjecting itself to Commission regulation as a public utility under the Public Utilities Act.

Fort Bragg is an approximately 250 square mile Army installation located in Cumberland, Hoke, Harnett, and Moore counties, and is exclusively located within DEP's franchised service territory assigned by the Commission under North Carolina's Territorial Assignment Act. DEP or its predecessor-utilities have been serving Fort Bragg for over a century, and Fort Bragg is an important customer of DEP. Today, DEP generates all of the

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power required to serve Fort Bragg and transmits electricity to six DEP transmission substations and four distribution-to-distribution deliveries located at the edge of Fort Bragg. The electricity is then distributed by Sandhills Utility Services, LLC ("Sandhills Utility"), which owns the federally-regulated privatized distribution system within Fort Bragg.

According to the Petition, and confirmed by Sunstone's recent responses to DEP's discovery requests, Sunstone prospectively plans to construct a combination of ground-mount and rooftop solar facilities that will generate up to 25 megawatts ("MW") of electricity.[2] The approximately 27,000,000 kWh of electricity that could be generated annually by the planned "up to 25 MW" solar generating facilities—approximately 8.75% of Fort Bragg's estimated annual electricity demand according to the Petition—would partially meet the electricity needs of on-base privatized housing owned by Sunstone's affiliate Bragg Communities LLC ("BCL") within the federal enclave area of Fort Bragg.[3]

The Petition asserts that Sunstone is "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" and suggests that no backfeed of power onto DEP's system would occur.[4] However, DEP now understands that BCL's on-base housing will not fully consume the energy generated by the planned solar project and, instead, BCL will be compensated for providing electricity for use within Fort Bragg via bidirectional metering of its electricity consumption under an existing Municipal Services Agreement ("MSA") with the Army.[5] In sum, as stated in

[2] Petition at ¶ 2; *see also* Exhibit 1 Response to DEP Data Request 1-2.
[3] Petition at ¶¶ 7, 12; *see also* Exhibit 2 Response to DEP Data Request 1-4.
[4] Petition at ¶¶ 3, 13.
[5] Petition at ¶¶ 3, 6; *see also* Exhibit 3 Response to DEP Data Request 1-3.

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paragraph 7 of the Petition, Sunstone is contemplating entering into a proposed "energy services agreement . . . [to] 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."[6]

Notably, Sunstone's Petition does not provide the Commission with any of the referenced agreements between Sunstone and its affiliate, BCL, between Sunstone and other parties at Fort Bragg, or between BCL and the Army more generally. What has now also become clear to DEP through discovery, however, is that despite filing the Petition in December 2020, "Sunstone has not entered into project-specific contracts" as of February 2021 and is in the very preliminary stages of project development.[7] No energy services agreement exists between Sunstone and BCL or has even been prepared.[8] Upon information and belief, no lease exists between Sunstone and BCL or Sunstone and the Army to allow siting of the proposed solar project(s) within Fort Bragg.[9] Sunstone also admits that even the actual size of the "up to 25 MW solar project" described in the Petition is currently unknown: "final design, and capacity, of the system will not be determined until completion of an engineering study."[10] Interconnection studies have not commenced so there is also no agreement authorizing interconnection of any proposed solar project to the Sandhills Utility grid.[11] To the best of DEP's understanding, Sunstone has not committed to developing the solar project(s) or funding any to-be-identified system

[6] Petition at ¶ 7.
[7] Exhibit 1.
[8] S*ee* Exhibit 4 Response to DEP Request for Production of Documents 1-2 (" . . . an agreement regarding its proposed provision of solar energy and energy efficiency services to BCL has not yet been prepared").
[9] For the Commission's reference, a 25 MWac solar generating facility would require approximately 200 acres of land and, likely, significantly more if Sunstone plans to develop a combination of rooftop and ground mounted installations.
[10] *See* Exhibit 2.
[11] *See* Exhibit 3.

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upgrades that may be required to interconnect to Sandhills Utility (or, potentially, DEP's) system.[12] And Sunstone does not have a clear timeline for when it will proceed with development: "At this stage there are not specific dates tied to particular milestones in the expected project development process."[13]

The Petition requests that the Commission issue a declaratory ruling that: (1) Fort Bragg is not subject to Commission regulation under the Public Utilities Act because it is a federal enclave;[14] (2) Sunstone's provision of solar energy and energy efficiency services within the federal enclave of Fort Bragg does not subject it or its assignees, nor their work, to the Public Utilities Act; and (3) Sunstone's proposed activities will not cause it to be considered a public utility under N.C. Gen. Stat. § 62-3(23).[15]

Despite generally referencing the Commission's authority to regulate public utilities under the Public Utilities Act, the Petition presents virtually no legal issues for the Commission to decide under North Carolina law and, after the most cursory references to the relevant North Carolina legal authority, requests that the Commission enter a declaratory order prospectively holding that Sunstone would be exempt from state utility regulation of its hypothetical proposed operations within Fort Bragg based on the supremacy of the United States Constitution and federal law.[16] The Petition fails to acknowledge (or even address) that Sunstone's proposed activities of generating, furnishing, and selling solar power to retail customers fits squarely under the definition of

[12] *See* Exhibit 3.
[13] *See* Exhibit 1.
[14] As an initial matter, DEP recognizes that Fort Bragg is a federal enclave subject to federal jurisdiction under the federal enclave clause of the U.S. Constitution, Art. I, § 8, cl. 17, but the issues Sunstone seeks a declaratory ruling for far exceed this non-contentious issue and instead involve interpretations of federal statutes, regulations, and policies that would impact the Army without involving the Army in this proceeding.
[15] Petition at 1.
[16] *See, e.g.*, Petition at ¶¶ 22-29.

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"public utility" subject to regulation under the Public Utilities Act, as previously interpreted by the Commission.[17]

For the avoidance of doubt, DEP believes there are compelling arguments that Commission regulation under the Public Utilities Act should apply to the generation and sale of the electric commodity within Fort Bragg, as applied through federal law[18] and previously interpreted by the Army.[19] However, DEP is filing this Motion because the preliminary nature of Sunstone's activities and the direct effects it will have on the Army support dismissal of the Petition for lack of subject matter jurisdiction because the Petition fails to set forth a justiciable controversy under the Declaratory Judgement Act and for failure to join the Army, a necessary party to this proceeding.

ARGUMENT

I. The Commission should dismiss the Petition for lack of an actual existing case or controversy.

Sunstone's Petition was filed pursuant to the Declaratory Judgment Act and must meet its requirements for the Commission to hear and decide the Petition. It has long been recognized that "[t]he Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317

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[17] *See, e.g.*, Petition at ¶¶ 21, 38. *See also State ex rel. Utils. Comm'n v. NC WARN*, 255 N.C. App. 613, 619, 805 S.E.2d 712, 716-17 (2017), *aff'd* 371 N.C. 109, 812 S.E.2d 804 (2018) (finding 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).

[18] *See 40 U.S.C. § 591 ("8093"),* discussed *infra*; *see also Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721 737 (D. Md. 2001), *aff'd on other grounds,* 290 F.3d 734 (4th Cir. 2002) (finding it "clear that federal statutory provisions [§8093] and regulations [48 C.F.R. § 41.201] require that the Army must follow state law and regulations, including utilities regulations and franchise agreements, in its purchase of the commodity electricity").

[19] *See* Exhibit 5 OSD General Counsel Memorandum, at 4 (Feb. 24, 2000), (memorandum issued by the General Counsel of the Department of Defense finding that § 8093, discussed *infra*, "waives the sovereign immunity of the United States with respect to the acquisition of the electricity commodity" and "[t]he Department must comply with state laws and regulations only when it is acquiring the electric commodity").

N.C. 579, 584, 347 S.E.2d 25, 29 (1986) (citing *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949)). To the contrary, 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*, 317 N.C. at 586, 347 S.E.2d at 30; *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"). This is because 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)).

Here, the facts presented in the Petition and through discovery demonstrate that the "the alleged controversy . . . . [is] based solely on *proposed* action" by Sunstone relating to its prospective plans to construct a yet-to-be-designed solar project that currently has no timeline for development nor has the necessary legal rights (ground lease) or approvals (interconnection studies and agreement) to be constructed nor has entered into a contract

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for sale of power to any retail customer (BCL). *Pine Knoll Shores*, 128 N.C. App. at 322-23, 494 S.E.2d at 619 (finding that trial court cannot render advisory opinions under the Declaratory Judgment Act, and, therefore, did not have jurisdiction to decide declaratory judgment petition where petitioner alleged only that they "anticipate some future action to be taken by defendants that would result in a violation" of agreement) (emphasis added); *Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 628, 518 S.E.2d 205, 207 (1999), *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999) (explaining that "future or anticipated action of a litigant does not give subject matter jurisdiction to our courts under the Declaratory Judgment Act"). In other words, the controversy alleged by Sunstone is 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 Petition does not present an actual, currently existing legal controversy for the Commission's resolution.

The lack of an actual controversy is apparent from the face of Sunstone's Petition, which fails to demonstrate that Sunstone has taken any meaningful steps to solidify its purported plans to construct a solar facility(s) and to generate and provide electricity to BCL within Fort Bragg. Indeed, 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 only provides scant detail about a prospective energy services arrangement in its Petition that it "may" enter into, at some point in the future, with its affiliate and requests that the Commission provide its blessing today that this potential future action can proceed without

Commission regulation.[20] The Petition also does not provide any 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 Judgement Act. In fact, Sunstone is unable to provide any such details because, as described earlier, Sunstone admits that the proposed project is largely hypothetical: there is no actual designed solar facility (or facilities), no interconnection or engineering study has been completed, and there are no specific dates or milestones for developing the proposed solar generating facilities or providing electricity to BCL. Sunstone even candidly admits that it "has not entered into project-specific contracts."[21]

Sunstone also admits that there are no agreements between Sunstone and Sandhills Utility addressing the "backfeed" expected to flow onto Sandhills Utility distribution network.[22] In claiming that the electricity generated by the solar facility would be consumed "only by BCL's on-base housing unity," Sunstone later explains that it "will be conducting" a study to "evaluate the impact on Sandhills Utility's distribution grid."[23] Sunstone claims that it would pay for any "necessary transmission or interconnection upgrades required by Sandhills Utility," but such a commitment is not enforceable at this point as the initial step of even performing a system impact study has not yet begun. It is also unclear whether DEP may be an affected system. Needless to say, this Commission is well aware of disputes between parties as to what interconnection-related upgrades are

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[20] In response to discovery requests from DEP, Sunstone was unable to provide even a draft of this proposed energy services agreement as one has not yet "been prepared." *See* Exhibit 1.
[21] *See* Exhibit 1.
[22] *See* Petition at ¶ 13.
[23] *See* Exhibit 3.

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indeed "necessary," but the fact that the proposed project has not yet reached a significant point in the development stage makes all the more clear that Sunstone's request does not present a current case or controversy for the Commission to decide.

Based upon the information provided in the Petition, there is nothing to make it appear reasonably certain that if the Commission were to rule on the Petition in Sunstone's favor that Sunstone "will engage in the covered activities rather than "put [the opinion] on ice to be used if and when occasion might arise." *Sharpe*, 317 N.C. at 589-90, 347 S.E.2d at 32 (internal citations omitted). Courts presented with similar fact patterns have routinely dismissed declaratory actions for failure to state an actual existing controversy. *See, e.g.*, *Town of Pine Knoll Shores v. Carolina Water Serv.*, 128 N.C. App. 321, 494 S.E.2d 618 (1998) (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. North Carolina Consumers Power, Inc. v. Duke Power Co.,* 285 N.C. 434, 437 206 S.E. 2d 178 (1974) (finding that Court had jurisdiction under Declaratory Judgement Act as to controversy over construction and validity of *existing* wholesale power contract). In short, similar to prior decisions where declaratory relief was denied by our Courts, Sunstone is requesting that the Commission provide an advisory opinion that would not resolve an actual current controversy, which does not exist given the highly preliminary nature of Sunstone's proposal.

In the face of so many unknowns underscoring the highly speculative nature of Sunstone's proposal, there is no actual existing controversy that is ripe for the

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Commission's consideration. Instead, Sunstone's Petition asks this Commission to render an advisory opinion to inform its conceptual plans and potential proposed activities. This is not permitted under the Declaratory Judgment Act, and Sunstone's Petition should be dismissed.

II. The Petition should also be dismissed for failure to request the Army be joined as a necessary party, or the Commission should join the Army if it determines it can decide the issues presented

If the Commission were to decide that Sunstone's Petition has met the Declaratory Judgment Act's jurisdictional prerequisite of presenting an actual current case or controversy, then a substantive determination by the Commission on the merits would certainly have a direct effect on the Army's material interests with respect to the provision of electricity within Fort Bragg, rendering it a necessary party to this proceeding. The Declaratory Judgment Act is clear that "all persons shall be made parties who have or claim any interest which would be affected by the declaration[.]" N.C. Gen. Stat. § 1-260; *see also North Carolina Monroe Constr. Co. v. Guilford County Bd. Of Educ.*, 278 N.C. 633, 639, 180 S.E.2d 818, 821 (1971) (finding that a "necessary party" "embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy"); s*ee also* N.C. R.C.P 19 (requiring court to order the appearance of a party in an action when "a complete determination of such claim cannot be made without the presence of other parties" and without a party's presence, its rights may be prejudiced). Moreover, North Carolina courts have found declaratory judgment proceedings as deficient where a necessary party—specifically the federal government agency responsible for interpreting and applying federal law—is not joined to the action. *See Griffin v. Fraser*, 39 N.C. App. 582, 588, 251 S.E.2d 650, 654 (1979) ("We also note that the United States was not joined as a party to

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the action for construction of the Code sections, creating another defect in the declaratory judgment status of the proceeding under G.S. 1-260").

There are at least three compelling reasons that the Army could be "directly affected" by a Commission order on the Petition and therefore should be joined as a necessary party if the Commission does not dismiss the Petition.

First, the Army's participation is necessary to resolve the complex Constitutional and federal law issues presented by the Petition. The sole basis of the Petition is that Sunstone should not be subject to Commission regulation because the federal government has exclusive jurisdiction to legislate within Fort Bragg, as a federal enclave, and, according to Sunstone, the federal government has not clearly and unambiguously waived its Constitutionally-derived sovereign immunity and accepted state regulation over the generation, purchase, and/or sale of electricity within Fort Bragg.[24] Sunstone's Petition identifies the relevant federal law, Section 8093 of the Continuing Authorization Act of 1988 (commonly referred to as § 8093),[25] but argues that it has no applicability to the Army's procurement of electricity within federal enclaves, such as Fort Bragg, or, even if it does apply to the Army, then it may not apply to Sunstone as a private entity operating within Fort Bragg.[26] Sunstone makes this inapplicability argument despite the fact that § 8093(a) *does* clearly and unambiguously state that any

> 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 …

[24] Petition, at ¶¶ 26-35.
[25] Section 8093 was later codified as 40 U.S.C. § 591.
[26] *See* Petition at ¶¶ 30-35, *citing West River Electric Ass'n v. Black Hills Power & Light Co.*, 918 F.2d 713 (8th Cir. 1990).

Sunstone cites a single 1990 eighth circuit split decision to argue this clear Congressional waiver of sovereign immunity with respect to electricity commodity sales does not apply to Fort Bragg, as a federal enclave, and then argues with minimal support that, by extension, § 8093 also does not apply to the relationship between Sunstone and BCL operating as private entities within Fort Bragg.[27]

Notably, there has been no indication—either cited by Sunstone or otherwise—that the Army and/or Department of Defense supports Sunstone's position that the policy objectives of § 8093 to ensure 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. In fact, the Federal Acquisition Regulations specifically applicable to the Department of Defense—which would extend to the contracting officer for the Army within Fort Bragg—state that the Department must comply with the requirements of § 8093 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 franchise or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements." 48 C.F.R. § 41.201(e). The Army is a necessary party to advise on whether § 8093 and the Department of Defense's own procurement regulations require procurement of electricity within Fort Bragg to follow federal law.

Moreover, if the Army actually intended to pursue a policy of allowing third party ownership of generation and retail electric competition at Fort Bragg, as Sunstone's Petition implies, the Federal Acquisition Regulations implementing § 8093 clearly

[27] *See* Petition at ¶¶ 32-34.

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establish that the Department "shall determine, with advice of legal counsel . . . [or by] consultation with the state agency responsible for regulating public utilities, that such competition would not be inconsistent with state law governing the provision of electric utility service, including state utility commission rulings and electric utility franchises or service territories established pursuant to state statute, state regulation, or state-approved territorial agreements." 48 CFR § 41.201(e). Sunstone's Petition fails to address the Army's position—legal or otherwise—on whether the proposed arrangement would comply with the Federal Acquisition Regulations. In fact, in response to DEP's discovery requests, it appears earlier drafts of the Petition shared with the Public Staff contained draft language such as **[Begin Confidential]** **[End Confidential]**

Sunstone further argues in its Petition that Congress' directive to the Army to follow state utility regulation and to respect utility franchise rights in the procurement of electricity is also inapplicable in this situation because military personnel living in BCL-owned housing receive a Basic Allowance for Housing ("BAH") that is directly allocated by the Army to BCL to cover rent expenses and, therefore, the federal government itself is not paying for the electricity.[29] To DEP, this argument is semantics and ignores where the BAH originates: Sunstone appears to acknowledge that the BAH is paid to BCL through

[28] *See* Confidential Exhibit 6, at SUN00032; *see also* Exhibit 1 at SUN00010-12. There is no indication on the face of the March 2016 Memorandum recommending approval of Covias' proposed renewable energy solar project within Fort Bragg that the Army considered the applicability of § 8093 or 48 CFR § 41.201(e).
[29] *See* Petition at ¶ 4.

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appropriated funds as it has stated that "service members sign a form authorizing the US Treasury to send the BAH to the LLC [BCL] to pay their rent."[30] The facts show that Sunstone is effectively attempting to create an end-run around these federal regulations by proposing to furnish and sell electricity to its affiliate, BCL, who would then provide electricity for compensation to the Army within Fort Bragg. Thus, the Army is also a necessary party to advise on whether § 8093 and the Department of Defense's own procurement regulations allow private entities to unilaterally procure electricity within Fort Bragg in contravention of federal law and Federal Acquisition Regulations.

Simply put, the Army has a direct, material interest in the Commission's determination (if the Commission were to make a determination) of Congress' intent and purpose in enacting § 8093 and the relevant Federal Acquisition Regulations that control the Army's procurement activities today, as well as its applicability to the activities of private entities such as BCL and Sunstone within Fort Bragg.

Second, the Army is a necessary party here because its contractual rights under certain agreements with BCL will be affected by a Commission decision on the Petition. In *Monroe Construction*, the court determined that a necessary party is one whose rights under a contract will necessarily be impacted by a judgment and, as a result, such parties must be joined in the proceeding and otherwise the proceeding is moot. *See Monroe Const. Co.*, 278 N.C. at 641-42, 180 S.E.2d at 822-23. BCL and the Army have executed a ground lease and the MSA that govern both BCL's rights and interests to own privatized housing within Fort Bragg, as well as the manner in which electricity and other utility services are provided to BCL.

[30] *See* Exhibit 7.

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For example, it appears under the ground lease that **[Begin Confidential]** [redacted]

[redacted] **[End Confidential]** Turning to the MSA, Sunstone's Petition summarily asserts that under the MSA, BCL may seek alternative suppliers and negotiate directly with them to furnish electricity for the on-base housing.[32] The provision of the MSA Sunstone presumably relies on for this argument, however, states that BCL can seek an alternate supplier of electricity to serve its privatized housing "and terminate [the MSA]."[33] However, all indications are that BCL is not terminating the MSA; instead, BCL is continuing to require the Army (and DEP) to continue to deliver power to BCL under the MSA (through Sandhills Utility) to meet BCL's partial electricity requirements as a "backstop" to Sunstone's proposed solar facility. It is unclear whether the Army is agreeable to continuing to provide this "partial requirements" service under the MSA, and Sunstone's summary interpretation of the MSA would unquestionably have a direct impact on the Army's contractual rights under the agreement. Thus, if the Commission elects not to dismiss the Petition, the Army should be joined in this proceeding to advise the Commission on its contractual rights under the MSA.

Third, it also seems significant to DEP that the Petition makes several claims about how Sunstone's proposal is furthering federal energy policy, Congressional directives, and how the project would "address[] these Army interests and DOD's policy."[34] Yet, the Petition fails to provide support from Army personnel specific to Sunstone's proposed

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[31] *See* Confidential Exhibit 8, at SUN001000.
[32] *See* Petition at ¶ 6.
[33] *See* Exhibit 9, at SUN000976.
[34] *See* Petition ¶¶ 14-17.

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project at Fort Bragg or whether the proposed project has been specifically approved by the Department of Defense as part of the Army's nationwide energy policy and strategy. Congress has established that it is the Department of Defense that is responsible for executing its energy policy, including the renewable energy goals invoked by Sunstone,[35] not private parties like Sunstone, and the Army has a direct interest to make clear its position on such issues rather than having private entities make representations for it without providing any project-specific support from the Army.

For all of these reasons, the Army is a necessary party to this proceeding and the Commission should dismiss the Petition for failure to join the Army as a necessary party.[36] In the alternative, if the Commission declines to dismiss the Petition and instead finds that the Army should be joined in this proceeding, DEP respectfully requests the Commission to issue an order requiring joinder of the Army as a necessary party and directing Sunstone to serve and effectuate joinder of the Army within thirty days.

CONCLUSION

For all of the foregoing reasons, and for whatever additional reasons the Commission may find persuasive, DEP respectfully requests that the Commission enter an order dismissing the Petition on the grounds that (1) the Commission lacks subject matter jurisdiction over Sunstone's Petition because it does not present an actual existing case or controversy and, instead, improperly seeks an advisory opinion from the Commission; and (2) Sunstone failed to join the Army, a necessary party. In the alternative, if the Commission determines that the Petition should not be dismissed, DEP respectfully requests the Commission enter an order requiring joinder of the Army and directing

[35] *See* 10 U.S.C. § 2911.
[36] *See* N.C. R.C.P 12(b)(7).

Sunstone to serve and effectuate said joinder within thirty (30) days of the Commission's Order.

In addition, if the Commission proceeds to adjudication of the issues raised in the Petition, DEP respectfully requests an extension of time to file comments up to and including 20 days from the date of the Commission's Order ruling on this Motion to allow all interested parties to participate in the comment process.

Respectfully submitted, this the 25th day of February, 2021.

/s/E. Brett Breitschwerdt
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Counsel for Duke Energy Progress, LLC

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DEP Exhibit 1

Response to DEP Data Request 1-2
(SUN00010-SUN00012)

Docket No. SP-100, Sub 35

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INTERROGATORIES

1-2. **Describe in detail Sunstone's efforts to develop the planned solar generating facility(s) to be located within Fort Bragg, including planned size (in MW) of the facility, dates of significant milestones in the development process, and any contracts entered into by or on behalf of Sunstone.**

Response: Without waiving any of its objections, Sunstone states that the aggregate projected capacity of all of its multiple solar facilities on Fort Bragg will be up to 25MW, employing a combination of ground mount and rooftop elements. The final design, and capacity, of the system will not be determined until completion of an engineering study, as described in response to Interrogatory 1-3. At this stage there are not specific dates tied to particular milestones in the expected project development process. However, information about the purpose, background and expected actions in connection with the project are set forth in a Privatized Housing Renewable Energy Solar Project Major Decision Concept Memorandum, issued through the Army's Installation Management Command, which recommends approval of Sunstone's development of solar energy capacity for military housing at Fort Bragg. The Army's memorandum is produced in response to Request for Production 1-1 and bears the Bates Stamp Nos. SUN00010-SUN00012. Sunstone has not entered into project-specific contracts, as of the date of these responses.

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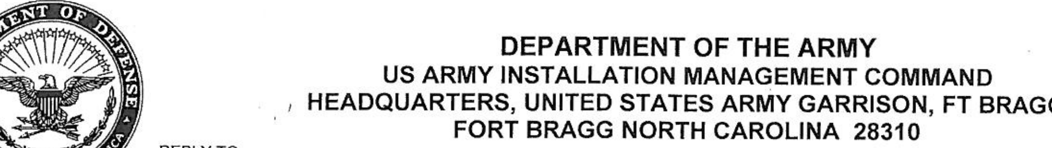

DEPARTMENT OF THE ARMY
US ARMY INSTALLATION MANAGEMENT COMMAND
HEADQUARTERS, UNITED STATES ARMY GARRISON, FT BRAGG
FORT BRAGG NORTH CAROLINA 28310

REPLY TO
ATTENTION OF

IMBG-PWH

21 Mar 16

MEMORANDUM THRU DPW SFS 28 Mar 16

FOR Garrison Commander

SUBJECT: Privatized Housing Renewable Energy Solar Project major Decision Concept Memorandum

1. Purpose. Recommend approval and signature of the attached major decision concept memorandum

2. Discussion.

a. Corvias is proposing a project to install a network of photovoltaic (PV) rooftop arrays throughout the Fort Bragg housing neighborhoods. No costs associated with this PV project shall be incurred by Bragg Communities LLC (BC).

b. Corvias will partner with a third party provider for the installation and maintenance/repair of all PV hardware. The PV will require an interconncetion agreement with Sandhills Utility Services prior to approval.

c. DPW Energy Manager has concurred with the initial project scope. Final project scope must be approved by DPW and Fort Bragg energy partners.

3. Recommendation. Garrison Commander approve and sign major decision concept memorandum at TAB A.

Douglas G. Jackson

DOUGLAS G. JACKSON
Chief, Housing Division
Director of Public Works

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Corvias military living

March 11th, 2016

MEMORANDUM THRU: OFFICE OF THE CHIEF OF STAFF FOR INSTALLATION MANAGEMENT, PUBLIC-PRIVATE INITIATIVES DIVISION, ATTN: Mr. Don Brannon, Program Manager, Room 9529, 2511 Jefferson Davis Highway, Arlington, VA 22202

TO: OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS & ENVIRONMENT), OFFICE OF THE DEPUTY ASSISTANT SECRETARY OF THE ARMY (INSTALLATIONS & HOUSING), ATTN: Mary Jeanne Marken Program Manager, Capital Ventures Directorate, Room 3D453, 110 Army Pentagon, Washington, DC 20310-0110.

SUBJECT: Privatized Housing Renewable Energy Solar Project – Fort Bragg, North Carolina (the "Solar Project")

1. **PURPOSE:**
   a. Bragg Communities, LLC ("BC") requests approval of a proposed Solar Equipment Lease ("SEL") for the Solar Project in accordance with the Deputy Assistant Secretary of the Army Installations & Housing (DASA I&H) Capital Ventures Directorate's memo dated August 24th 2015 titled "Approval of concept for Corvias to Execute Renewable Energy Portfolio Project." The Solar Project will be structured to benefit the privatized housing project at Fort Bragg without adversely impacting the Army's existing utility infrastructure. The proposed SEL will be signed with an effective date aligning with completion of construction.

2. **BACKGROUND:**
   a. The Solar Project is expected to be installed and functioning no later than December 2016. Construction is currently projected to commence by May 2016.
   b. The installation of 255W/260W Solar PV Panels utilizing Hyundai: HiS- M250MG module materials will allow 6kW or comparable system sizes. The production estimates assume a total estimated annual production of 35MW -/+ 10% installed with a kW LA rate at or below the current/kW utility rate.
   c. Over the life of the Solar Project, it is estimated to provide $7.6 million in savings to BC for rate stabilization and security.
   d. There will be no cost for the development of the Solar Project to the Army because all development, engineering, construction and legal costs associated with the Solar Project will be incurred by the solar developer. Additionally, none of the associated implementation or legal costs will be incurred by BC.
   e. Long term operations and maintenance will be provided by the solar developer.
   f. All renewable energy credits associated with the Solar Project will be transferred to the Army.

3: **ACTIONS**
   a. Develop interconnection agreement with local utility operator, Sandhills Utility Service, and Garrison Energy Manager.
   b. Sign SEL with the solar equipment owner, which includes the grant of a license for the solar equipment owner to enter the Ground Lease premises for, among other things, the installation, operation, owning, maintaining, removing, and replacing of the solar panels.
   c. Communications to residents of the solar installation program and the impact to their homes.
   d. Incorporate renewable energy awareness into the RCI Live Army Green program at Fort Bragg.
   e. Amend the Ground Lease between BC and the Army to include renewable energy language.
   f. Finalize the process for receiving RECs (renewable energy credits) and reporting. RECs to be retired and replaced by the solar equipment owner. BC will provide a cover letter to the Army demonstrating the RECs have been retired in the name of the Army to fulfill the requirement of the lease agreement. The replacement RECs will be placed into a third party tracking system by the DevCo with an option to retire the RECs and notes section to define the transaction.

Corvias™ | military living

March 11th, 2016

4. SIGNATURES:

Both the Managing Member and the Designated Member of BC agree with this request, and ask that the Major Decision Committee approve the modification outlined herein.

Charles E. Parker
Managing Member
Bragg Communities, LLC

COL Brett Funck
Designated Member
Bragg Communities, LLC

Encl:
(DASA I&H) Capital Ventures Directorate "Approval of concept for Corvias to Execute Renewable Energy Portfolio Project"

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DEP Exhibit 2

Response to DEP Data Request 1-4

Docket No. SP-100, Sub 35

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1-4. **Regarding Sunstone's statement in Paragraph 12 of the Request that "[d]emand from on-base housing will be reduced by 35% through solar energy and energy efficiency", please describe in detail these projections and calculations.**

Response: Without waiving any of its objections, data provided by the Army shows that actual consumption from on-base military housing at Fort Bragg between January 2019 and December 2019 (the last full calendar year of data available at the time of calculation) was 107,335,762 kWh. Ongoing Energy Conservation Measures (ECMs) employed in on-base housing are projected to reduce consumption by 10% (10,733,576 kWh) to around 96,600,000 kWh annually. Based on the projected annual generation from a 20MW solar energy program of approximately 27,000,000 kWh, the total projected reduction anticipated from ECM and solar generation is approximately 37,700,000 kWh, or roughly 35% of total consumption from on-base military housing in 2019.

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DEP Exhibit 3

Response to DEP Data Request 1-3

Docket No. SP-100, Sub 35

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1-3. **Please confirm that energy proposed to be furnished by Sunstone from its proposed solar generating facility would be exclusively consumed by Bragg Communities, LLC's privatized military housing at Fort Bragg ("Bragg Communities").**

   a. **If you cannot confirm that energy produced by Sunstone from its proposed solar generating facility will be exclusively consumed by Bragg Communities, please explain how the electricity produced by Sunstone that is not consumed by Bragg Communities is consumed.**
   b. **Will electricity generated by Sunstone's proposed solar generating facility be directly or indirectly delivered to or consumed by the Army at Fort Bragg?**

<u>**Response:**</u> Without waiving any of its objections, Sunstone states that, yes, its proposed project would provide solar energy and energy efficiency services exclusively to on-base, privatized military housing at Fort Bragg that is owned and managed by Bragg Communities, LLC ("BCL"). Sunstone would provide energy for consumption only by BCL's on-base housing units. As a part of Sunstone's development process, its interconnecting provider located on-base, Sandhills Utility Services, LLC ("Sandhills Utility"), will be conducting an engineering study to evaluate the peak production expected to be produced by the solar facility, and will evaluate the impact on Sandhills Utility's distribution grid to help balance electron flow based on the addition of such alternative renewable generation. This study would indicate whether any system upgrades are required, and Sunstone would pay for any necessary transmission or interconnection upgrades required by Sandhills Utility - which relate to the solar project - after review of the engineering study with Sandhills Utility. All energy efficiency benefits of the Sunstone solar energy and energy efficiency program will be realized by BCL, with the aid of bi-directional meters. Upon information and belief, power delivered to or consumed by other facilities or users at Fort Bragg that are not a part of on-base housing operated by BCL would continue to be procured by the Army from its existing providers.

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DEP Exhibit 4

Response to DEP Data Request for Production of Documents

Docket No. SP-100, Sub 35

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1-2. **Please identify and produce a copy of the proposed energy services agreement, including all executed and unexecuted versions, between Sunstone and Bragg Communities, LLC, to provide solar energy and energy efficiency services to on-base military housing at Fort Bragg, as referenced in Paragraph 2 of the Request.**

Response: Without waiving any of its objections, Sunstone states that an agreement regarding its proposed provision of solar energy and energy efficiency services to BCL has not yet been prepared.

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DEP Exhibit 5

OSD General Counsel Memorandum (February 24, 2000)

Docket No. SP-100, Sub 35

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GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

FEB 2 4 2000

MEMORANDUM FOR GENERAL COUNSEL OF THE ARMY
GENERAL COUNSEL OF THE NAVY
GENERAL COUNSEL OF THE AIR FORCE

SUBJECT: The Role of State Laws and Regulations in Utility Privatization

Section 2688 of title 10, United States Code, provides permanent authority to the Military Departments to convey certain listed types of utility systems to a utility company or other entity. As consideration for the conveyance, the Secretary shall receive fair market value, in the form of a lump sum payment or a reduction in charges for utility services provided by the utility or entity. The department commonly refers to the process of conveying the utility system to a non-Federal entity and concurrently contracting for services from the new owner, as privatization of that utility system. As we explore the role of state laws and regulations in utility privatization, we must be acutely aware of these two distinct and yet interrelated components, because the extent to which state laws and regulations are applicable to privatization varies depending on which component of privatization is at issue. Consequently, this memorandum addresses two questions: (1) Do state laws and regulations apply to the conveyance of an on-base utility system under section 2688 of title 10, United States Code?; and (2) Do state laws and regulations apply to or otherwise affect the Federal government's acquisition of utility services related to an on base utility system conveyed under section 2688 of title 10, United States Code? As discussed more fully below, the answer to this second question is different for the commodity electricity than for electric utility services, and for other types of utilities.

I. Do State Laws And Regulations Apply To The Conveyance Of An On-Base Utility System Under Section 2688 Of Title 10, United States Code?

It is a longstanding Constitutional principle that the states may not regulate the Federal government except to the extent that the Constitution so provides or the Congress consents to such regulation, McCulloch v. Maryland, 17 U.S. 316 (1819). For Congress to consent to such regulation, it must waive the sovereign immunity of the United States. A waiver of sovereign immunity must be unequivocal. See, e.g., United States Department of Energy v. Ohio, 503 U.S. 607 (1992) ("(t)his Court presumes congressional familiarity with the common rule that any waiver of the Government's sovereign immunity must be unequivocal. Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." Citation

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omitted). In Hancock v. Train, 426 U.S. 167 (1976), the Supreme Court discussed Federal supremacy at length particularly as it relates to Federal installations:

> It is a seminal principle of our law "that the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." From this principle is deduced the corollary that "[it] is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." Id., at 427.
>
> The effect of this corollary, which derives from the Supremacy Clause and is exemplified in the Plenary Powers Clause giving Congress exclusive legislative authority over Federal enclaves purchased with the consent of a State, is "that the activities of the Federal Government are free from regulation by any state."
>
> * * *
>
> Taken with the "old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign" "without a clear expression or implication to that effect." this immunity means that where "Congress does not affirmatively declare its instrumentalities or property subject to regulation," "the federal function must be left free" of regulation. Particular deference should be accorded that "old and well-known rule" where, as here, the rights and privileges of the Federal Government at stake not only find their origin in the Constitution, but are to be divested in favor of and subjected to regulation by a subordinate sovereign. Because of the fundamental importance of the principles shielding Federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of state regulation "clear and unambiguous."

426 U.S. at 178 (citations omitted).

The authority to convey an on-base utility system, granted by Section 2688, is in furtherance of the Congress' authority under Article IV, Section 3, of the Constitution "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; ...". Consequently, in this instance, the "rights and privileges of the Federal Government at stake ... find their origin in the Constitution", specifically, the property clause of Article IV, Section 3.

Through Section 2688 Congress granted to the military departments the authority to convey its utility systems. Regardless of the jurisdictional/enclave status of the installation, the disposal of Federal property is a Federal action which may not be restricted by the state, absent an explicit waiver of Federal sovereignty. Consequently, if Congress were to waive the sovereign immunity of the United States with respect to the

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conveyance of an on-base utility system, it is likely it would do so, if at all, in Section 2688. Section 2688 refers to state regulation in its subsection (c)(2)—

> (c) Consideration.—(1) The Secretary concerned shall require as consideration for a conveyance under subsection (a) an amount equal to the fair market value (as determined by the Secretary) of the right, title, or interest of the United States conveyed. The consideration may take the form of—
>
> (A) a lump sum payment; or
>
> (B) a reduction in charges for utility services provided by the utility or entity concerned to the military installation at which the utility system is located.
>
> (2) If the utility services proposed to be provided as consideration under paragraph (1) are subject to regulation by a Federal or State agency, any reduction in the rate charged for the utility services shall be subject to establishment or approval by that agency.

Paragraph (2), by its own language, only applies when the consideration for the purchase of the on-base utility system is a reduction in charges, as opposed to a lump sum payment, and then only to the rate charged for the utility services. Consequently, if the sale is for a lump sum payment, there is no waiver of sovereign immunity under 10 U.S.C. § 2688. Furthermore, if the consideration for the sale is a reduction in charges, there is a waiver of sovereign immunity, but the waiver is limited to regulation of the rate charged for the utility services. There is nothing in Section 2688 that can be interpreted as a waiver of the Government's sovereign immunity from state or local regulation with respect to the conveyance of the on-base utility system. To the contrary, Section 2688 specifically indicates the manner by which the government may convey the on-base utility system: "[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . . the Secretary shall carry out the conveyance through the use of competitive procedures." 10 U.S.C. 2688(b).

In addition to section 2688, there is, for electricity, a special statutory provision contained in the Department of Defense Appropriations Act, 1988, Public Law 100-202, that bears on the question of whether Congress has waived the sovereign immunity of the United States—

> Sec. 8093. None of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner 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: Provided, That nothing in this section shall preclude the head of a Federal agency from entering into a contract pursuant to 42 U.S.C. 8287; nor shall it preclude the Secretary of a military department from entering into a contract pursuant to 10 U.S.C. 2394 or from purchasing electricity from

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> any provider when the utility or utilities having applicable State-approved franchise or other service authorizations are found by the Secretary to be unwilling or unable to meet unusual standards for service reliability that are necessary for purposes of national defense.

As will be discussed in more detail later, this provision waives the sovereign immunity of the United States with respect to the acquisition of the electricity commodity. However, nothing in this provision can be construed as waiving the sovereign immunity of the United States with respect to the disposal of an on-base utility system.

Because Congress has not waived the sovereign immunity of the United States with respect to the conveyance of an on-base utility system under section 2688 of title 10, United States Code, state law is not applicable to the conveyance of an on-base utility system under Section 2688; rather, Section 2688 governs that conveyance. Accordingly, "[i]f more than one utility or entity . . . notifies the Secretary concerned of an interest in a conveyance . . ., the Secretary shall carry out the conveyance through the use of competitive procedures", not on a sole source basis to a utility that state law indicates has an exclusive right to provide utility service in the relevant geographic area.

Section 2688 also provides that the Secretary concerned may not make a conveyance of a utility system until he submits an analysis demonstrating, *inter alia*, that "the conveyance will reduce the long-term costs of the United States for utility services provided by the utility system concerned . . .." Whether this economic standard is met – and whether conveyance of the utility is permissible under section 2688 – can be substantially affected by whether state laws and regulations apply to the Federal Government's acquisition of utility services from the prospective new owner of the utility system. We now turn to address that question.

II. Do State Laws And Regulations Apply To Or Otherwise Affect The Federal Government's Acquisition Of Utility Services Related To An On-Base Utility System Conveyed Under Section 2688 Of Title 10, United States Code?

A. Can The States Regulate The Federal Government's Acquisition Of Utility Services?

For the reasons discussed in the previous section, the states may not regulate the Federal government in any respect absent an unequivocal waiver of sovereign immunity. With one exception discussed below with respect to acquisition of the electricity commodity, there has been no such waiver with respect to Federal acquisition of utility services, hence states may not regulate these transactions directly.

Some have argued that through Section 8093 of the Department of Defense Appropriations Act, 1988, Congress may have waived the sovereign immunity of the United States with respect to the acquisition of electric utility services. As indicated previously, Section 8093 provides that

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> [n]one of the funds appropriated or made available by this or any other Act with respect to any fiscal year may be used by any Department, agency, or instrumentality of the United States to purchase electricity in a manner 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.

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 purchase of the electric commodity (electric power) excluding distribution or transmission services.[1] There is nothing in this section to indicate that "purchase electricity" should be read in any way other than its plain language. Consequently, electricity does not include the provision of utility services other than the commodity itself. This reading of section 8093 is also buttressed by the rule of statutory construction that waivers of sovereign immunity should be narrowly construed. See, e.g., United States Department of Energy v. Ohio, 503 U.S. 607 (1992) ("(t)his Court presumes congressional familiarity with the common rule that any waiver of the Government's sovereign immunity must be unequivocal. Such waivers must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires.").

---

[1] In West River Elec. Assn., Inc. v. Black Hills Power & Light Co., 918 F.2d 713 (8th Cir. 1990), the United States Court of Appeals for the Eighth Circuit considered the application of section 8093 to the purchase of electricity at Ellsworth AFB. The court concluded that—

> ...Congress, through section 8093, has not provided the necessary clear authorization to defer its exclusive jurisdiction over Ellsworth and to apply in its stead the South Dakota utility service territories as established under South Dakota law.
>
> Nor are we able to find in section 8093, on its face or in relation to the Appropriations Act as a whole, or from the legislative history, any clear and unambiguous declaration by Congress to amend the extensive and carefully-crafted body of federal procurement law. In fact, nowhere in section 8093 or its legislative history is the Competition in Contracting Act mentioned. Furthermore, as previously noted, the legislative history clearly states that this legislation was intended to protect against utility abandonment by their federal customers. It is undisputed that no abandonment is occurring here.

918 F.2d at 719. If the Department were to apply the holding of this case to all its privatization actions on installations with exclusive Federal legislative jurisdiction, the applicability of section 8093 would be limited to an even greater degree than suggested by this memorandum.

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Furthermore, the legislative history indicates that the "provision is intended to protect remaining customers of utility systems from the higher rates that inevitably would result if a Federal customer were allowed to leave local utility systems to obtain retail electric utility service from a nonlocal supplier." Senate Report 100-235, Report of the Committee on Appropriations accompanying S. 1923, the Department of Defense Appropriations Bill, 1988, page 70. There is nothing about the disposal of a government constructed and owned utility distribution system, and the subsequent acquisition of services from that system, that in any way undermines the stated purpose of section 8093.

However, because section 8093 waives the sovereign immunity of the United States with respect to the purchase of the electricity commodity, whether we could purchase or obtain electricity from a generating facility the Department has transferred through section 2688 is dependent upon state law.

B. CAN THE STATES REGULATE PROVIDERS OF UTILITY SERVICES TO THE FEDERAL GOVERNMENT?

While states generally recognize that they cannot regulate Federal contracting functions directly, some states have tried to regulate Federal contractors. Using this device, states sometimes attempt to accomplish indirectly what they could not achieve through direct oversight over activities of the Federal Government. The result is often a conflict between Federal regulations affecting Federal purchases and state regulation of providers of goods and services in its territory. Typically states will require a provider of a particular service or item of supply to be licensed while Federal contracting rules do not require the vendor to obtain a state license.

Conflicts between state and Federal laws are resolved through the Supremacy Clause of the Constitution: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Article VI, clause 2. Where there are direct conflicts between state and Federal law, state law must give way. The answer is less clear-cut where state and Federal laws do not directly conflict but where state laws affect Federal policies and programs to a greater or lesser degree. The Supreme Court has explained the rules for resolving conflicts between state and Federal law as follows:

> In determining whether a state statute is pre-empted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our sole task is to ascertain the intent of Congress. See Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Malone v. White Motor Corp., 435 U.S. 497, 504 (1978). Federal law may supersede state law in several different ways. First, when acting within constitutional limits, Congress is empowered to pre-empt state law by so stating in express terms. E. g., Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Second, congressional intent to pre-empt state law in a particular area may be inferred where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress "left no room" for supplementary state regulation.

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> Elevator Rice v. Santa Fe Corp., 331 U.S. 218, 230 (1947). . . . As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law. Such a conflict occurs either because "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). See Michigan Canners & Freezers Assn., Inc. v. Agricultural Marketing and Bargaining Bd., 467 U.S. 461, 478 (1984); Fidelity Federal Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 156 (1982). Nevertheless, pre-emption is not to be lightly presumed. See Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

California Fed. Savings & Loan Association v. Guerra, 479 U.S. 272, 284 (1987).

In the Federal contracting arena it appears that the second prong of the Guerra Supremacy Clause analysis applies. That is, the Federal Government has "occupied the field" of rules and standards applying to federal procurement and left no space for state intervention. In Miller v. Arkansas 352 U.S 187 (1956) the state attempted to prosecute a Federal contractor for not obtaining a contractor's license. The Supreme Court held that the Federal regulations establish methods for ensuring the responsibility of Federal contractors and that the states' attempt to insert themselves in this process violated the Supremacy clause. Many other cases since Miller have reaffirmed that the states may not require licensing of Federal contractors. The justification that regulation is intended to exclude bad contractors duplicates the Federal Government's own contractor selection procedures and is deemed an unwarranted interference with this Federal function. United States v. Virginia, 139 F.3d 984 (1998). Based on these precedents, state attempts to require that Federal utility service contractors operating a utility system on the installation obtain a state license to "ensure the Government gets quality service", should certainly fail.

States may justify regulation of a utility contractor on other grounds e.g. safety and health considerations affecting the broader utility distribution framework. This requires a different Supremacy Clause analysis since it is not the case that Congress has "left no room" for state regulation to ensure safe and economical operation of intrastate utility distribution systems. On the contrary, such regulation occurs in every state. Given potentially inconsistent Federal and state regulations each addressing legitimate concerns, a balancing test is required. United States v. Town of Windsor 765 F.2d 16, 19 (2d Cir, 1985)("application of the Supremacy Clause requires a balancing of the state and local interest in enforcing their regulations against the Government's interest in opposing the regulation."); United States v. Philadelphia 798 F2d 81, 87 (3d Cir. 1986)("a mere conflict of words is not sufficient; the question remains whether the consequences [of state regulation]....sufficiently injure the objectives of the federal program to require non recognition." citing McCarty v. McCarty, 453 U.S. 210, 232 (1981).

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Using the balancing test, courts have found that a state building code is inapplicable to a Federal project, concluding that "[e]nforcement of the substance of the permit requirement against the contractors would have the same effect as direct enforcement against the Government." 765 F.2d at 19; and invalidated a state statute that prohibited carriers from transporting government property at rates other than those approved by a state commission because it was a prohibition against the Federal government and clearly in conflict with Federal policy on negotiated rates. Public Utilities Commission of California v. United States, 355 U.S. 534 (1958). On the other hand, in North Dakota v. United States, 495 U.S. 423 (1990), the Court held that state liquor reporting and labeling requirements imposed on contractors who sell liquor to the Federal government were not invalid because they did not regulate the Federal government directly, were not discriminatory, and did not impose a significant burden on the Federal government or conflict with a Federal system of regulations. Similarly, where the application of the state regulation required the contractor to comply with certain work safety rules, the Court found the impact on the Federal government's interest incidental and concluded that the rules were valid as applied against the contractor. James Stewart & Company v. Sadrakula, 309 U.S. 94 (1940).

In applying a balancing test, the Courts would be required to balance Federal policies favoring maximum possible competition in government contracting against whatever safety or other regulatory concerns the states could articulate. It would seem clear from the case law that the state could not impose a license requirement because that could operate to overturn the Federal selection of a contractor using competitive procedures. Miller v. Arkansas 352 U.S 187 (1956); United States v. Virginia, 139 F.3d 984 (1998). However, the state may well regulate the operation of that contractor in a non-discriminatory way to protect the health and safety of all its citizens as long as that regulation does not impose a significant burden on the Federal government or conflict with a Federal system of regulation. North Dakota v. United States, 495 U.S. 423 (1990). Some degree of state regulation of the contractor operating a utility system on the installation may be permissible, to ensure, for example, that the operation of the on-base system does not threaten the safety and reliability of any utility system to which the on-base system connects.

III. CONCLUSIONS AND RECOMMENDATIONS.

When the Department disposes of an on-base utility system, and more than one entity expresses an interest in the conveyance, the Department must dispose of the utility systems "using competitive procedures" notwithstanding state laws and regulations regarding who can own a utility system. Congress has not waived the sovereign immunity of the United States with respect to disposal. Any effort to dispose of the system in a non-competitive manner, when more than one entity expresses an interest in the conveyance, even if undertaken to voluntarily comply with state law, would violate the express terms of section 2688.

Additionally, the state may not regulate the Federal Government's acquisition of utility services related to the on-base utility system. Federal procurement laws and

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regulations are supreme in this area. The Department must comply with state laws and regulations only when it is acquiring the electricity commodity.

Finally, while the entity to whom the Department conveyed the on-base utility system is not required to submit to state licensing or similar requirements that undermine the Federal competitive selection of that entity, to the extent the state has regulations regarding the conduct of operation and ownership of utility systems, the entity may have to comply with those requirements if those state requirements do not impose a significant burden on the Federal Government, conflict with a Federal system of regulation, or undermine the Federal policy being implemented. This will require a careful analysis of particular state requirements in relation to the Federal action.

Douglas A. Dworkin
Acting General Counsel

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DEP Exhibit 6 – Public

(SUN 00031-SUN 00044)

Docket No. SP-100, Sub 35

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(SUN 00031-SUN 00044)

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DEP Exhibit 7

Emails between M. Connor and W. Culton, Jr.
(January 8, 2018)
(SUN 00001)

Docket No. SP-100, Sub 35

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From: Connor, Mark J CIV USARMY HQDA (US) <mark.j.connor.civ@mail.mil>
Sent: Tuesday, January 9, 2018 9:57 AM
To: Bill Culton
Subject: RE: [Non-DoD Source] Communities' entities question

Project LLCs are not "instrumentalities of the United States" -- rather, they are "eligible entities" as defined at 10 USC 2871(5).

From: Bill Culton [Bill.Culton@corvias.com]
Sent: Tuesday, January 09, 2018 7:48 AM
To: Connor, Mark J CIV USARMY HQDA (US)
Subject: [Non-DoD Source] Communities' entities question

All active links contained in this email were disabled. Please verify the identity of the sender, and confirm the authenticity of all links contained within the message prior to copying and pasting the address to a Web browser.

Hi Mark – I hope all is well. Someone asked me if our partnership/LLC's with the Army are considered "instrumentalities of the Army or US Government". I said I'd be shocked (and appalled) if that were the case. The only time I've heard the term "instrumentality" used is in the context of AAFES. I explained that the "federal funds" that make their way to the LLC are really just the service members BAH (which they can use outside the installation) and only come to our lockbox b/c the service members sign a form authorizing the US Treasury to send the BAH to the LLC to pay their rent.
Is there anything you can point me to that would make it clear that our LLC's are not instrumentalities?
Thanks in advance,
Bill

Corvias

William E. Culton, Jr. I General Counsel
main:(401) 228-2800 cell: (401) 339-1772
1405 South County Trail, Suite 530
East Greenwich, RI 02818
corvias.com < Caution-http://www.corvias.com/ >
< Caution-http://www.twitter.com/corvias > < Caution-https://www.linkedin.com/company/corvias-group?trk=company_logo >

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DEP Exhibit 8 – Public

(SUN 00995-SUN 01025)

Docket No. SP-100, Sub 35

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(SUN 00995-SUN 01025)

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DEP Exhibit 9

Municipal Services Agreement
(SUN 000975-SUN 000994)

Docket No. SP-100, Sub 35

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2020 MUNICIPAL SERVICES AGREEMENT

THIS CONTRACT, entered into originally August 1, 2003 by and between the UNITED STATES OF AMERICA (hereinafter called the "Government") held in effect continuously and renewed annually is, represented by the Utilities Sales Officer executing this contract and

Bragg Communities LLC
(Hereinafter called the "Purchaser" or "BC, LLC")

WHEREAS, the Government has established Military Installations near Fayetteville, North Carolina known as Fort Bragg and Pope Army Airfield, and owns, maintains and operates facilities for the furnishing of certain utilities services and also obtains certain utility services from utility companies and

WHEREAS, pursuant to the Military Housing Privatization Initiative (10 U.S.C. section 2878 as amended), Government and Purchaser have entered into a ground lease on August 1, 2003 with Supplemental Agreements 2 (1 Sep 07); 3 (20 Dec 07); 4 (30 Aug 10); 5(6 Jun 11); 6 (13 Aug 14); & 7 (13 Aug 14) effective as of the Amendment No. 2 date 1 Sept 07 ("Ground Lease");

WHEREAS, pursuant to the Ground Lease, Government has leased to Purchaser, portions of Fort Bragg and Pope Army Airfield real estate designated for family housing and unaccompanied housing (SUH) and has conveyed any improvements thereon, for a term of fifty years, which term is renewable for an additional twenty-five years by agreement of Government and Purchaser;

WHEREAS, the Ground Lease contains the Government's Covenant to provide or otherwise ensure the availability of utility services (and other municipal services) for the benefit of Purchaser's administrative operations and the residents of the Family Housing and senior unaccompanied housing;

WHEREAS, the Purchaser desires to obtain services from the Government for electricity, natural gas, water, wastewater, police and fire protection.

WHEREAS, construction of facilities in connection with the sale of such service to the Purchaser will not hinder the construction of public or private utility service facilities of a like nature;

WHEREAS, PURSUANT TO 10 USC, section 2872a, and FMR 7000.14R, Vol. 11A the Government is authorized to sell and be reimbursed services required by the Purchaser;

WHEREAS, the Government desires to obtain service from the Purchaser for road maintenance and repair within the Ground Lease in the Linden Oaks Housing Area;

NOW, THEREFORE, in consideration of the premises and the mutual agreement herein contained, to be performed by the parties hereto respectively, it is agreed as follows:

GENERAL PROVISIONS

1. SERVICES TO BE RENDERED. From and after the effective date of this contract, the Government agrees to supply the Purchaser with the services and utilities listed in the attached General and Special Provisions A-F and the Purchaser agrees to supply services listed in Special Provision G.

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2. PAYMENTS. For and in consideration of the performance of the stipulations of this contract, the Purchaser agrees to pay the Government for service herein contracted for, at the rates set forth in attached Special Provisions A-F and the Government agrees to pay the Purchaser for service herein contracted for in Special Provision G. Monthly Bills are available on the 20th of each month in WWW.PAY.GOV. The DPW Housing office will validate the bill each month and provide a signed copy of the bill to Corvias by the end of each month. All such bills will be due and payable within 30 days of the date of the invoice.

3. USE OF SERVICE. Purchaser and Government agree to use the services provided herein, respectively, in such manner as not to in any way disrupt or interfere with the requirements of the Government, Purchaser or any other Purchaser that may be served by the Government. Purchaser agrees that these services shall be exclusively for the benefit of Bragg Communities, LLC (BC, LLC).

4. CHANGE OF RATES. The rates for each service to be charged the Purchaser or Government shall be the local prevailing rates for similar service, provided that the rates shall not be less and shall not be more than the cost to the Government or Purchaser of supplying the service, including losses, overhead, and capital charges.

   The rates and charges applicable to the service or services contemplated herein will be renewed annually or more often if necessary, in compliance with the above requirements. Annual validation or rate calculations will be normally available in October/November of the current calendar year and will become effective in January of the following year.

   If during the life of this contract there should be a change in the applicable local prevailing rates or in the cost to the Government or Purchaser, the contract rates set forth herein will be adjusted, with **30-day advance written notice**, as required to conform therewith and the Government or Purchaser agrees to furnish, subject to the conditions set forth herein, and the Purchaser or Government agrees to take and pay for, such service at the adjusted rates from and after the date when such adjusted rates are made effective.

   In the event that alternate source(s) of service become available to Purchaser at a more beneficial rate, then the Purchaser may elect to seek an alternate source for the service or services and terminate this agreement in accordance with Paragraph 7.

5. Bragg Communities, LLC as Purchaser may negotiate connection charges, relocation fees and construction standards directly with any privatized utility service provider.

6. LIABILITY. Except for actions on the part of the Government that constitute a breach of contract or gross negligence, the Purchaser shall indemnify, hold and save the Government, its officers, agents and employees, harmless from liability of any kind, for or on account of any claim or action that may be asserted in connection with the services furnished under this contract. Likewise, except for actions on the part of the Purchaser that constitute a breach of contract or gross negligence, the Government shall indemnify, hold and save the Purchaser, its officers, agents and employees, harmless from liability of any kind, for or on account of any claim or action that may be asserted in connection with the services furnished under this contract.

7. TERMINATION. In the event a service or utility is terminated by the Purchaser, with 30-day advance written notice and in accordance with the terms hereof; the Government shall have the right to recapture costs of such services or utilities previously rendered.

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In the event of a national emergency proclaimed by the President, the Government may terminate this contract immediately without such advance notice. It is further mutually agreed that this contract will be terminated at such time as the installation furnishing said service becomes inactive.

8. RECAPTURE. In the event this contract is terminated in accordance with the terms hereof; the Government shall have the right to recapture with reasonable notice any utility facility it may have furnished in connection with the sale of any utility service to the Purchaser.

9. FACILITIES TO BE PROVIDED. The Government shall not be obligated in any way for the cost of making connections for Purchaser's services. Purchaser shall, at Purchaser's expense, install, maintain, and operate all new facilities required for obtaining services, including appropriate industry-standard **metering** when required by the Government or other utility service Owner and regulating equipment and service connections to the existing utility system. Plans for all such facilities shall be subject to the approval of the Utilities Sales Officer and the installation of such facilities shall be subject to his/her supervision. Such approvals shall not be unreasonably withheld. Once new facilities are inspected and approved by the government the responsibility for the upkeep and maintenance of the new facilities shall be governed by the terms and conditions of the Ground Lease. Purchaser's obligations with regards to maintaining existing facilities are described in the attached Special Provisions.

10. OFFICIAL NOT TO BENEFIT. No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract, or to any benefit arising from it. However, this clause does not apply to this contract to the extent that this contract is made with a corporation for the corporation's general benefit.

11. COVENANT AGAINST CONTINGENT FEES. The Purchaser warrants that no person or selling agency has been employed or retained to solicit or obtain this contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Government shall have the right to annul this contract without liability or, at its discretion, to deduct from the contract price or consideration, or otherwise recover, the full amount of the contingent fee.

"Bona fide agency," as used in this clause, means an established commercial or selling agency, maintained by a contractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds itself out as being able to obtain any Government contract or contracts through improper influence.

"Bona fide employee," as used in this clause, means a person employed by the Purchaser and subject to the purchaser's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Government contracts nor holds out as being able to obtain Government contract or contracts through improper influence.

"Contingent fee," as used in this clause, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Government contract.

"Improper influence", as used in this clause, means any influence that induces or tends to induce a Government employee or officer to give consideration or to act regarding a Government contract on any basis other that the merits of the matter.

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12. DISPUTES.

a. This contract is subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) (the Act)

b. The Government and Purchaser shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of a warranted Contracting Officer.

c. The requirements of the Disputes clause at FAR 52.233-1 are supplemented to provide that matters involving the interpretation of retail rates, rate schedules, tariffs, riders, and tariff related terms provided under this contract and conditions of service are subject to the jurisdiction and regulation of the utility rate commission or regulatory body for the utility.

13. DEFINITION

The term "Utility Provider" means the US Government Directorate of Public Works (DPW), Fort Bragg, NC controlled commodity through a self-owned or privatized utility network including Old North Utility Services (ONUS), Harnett County Public Utilities, Public Works Commission (PWC), Piedmont Natural Gas (PNG), or Sandhills Utilities Services (SUS) so long as billing for service is through the US government.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the approved date below here written.

by: Pete Sims, Authorized Representative

Bragg Communities LLC
Effective Date: 1 Jan 20
Approved Date: July 22, 2020

THE UNITED STATES OF AMERICA

Mr. Justin O. Mitchell
Garrison Manager, Fort Bragg, NC

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SPECIAL PROVISION A
ELECTRIC SERVICE

1. ESTIMATED SERVICE REQUIREMENTS.

Actual Annual Consumption for FY19:

Neighborhood	Actual Consumption	Unit
Bragg Family Housing (includes Pope and Linden Oaks)	103,291,267	KWH
Bragg Family Housing (includes Pope and Linden Oaks)	122,304	SF
Bragg Randolph Pointe (SUH)	4,107,943	KWH

The parties hereto are not obligated to deliver or receive, nor are they restricted to, the above amounts.

2. POINT OF DELIVERY. The point of delivery of service shall be: At master electric meters that measure an area of dwelling units.

3. DESCRIPTION OF ELECTRIC SERVICE. The Government will supply 12,470/7,200V, 3 phase, 4 wire and 120/208V, single phase, 3 wire, 60 HZ alternating current.

4. RATES. The rate to be charged Bragg Communities LLC (BC, LLC) is variable monthly, or more frequently if Fort Bragg's utility suppliers push cost increases/decreases to the installation. Directorate of Public Works (DPW) passes these cost increases/decreases to BC, LLC as they occur.

a. Electrical consumption for Bragg Family Housing (including Pope and Linden Oaks) will be billed at the monthly per KWH rate (currently 0.08526/KWH) for metered housing units and electrical fixtures. Non-metered electrical fixtures will be billed at the monthly square-footage rate (currently 0.09908/SF).

Actual FY19 Kilowatt-Hour (KWH) Consumption for Bragg Family Housing (including Pope and Linden Oaks) with FY20 rates:

Family Housing

	FH Electric Consumption Per KWH FY19	FY20 Rate	Total
Oct-18	9,346,967	0.08526	$ 796,922.41
Nov-18	7,223,368	0.08526	$ 615,864.36
Dec-18	7,422,925	0.08526	$ 632,878.59
Jan-19	8,572,827	0.08526	$ 730,919.23
Feb-19	9,624,551	0.08526	$ 820,589.22
Mar-19	7,901,864	0.08526	$ 673,712.92
Apr-19	7,352,684	0.08526	$ 626,889.84
May-19	7,070,843	0.08526	$ 602,860.07
Jun-19	8,875,016	0.08526	$ 756,683.86
Jul-19	9,032,429	0.08526	$ 770,104.90
Aug-19	10,840,617	0.08526	$ 924,271.01
Sep-19	10,027,176	0.08526	$ 854,917.03
TOTAL			**$ 8,806,613.42**

BC, LLC: Bragg Communities, LLC; SUH: Senior Unaccompanied Housing

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Actual FY19 Square-Footage (SF) Consumption for Bragg Family Housing (including Pope and Linden Oaks) with FY20 rates:

Family Housing			
	FH Electric SQ FT	FY20 Rate	Total
Oct-18	10,192	0.09908	$ 1,009.82
Nov-18	10,192	0.09908	$ 1,009.82
Dec-18	10,192	0.09908	$ 1,009.82
Jan-19	10,192	0.09908	$ 1,009.82
Feb-19	10,192	0.09908	$ 1,009.82
Mar-19	10,192	0.09908	$ 1,009.82
Apr-19	10,192	0.09908	$ 1,009.82
May-19	10,192	0.09908	$ 1,009.82
Jun-19	10,192	0.09908	$ 1,009.82
Jul-19	10,192	0.09908	$ 1,009.82
Aug-19	10,192	0.09908	$ 1,009.82
Sep-19	10,192	0.09908	$ 1,009.82
			$ 12,117.88

Note: * Sandhills Utility Service Facilities Surcharge began January 2007; include BC, LLC pro-rated operations and maintenance shared costs charged to Directorate of Public Works. Starting 1 October 2015, facility charges (O&M) and line losses are combined with the commodity rate into a comprehensive unit cost.

b. Phase I and Phase II of Randolph Pointe Apartments (SUH) were completed in 2009 and 2014, respectively. Electrical consumption for apartment units, neighborhood center, apartment/leasing office, garages, and exterior lighting will be billed at the monthly per KWH rate (currently 0.09908/KWH)

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Actual FY19 Consumption for Randolph Pointe Apartments (SUH) with FY20 rates:

Randolph Point			
	RP Electric Consumption Per KWH FY 19	FY 20 Rate	Total
Oct-18	278,962	0.08526	$ 23,784.30
Nov-18	290,729	0.08526	$ 24,787.55
Dec-18	342,572	0.08526	$ 29,207.69
Jan-19	351,967	0.08526	$ 30,008.71
Feb-19	384,967	0.08526	$ 32,822.29
Mar-19	344,600	0.08526	$ 29,380.60
Apr-19	352,707	0.08526	$ 30,071.80
May-19	289,598	0.08526	$ 24,691.13
Jun-19	348,389	0.08526	$ 29,703.65
Jul-19	352,227	0.08526	$ 30,030.87
Aug-19	403,496	0.08526	$ 34,402.07
Sep-19	367,729	0.08526	$ 31,352.57
			$350,243.22

c. Electrical charges for Bragg Communities, LLC-controlled facilities are as follows:

1) Corvias Military Living-owned Headquarters Building, Armistead Street, Pope AFB (Building 36) will be billed at the monthly per KWH rate (currently 0.08526/KWH).

2) Leased Mallonee Service Area, S. Lucas Avenue (6-9155, 6-9262, 6-9355, 6-9357, and 6-9455) will be billed at the monthly per KWH rate (currently 0.08526/KWH).

3) Leased Administrative offices in the Soldier Support Center (Building 4-2843) started 8 April 2014. DPW bills at a monthly blended estimated square foot rate: 164 SF x 0.09908/SF = $16.25 monthly. Currently Corvias has not reestablished an office space in the Soldier Support Center. Once an Office has space has been reestablished, this cost will apply

Estimated annual: $195.00; however, rates are set by fiscal year so Oct 19 - Dec 19 and are subject to rate adjustments.

4) Non-metered electrical fixtures will be billed at the monthly square-footage rate (currently 0.09908/SF).

5. METERING AND BILLING. Service will be measured by master electric meters, metered transformers, and blended estimated square footage rates. For all meters, periodic meter calibration is a utility provider responsibility. The meters will be read monthly by the Government or bona fide agent assigned. Bills will be rendered monthly to the Purchaser by the Government. A copy of the electrical deduct worksheet will be provided monthly with the bill.

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6. ALTERATIONS AND ADDITIONS: Additional housing facilities added or serving the housing inventory by BC, LLC are covered under this agreement. Any additional metering required to measure housing electrical consumption will be funded by Bragg Communities, LLC.

7. PURCHASER'S MAINTENANCE OBLIGATIONS: The point of demarcation where BC, LLC shall assume responsibility for electrical maintenance & repair is as follows:

a. Family Housing:

- For aerial services at the service entrance connection point (weather head).
- For underground low voltage services at the line side lugs of the entrance panel, meter base, or main disconnect switch.

b. Apartments:

- For underground low voltage services at the line side lugs of the entrance panel, meter base, or main disconnect switch.

c. Leased facilities: See terms of individual lease if not mentioned above.

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SPECIAL PROVISION B
GAS SERVICE

1. ESTIMATED REQUIREMENTS.

Actual Annual Consumption for FY17:

Neighborhood	**Actual Consumption (Therms)**
Bragg Family Housing	
Government-Owned	**1,075,068**
Piedmont Natural Gas-Owned	**252,822**
Randolph Pointe Apts (SUH)	N/A

The parties hereto are not obligated to deliver or receive, nor are they restricted to, the above amounts.

2. POINT OF DELIVERY/DEMARCATION. For dwelling units where the natural gas distribution system is Government-owned, the demarcation point is the first pipefitting or valve downstream (dwelling unit side) of the regulator and/or meter, or for Piedmont Natural Gas Company (aka North Carolina Natural Gas Company) meters connected to individual dwelling units (Cherbourg HA-13 & Ste. Mere Eglise HA-14/15).

3. QUALITY OF GAS. The Government will supply the Purchaser with gas of similar characteristics as the gas received by the Government.

4. RATES. The rates to be charged Bragg Communities, LLC are variable monthly, or more frequently if Fort Bragg's utility suppliers push cost increases to the installation. Directorate of Public Works (DPW) passes these cost increases/decreases to the customer as they occur. Starting 1 October 2015, facility charges (O&M) and lines losses are combined with the commodity rate into one comprehensive unit cost for the Government-owned natural gas service.

a. Because of variation in heat content, adjustments, if any, made by Government's supplier in the price of the gas received by Government is proportionately applied to the rate schedule.

b. Actual FY19 Consumption for Bragg Family Housing with FY20 rates:

Government Owned Gas System			
	THERMS	FY20 rate per Therm	Total
Oct-18	32,165	0.74894	**$ 24,089.66**
Nov-18	65,470	0.74894	**$ 49,033.10**
Dec-18	124,742	0.74894	**$ 93,424.27**
Jan-19	212,834	0.74894	**$ 159,399.90**
Feb-19	195,320	0.74894	**$ 146,282.96**
Mar-19	190,942	0.74894	**$ 143,004.10**
Apr-19	112,065	0.45568	**$ 51,065.78**
May-19	58,266	0.45568	**$ 26,550.65**
Jun-19	25,032	0.45568	**$ 11,406.58**
Jul-19	19,405	0.45568	**$ 8,842.47**
Aug-19	17,883	0.45568	**$ 8,148.93**
Sep-19	20,944	0.45568	**$ 9,543.76**
	1,075,068		**$ 730,792.16**

BC, LLC: Bragg Communities, LLC; SUH: Senior Unaccompanied Housing

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PIEDMONT NATURAL GAS-OWNED SYSTEM			
	PNG Consumption by THERMS	FY20 rate	Total
Oct-18	11,950	0.74894	$ 24,089.66
Nov-18	28,502	0.74894	$ 49,033.10
Dec-18	42,760	0.74894	$ 93,424.27
Jan-19	44,747	0.74894	$ 159,399.90
Feb-19	40,942	0.74894	$ 146,282.96
Mar-19	31,706	0.74894	$ 143,004.10
Apr-19	17,481	0.45568	$ 51,065.78
May-19	7,787	0.45568	$ 26,550.65
Jun-19	7,068	0.45568	$ 11,406.58
Jul-19	6,664	0.45568	$ 8,842.47
Aug-19	6,331	0.45568	$ 8,148.93
Sep-19	6,884	0.45568	$ 9,543.76
	252,822		**$ 730,792.16**

*PNG Rate reflects the installation billed rate as of May 2019

Natural Gas Combined				
	GOV-OWNED by THERMS	PNG Consumption by THERMS	FY20 rate	Total
Oct-18	32,165	11,950	0.74894	$ 33,039.49
Nov-18	65,470	28,502	0.74894	$ 70,379.39
Dec-18	124,742	42,760	0.74894	$ 125,448.95
Jan-19	212,834	44,747	0.74894	$ 192,912.71
Feb-19	195,320	40,942	0.74894	$ 176,946.06
Mar-19	190,942	31,706	0.74894	$ 166,749.99
Apr-19	112,065	17,481	0.45568	$ 59,031.52
May-19	58,266	7,787	0.45568	$ 30,099.03
Jun-19	25,032	7,068	0.45568	$ 14,627.33
Jul-19	19,405	6,664	0.45568	$ 11,879.12
Aug-19	17,883	6,331	0.45568	$ 11,033.84
Sep-19	20,944	6,884	0.45568	$ 12,680.66
	1,075,068	252,822		**$ 904,828.10**

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c. Gas charges for Corvias Military Living Headquarters Building, Armistead Street, Pope AAF (Building 36) is included above under the government-owned columns.

5. UNIT OF MEASURE. The method of determining the volume of gas in cubic feet, or the quantity of heat units in Therms, delivered to the Purchaser by the utility, shall be the same as that used to determine the amount of cubic feet or Therms delivered to the Government by its supplier.

6. METERING AND BILLING. Gas will be measured by natural gas meters. For master meters, periodic meter calibration is a utility provider responsibility. Piedmont Natural Gas Company owns its meters and gas distribution system in Nijmegen/Cherbourg (HA-13) and Ste. Mere Eglise (HA-14/HA-15). The meters will be read either by the utility, or its authorized representative, or the Government or bona fide agent assigned, and bills will be rendered monthly to the Purchaser.

7. ALTERATIONS AND ADDITIONS:
Additional housing facilities added or serving the housing inventory by Bragg Communities, LLC will be covered under this agreement.

Any additional metering required to measure housing natural gas consumption will be funded by Bragg Communities, LLC.

8. PURCHASER'S MAINTAINENCE OBLIGATIONS:
The point of demarcation where Bragg Communities, LLC shall assume responsibility for natural gas maintenance & repair is as follows:

- For dwelling units/housing facilities where the natural gas distribution system is owned by Piedmont Natural Gas Company (aka North Carolina Natural Gas Company) in Nijmegen/Cherbourg (HA-13) and Ste. Mere Eglise (HA-14/HA-15), the demarcation point is the first pipe fitting down-stream (dwelling unit side) of the meter.

- For dwelling units/housing facilities where the natural gas distribution system is owned by the government/Bragg Communities, LLC, the demarcation point is the first pipe fitting or valve down-stream (dwelling unit side) of the regulator and/or meter.

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SPECIAL PROVISION C
WATER SERVICE

1. ESTIMATED REQUIREMENTS.

Estimated annual water consumption:

Neighborhood	Estimated Consumption (KGAL)
Bragg Family Housing (Excluding Linden Oaks)	348,228.4
Randolph Pointe Apts (SUH)	11,900.6

The parties hereto are not obligated to deliver or receive, nor are they restricted to, the above amounts.

2. POINT OF DELIVERY. The point of delivery of water shall be the point of connection at various locations within the water main.

3. QUALITY OF WATER. The Government will supply the same quality of potable water as supplied to Fort Bragg by means of its water system located at the said Army Installation.

4. RATES. The rates to be charged the Purchaser by the Government for the water service are subject to ASA (I&E) Memorandum, subject: Utility Services Reimbursement Policy for Residential Communities Initiative (RCI) Partnerships, 5 May 2004. Water commodity services will be provided from a privately-owned system to the RCI project. Facility charges (O&M) and line losses are combined with the commodity rate into one comprehensive unit cost.

a. Bragg Family Housing (including Pope). The cost will be charged to the project at a rate of $4.88602/KGAL (including line loss and O&M charges) with a multiplier of 6.68 KGAL per occupied home in all neighborhoods with the exception of Randolph Pointe which is billed separately (see 4b) and Linden Oaks which is billed separately by Harnett County. The estimated average annual consumption is calculated using the previous fiscal year's average family housing occupancy (excluding Linden Oaks/HA-27). The average occupancy for FY18 was 4,344. This occupancy is multiplied by a "per door" multiplier (6.68 for 2020) to estimate monthly and annual water consumption. This multiplier is calculated using Linden Oaks/HA-27 as a model and is an estimate of monthly water use (in KGAL) "per door". This multiplier is based on a 12-month average and is subject to annual review and revision.

Family Housing

Water	Main post Occupancy	Multiplier	Sub Total Kgal	Rate	Grand total
Oct-18	4531	6.68	30267.08	4.88602	$ 147,885.56
Nov-18	4526	6.68	30233.68	4.88602	$ 147,722.37
Dec-18	4512	6.68	30140.16	4.88602	$ 147,265.42
Jan-19	4524	6.68	30220.32	4.88602	$ 147,657.09
Feb-19	4529	6.68	30253.72	4.88602	$ 147,820.28
Mar-19	4481	6.68	29933.08	4.88602	$ 146,253.63
Apr-19	4422	6.68	29538.96	4.88602	$ 144,327.95
May-19	4298	6.68	28710.64	4.88602	$ 140,280.76
Jun-19	4176	6.68	27895.68	4.88602	$ 136,298.85
Jul-19	4082	6.68	27267.76	4.88602	$ 133,230.82
Aug-19	4054	6.68	27080.72	4.88602	$ 132,316.94
Sep-19	3995	6.68	26686.6	4.88602	$ 130,391.26
			348228.4		**$ 1,701,450.93**

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b. Randolph Pointe Apartments (SUH). Randolph Pointe Phase I and Phase II were completed 2009 and 2014, respectively. The cost will be charged to the project at a rate of $4.88602/KGal (including line loss and O&M charges) with a multiplier of 1.516 KGAL per occupied apartment unit. Estimated consumption: 654 Units x "1.516" KGAL per Unit (includes neighborhood center, pool, etc) = 11,900.6 KGAL. Average annual consumption is calculated using the previous fiscal year's average occupancy for Randolph Pointe. The average occupancy for FY19 was 654 based on occupancy from October 2018 through September 2019. This occupancy is multiplied by a "per bed" multiplier ("1.516" for FY20) to estimate monthly and annual water consumption. This multiplier is calculated using Linden Oaks/HA-27 as a model of 1,516 or(1.516) per person and is an estimate of monthly water use (KGAL). "per bed occupied". This multiplier is based on a 12-month average and is subject to annual review and revision.

Randolph Point					
	RP Monthly Occupancy	Multiplier	Sub Total Kgal	Rate	Grand total
Oct-18	665	1.516	1008.14	4.88602	$ 4,925.79
Nov-18	669	1.516	1014.204	4.88602	$ 4,955.42
Dec-18	667	1.516	1011.172	4.88602	$ 4,940.61
Jan-19	669	1.516	1014.204	4.88602	$ 4,955.42
Feb-19	644	1.516	976.304	4.88602	$ 4,770.24
Mar-19	647	1.516	980.852	4.88602	$ 4,792.46
Apr-19	644	1.516	976.304	4.88602	$ 4,770.24
May-19	643	1.516	974.788	4.88602	$ 4,762.83
Jun-19	633	1.516	959.628	4.88602	$ 4,688.76
Jul-19	647	1.516	980.852	4.88602	$ 4,792.46
Aug-19	667	1.516	1011.172	4.88602	$ 4,940.61
Sep-19	655	1.516	992.98	4.88602	$ 4,851.72
			11,900.6		$ 58,146.57

c. In Sep 07 Fort Bragg privatized its water distribution and wastewater collection systems to Old North Utility Services (ONUS). ONUS officially took over operation and maintenance (O&M) of the systems on 1 Mar 08. The estimated BC, LLC O&M portion is 12 percent of the monthly total installation O&M cost. DPW began billing BC, LLC for this utility cost effective with the April 10 utility invoice. On 1 May 2015, all water and wastewater service infrastructure (excluding Linden Oaks/HA-27) previously installed and maintained by BC, LLC was transferred to ONUS. This transaction transferred the responsibility of maintenance of these installed systems from BC, LLC to ONUS with respect to the point(s) of demarcation referenced in paragraph 8 below. Starting 1 October 2015, facility charges (O&M) and line losses are combined with the commodity rate into one comprehensive unit cost.

5. METERING AND BILLING. Individual water meters are not currently installed on Bragg Family Housing units nor Randolph Pointe Apartments units or buildings.

Water consumption for family housing or a housing area will be billed monthly at the rate of $4.88602/KGAL with the estimated consumption in kilo-gallons (KGAL)

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calculated as the monthly occupancy for family housing or housing area multiplied by 6.68 KGAL per occupied home. The monthly occupancy will be considered the actual occupancy of family housing or a housing area provided by BC, LLC at the end of the consumption month.

Water consumption for Randolph Pointe Apartments will be billed monthly at the rate of $4.88602/KGAL with the estimated consumption in KGAL calculated as the monthly occupancy for Randolph Pointe Apartments multiplied by "1.516" KGAL per occupied bed per apartment unit. The monthly bed occupancy will be considered the actual occupancy of Randolph Pointe provided by BC, LLC at the end of the consumption month.

a. Irrigation systems installed by BC, LLC will be individually metered. They will be listed separately on the monthly bill and not rolled into sanitary sewer charges.

b. Fort Bragg Family Housing Linden Oaks/HA-27. Billing and payment for water by this Purchaser is transacted directly with Harnett County. In the event this utility is extended by the Government or other parties for use outside the BC, LLC ground leased area, sub-metering and associated costs will be borne by the Government or that interested party and billed directly by Harnett County.

6. RECAPTURE: Fort Bragg Family Housing Linden Oaks/HA-27. In the event this utility is extended for use outside the BC, LLC ground leased area and in accordance with the terms hereof; BC, LLC shall have the right to recapture proportional costs of such utilities provided and billed by Harnett County through sub-metering or other mutually agreeable means.

7. ALTERATIONS AND ADDITIONS: Additional dwelling units/housing facilities added by BC, LLC will be covered under this agreement.

a. Any additional metering required to measure housing water consumption will be funded by BC, LLC except for meters mentioned in Section 6 Recapture above.

b. At Fort Bragg Family Housing Linden Oaks/HA-27. In the event this utility is extended by the Government for its use outside the BC, LLC ground leased area, the Government or its designated agents, in advance, will provide and coordinate all utility extensions and connections with BC, LLC.

8. PURCHASER'S MAINTENANCE OBLIGATIONS:
Excluding Linden Oaks/HA-27, the point of demarcation where Bragg Communities LLC shall assume responsibility for all water system maintenance & repair is as follows:

- DU-side of (but not including) the appurtenance (typically a valve or meter) from the main or if no appurtenance, at the five-foot line exterior to the building on the service line.

- Maintenance of new and existing master bulk water meters and back flow preventers are the responsibility of ONUS.

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SPECIAL PROVISION D
WASTEWATER SERVICE

1. ESTIMATED REQUIREMENTS.

Estimated annual wastewater consumption (assumed to be 89.9% of water consumption based on the Linden Oak model data):

Neighborhood	Estimated Consumption (KGAL)
Bragg Family Housing (Excluding Linden Oaks)	313,822.6
Randolph Pointe Apts (SUH)	10,730.95

The parties hereto are not obligated to deliver or receive, nor are they restricted to, the above amounts.

2. POINT OF DELIVERY. The sanitary sewage collection and treatment shall be made at various points of connection within the existing wastewater collection system.

3. SERVICE TO BE RENDERED. The wastewater to be received, carried and disposed of hereunder shall be such as is customarily received at the privatized wastewater treatment plant, and shall not contain any material which would cause an unusual burden upon the said wastewater treatment plant or interfere with the operation of the privatized wastewater system.

4. RATES. The rates to be charged the Purchaser by the Government for sanitary sewer service are subject to ASA (I&E) Memorandum, subject: Utility Services Reimbursement Policy for Residential Communities Initiative (RCI) Partnerships, 5 May 2004. Facility charges (O&M) and line losses are combined with the commodity rate into one comprehensive unit cost.

a. Bragg and Pope Family Housing operations and maintenance costs began 1 January 2007 with the privatization of wastewater treatment plant operations by Harnett County. The cost will be charged to the project at a rate of $4.69678/KGAL (including line loss and O&M charges) with the estimated wastewater generation in KGAL calculated as the monthly occupancy for family housing or housing area multiplied by 6.02 (6.02 x 89.9%) per occupied home in all neighborhoods except Randolph Pointe which is billed separately (see 4b) and Linden Oaks which is billed separately by Harnett County. Wastewater generation as a percentage of water consumption is calculated using Linden Oaks/HA-27 as a model and subject to annual review and revision. The multiplier of 6.02 is calculated using Linden Oaks/HA-27 as a model and is an estimate of monthly water use (KGAL) "per door".

Family Housing					
Sewer	Main post Occupancy	Multiplier	Sub Total Kgal	Rate	Grand total
Oct-18	4531	6.02	27276.62	4.69678	$ 128,112.28
Nov-18	4526	6.02	27246.52	4.69678	$ 127,970.91
Dec-18	4512	6.02	27162.24	4.69678	$ 127,575.07
Jan-19	4524	6.02	27234.48	4.69678	$ 127,914.36
Feb-19	4529	6.02	27264.58	4.69678	$ 128,055.73
Mar-19	4481	6.02	26975.62	4.69678	$ 126,698.55
Apr-19	4422	6.02	26620.44	4.69678	$ 125,030.35

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May-19	4298	6.02	25873.96	4.69678	$	121,524.30
Jun-19	4176	6.02	25139.52	4.69678	$	118,074.79
Jul-19	4082	6.02	24573.64	4.69678	$	115,416.98
Aug-19	4054	6.02	24405.08	4.69678	$	114,625.29
Sep-19	3995	6.02	24049.9	4.69678	$	112,957.09
			313822.6		$	1,473,955.71

b. Phase I and Phase II of the Randolph Pointe Apartments (SUH) were completed in 2009 and 2014, respectively. The cost will be charged to the project at a rate of $4.69678/KGAL (including line loss and O&M charges) with the estimated wastewater generation in KGAL calculated as the monthly bed occupancy for Randolph Pointe Apartments multiplied by 6 per occupied bed per apartment unit. Wastewater generation as a percentage of water consumption is calculated using Linden Oaks/HA-27 as a model and subject to annual review and revision. The multiplier of "1.367" is calculated using Linden Oaks/HA-27 as a model and is an estimate of monthly wastewater use (KGAL) "per person per door".

Randolph Point						
	RP Monthly Occupancy	Multiplier	Sub Total Kgal	Rate	Grand total	
Oct-18	665	1.367	909.055	4.69678	$	4,269.63
Nov-18	669	1.367	914.523	4.69678	$	4,295.31
Dec-18	667	1.367	911.789	4.69678	$	4,282.47
Jan-19	669	1.367	914.523	4.69678	$	4,295.31
Feb-19	644	1.367	880.348	4.69678	$	4,134.80
Mar-19	647	1.367	884.449	4.69678	$	4,154.06
Apr-19	644	1.367	880.348	4.69678	$	4,134.80
May-19	643	1.367	878.981	4.69678	$	4,128.38
Jun-19	633	1.367	865.311	4.69678	$	4,064.18
Jul-19	647	1.367	884.449	4.69678	$	4,154.06
Aug-19	667	1.367	911.789	4.69678	$	4,282.47
Sep-19	655	1.367	895.385	4.69678	$	4,205.43
			10730.95		$	50,400.91

c. In Sep 07 Fort Bragg privatized its water distribution and wastewater collection systems to Old North Utility Services (ONUS). ONUS officially took over O&M of the systems on 1 Mar 08. On 1 May 2015, all water and wastewater service infrastructure (excluding Linden Oaks/HA-27) previously installed and maintained by BC, LLC was transferred to ONUS. This transaction transferred the responsibility of maintenance of these installed systems from BC, LLC to ONUS with respect to the point(s) of demarcation referenced in paragraph 8 below. Facility charges (O&M) and line losses are combined with the commodity rate into one comprehensive unit cost.

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5. METERING AND BILLING. The quantity of wastewater received by the Government will be taken as 89.9% of the quantity of water used by the purchaser. This percentage is calculated based on actual water consumption and wastewater generation in Linden Oaks/HA-27 and is subject to annual review and revision. For billing purposes, this percentage will be applied to the multiplier used for water consumption calculations.

Wastewater generation for family housing or a housing area will be billed monthly at the rate of $4.69678/KGAL with the estimated generation in kilo-gallons (KGAL) calculated as the monthly occupancy for family housing or housing area multiplied by 6.02 KGAL per occupied home. The monthly occupancy will be considered the actual occupancy of family housing or a housing area for the consumption month. This occupancy will be sent from Corvias Military Living to DPW Housing Division RCI personnel no later than the 3rd of the billing month. DPW Housing Division RCI will review and forward to DPW Utilities Branch no later than the 5th of the billing month for use in monthly utility billing.

For example, Bragg Family Housing (main post) had an occupancy of 3,995 for the month of September 2019, the consumption month. This occupancy will be provided by Corvias Military Living to DPW Housing Division RCI no later than the 3rd of each month. DPW Housing Division RCI will review and send final occupancy to DPW Utilities Branch no later than the 5th of each month.

Wastewater generation for Randolph Pointe Apartments will be billed monthly at the rate of $4.69678/KGAL with the estimated generation in KGAL calculated as the monthly occupancy for Randolph Pointe Apartments multiplied by "1.367" KGAL per occupied bed per apartment unit. The monthly occupancy will be considered the actual unit occupancy for the consumption month. This occupancy will be sent from Corvias Military Living to DPW Housing Division RCI personnel no later than the 3rd of the billing month. DPW Housing Division RCI will review and forward to DPW Utilities Branch no later than the 5th of the billing month for use in monthly utility billing.

Individually metered water irrigation systems will be listed separately on the monthly bill and not rolled into wastewater charges.

Fort Bragg Family Housing, Linden Oaks/HA-27. Billing and payment for sanitary sewer by this Purchaser is transacted directly with Harnett County. In the event this utility is extended by the Government for its use outside the BC, LLC ground leased area associated costs will be borne by the Government and billed directly by Harnett County.

6. RECAPTURE: Fort Bragg Family Housing Linden Oaks/HA-27. In the event this utility is extended by the Government for its use outside the BC, LLC ground leased area and in accordance with the terms hereof; Bragg Communities, LLC shall have the right to recapture proportional costs of such utilities provided and billed by Harnett County through mutually agreeable means.

7. ALTERATIONS AND ADDITIONS: Additional dwelling units/housing facilities added by Bragg Communities, LLC will be covered under this agreement.

Fort Bragg Family Housing: Linden Oaks/HA-27. In the event this utility is extended by the Government for its use outside the BC, LLC ground leased area, the Government or its designated agents, in advance, will provide and coordinate all utility extensions and connections with BC, LLC.

8. PURCHASER'S MAINTAINENCE OBLIGATIONS: The point of demarcation where Bragg Communities LLC shall assume responsibility for wastewater maintenance & repair is as follows:

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- Linden Oaks/HA-27 maintenance and repair is covered under the 4b. Referenced agreements with Harnett County.

- For existing dwelling units (DU) as of 1 Mar 08 (Privatization of Wastewater utilities by Old North Utility Services) - The point of demarcation shall be at the DU-side of the clean-out (NLT 5 feet from DU) or if no clean-out, at the five-foot line exterior to the building on the service line. For dwelling unit clean-outs located less than 5 feet from DU: POD is as if no clean-out is present, meaning at the five-foot line exterior to the building on the service line.

- For all new BC, LLC construction or major renovation greater than 50% of DU - ONUS will supply and locate clean-out(s) NLT 10 feet from each DU. The point of demarcation for BC, LLC responsibility shall be at the DU-side of the clean-out.

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SPECIAL PROVISION F
FIRE & POLICE SUPPORT SERVICE

1. ESTIMATED REQUIREMENTS.

Neighborhood	Total Dwelling Units
Fort Bragg Family Housing	6,104
Randolph Pointe Apts (SUH)	432

TOTAL	Quarterly $336,362.40	2019 Total $1,345,449.60

* Total dwelling units for Bragg Family Housing (Main Post) do not include Biazza Ridge due to its demolition and pending reconstruction.

2. POINT OF DELIVERY. All housing areas at Fort Bragg and Pope Army Airfield, NC are managed by Bragg Communities, LLC.

3. SERVICE TO BE RENDERED. The standard of fire and police services support provided as of 31 July 2003

4. RATES. The rates to be charged the Purchaser by the Government herein are as follows:

Rates above are to be paid no later than 30 days from receipt of invoice. If D,ASA (IH&P) publishes policy guidance that will contain a rate calculation methodology for reimbursement of DES municipal services that would result in a rate correction, Bragg Communities, LLC will be subject to payment for any rate increase or refund for any rate reduction. .

5. BILLING. Bills will be rendered in January, April, July, and October to the Purchaser by the Government.

6. ALTERATIONS AND ADDITIONS: Adjusted up or down based upon dwelling units/ Housing facilities added or demolished in the inventory. In-active and unoccupied homes are considered part of the inventory for fire and police support services charges.

BC, LLC: Bragg Communities, LLC; SUH: Senior Unaccompanied Housing

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SPECIAL PROVISION G
Road Maintenance

1. ESTIMATED REQUIREMENTS.
Estimated quantity of roads in the Linden Oaks neighborhood is 16.32 miles. It is estimated that the Gordon Elementary School accounts for 3.22 percent of road traffic, Shughart Elementary and Middle Schools account for 6.44 percent of traffic, Fort Bragg Fire and Emergency Services Facility accounts for 1.0 percent, Morales School Age Services accounts for 1.0 percent, Alexander Child Development Center accounts for 1.0 percent, and the Chay Youth Activities Center accounts for another 1.0 percent. The total usage attributable to Department of the Army is 13.66 percent. The parties hereto are not obligated to deliver or receive, nor are they restricted to, the above amounts.

2. POINT OF DELIVERY. Department of the Army facilities located within the Linden Oaks housing area at Fort Bragg, NC managed by Bragg Communities, LLC.

3. SERVICE TO BE RENDERED. Standard life cycle maintenance and repair of all public roadways accessible and utilized by customers and employees of Fort Bragg schools, Child Development Centers, Fire and Emergency Facilities, AAFES facilities, DFMWR facilities, and all other current and future municipal service facilities.

4. RATES. The rates to be charged the Government by Bragg Communities, LLC herein, are as follows:

Non-BC, LLC Facility	Percentage	Annual BC,LLC O&M Cost	Facility Total
Gordon Elementary School	3.22%	$26,738.00	$ 860.96
Shughart Elementary & Middle Schools	6.44%	$26,738.00	$1,721.93
Fort Bragg Fire and Emergency Services Facility	1.00%	$26,738.00	$ 267.38
Morales School Age Services	1.00%	$26,738.00	$ 267.38
Alexander Child Development Center	1.00%	$26,738.00	$ 267.38
Chay Youth Activities Center	1.00%	$26,738.00	$ 267.38
Total Reimbursement	13.66%		**$3,652.41**

5. BILLING. Bills will be rendered in January, April, July, and October to the Government by Bragg Communities LLC in the form of credits taken against utility invoices previously addressed in Special Provisions A - E.

6. ALTERATIONS AND ADDITIONS: Adjusted up or down based upon road miles of asphalt or concrete roadways added or demolished in the inventory.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgement Act*, 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 25th day of February, 2021.

/s/E. Brett Breitschwerdt

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