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Nov 15 2021

November 15, 2021

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

RE: Sunstone Energy Development LLC
Pre-Hearing Brief
Docket No. SP-100, SUB 35

Dear Ms. Dunston:

On behalf of Sunstone Energy Development LLC, we hereby submit the Pre-Hearing Brief in the above referenced docket. Exhibit A to the Brief, Affidavit of Dan Swayze, has a Confidential Exhibit 1. Exhibit A and the Confidential Exhibit 1 thereto will be filed under separate covers. An electronic copy of the Brief and Exhibit A thereto are being e-mailed to briefs@ncuc.net.

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

Thank you in advance for your assistance.

Sincerely,

Brad M. Risinger

pbb
cc: All parties of record

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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 Sunstone Energy Development, LLC That the Jurisdiction of the North Carolina Utilities Commission does not extend to The Federal Enclave within Fort Bragg	))))))	PRE-HEARING BRIEF OF SUNSTONE ENERGY DEVELOPMENT LLC

Sunstone Energy Development LLC ("Sunstone") provides this pre-hearing brief in response to the Commission's Order Scheduling Oral Argument, Allowing Briefing, and Requiring Responses to Commission Questions issued on October 20, 2021.

INTRODUCTION

State ex rel Utils. Comm'n v. Cube Yadkin Generation, LLC, ___ S.E.2d ___, 2021 WL 4057218 (N.C. App. 2021) is a ruling that should be limited to its peculiar facts. The Court of Appeals confronted a unique set of circumstances under which it discerned that Cube Yadkin Generation, LLC ("Cube") had identified a possible use for existing hydroelectric facilities that no longer had a long-term customer to serve, but lacked a meaningful business construct into which a positive Commission ruling would fit. Thus, the Court concluded that "with no evidence that [Cube] would be able to acquire that real property," and nothing solid to report about potential tenants, its petition amounted to a request about whether its "particular business venture is a legal use of its time and resources." (*Id.* at **3-4, ¶¶ 12, 15).

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The Commission's consideration of the Proposed Project[1] is not laden with the uncertainty the court identified in Cube's business plan. Instead, it presents a readily identifiable controversy that upon resolution will apply directly to whether the United States Army can allow a private, on-base energy provider to supply solar energy to a privatized operator of residential housing wholly within the bounds of a federal enclave.

I. The Proposed Project Would be Developed and Operated on a Federal Enclave in which the United States has Granted a 50-Year Ground Lease to the Offtaker of Solar Energy

A primary factor in the *Cube Yadkin* analysis concluding there was no "active controversy" was the Court's observation that Cube did not own or have an interest in the Badin Business Park land it proposed to develop. Cube, the court wryly noted, "intends to make formal efforts to acquire the very land it intends to develop and lease only after the Commission approves of its Proposed Plan." (*Id.* *3, ¶ 11). Here, though, Fort Bragg is a federal enclave[2] in which Congress has exclusive legislative jurisdiction with the consent of the State of North Carolina. U.S. Const. art. I, § 8, cl. 17. BCL has a Ground Lease with the United States, subject to an initial term running to 2053, that includes areas within Fort Bragg on which BCL will operate, improve, and maintain military housing. The solar energy and energy efficiency services Sunstone would afford to BCL under the Proposed Project would be generated and provided wholly within areas subject to BCL's Ground Lease with the United States. (Affidavit of Dan Swayze, ¶ 4) (Exhibit A). BCL would be

[1] Sunstone seeks to enter into a contract with Bragg Communities, LLC ("BCL") - the private entity that owns and controls privatized, on base military housing at Fort Bragg pursuant to the United States Department of the Army's ("Army") Residential Communities Initiative ("RCI") - to provide solar energy and energy efficiency services to housing units on the federal Army base of Fort Bragg ("Proposed Project").

[2] DEP concedes the point. Initial Comments of Duke Energy Progress, LLC, at 11.

the sole offtaker of the energy generated by the Proposed Project, and its facilities and activities are wholly located within the bounds of the Ground Lease. (*Id.* ¶ 5).

In *Cube Yadkin*, the Court of Appeals found that Cube had "no present interest in the resolution of its question" – whether its proposed activities in supplying power to future tenants of a revitalized Business Park would qualify for a landlord-tenant exemption from regulation as a "public utility." *Cube Yadkin*, *3, ¶ 12. Cube's business plan would have made use of its hydroelectric facilities previously used to power an aluminum production plant located in the Business Park. After an affirmative ruling on its declaratory request to the Commission, Cube proposed it then would seek to acquire land in the Business Park, find tenants, and secure leasing contracts. (*Id.* at **1, 3, ¶¶ 3, 11). The court found it insufficient for purposes of demonstrating a justiciable controversy that taking these suggested, but undefined steps "*would* provoke an adversarial relationship with Duke," noting that the dispute Cube presented for declaratory resolution "simply does not yet exist." (*Id.* *3, ¶ 12) (emphasis in original).

Unlike Cube, here the "adversarial relationship with Duke" already exists. The adversarial relationship is fully formed and acknowledged by both Sunstone and Duke Energy Progress, LLC ("DEP").

In its capacity as sovereign over the Fort Bragg enclave, the United States (through the Army) has elected to advance its alternative energy objectives by allowing a private party to generate and sell solar energy and provide energy efficiency services to private entities that own and control the on-base housing for service members and their families at several federal installations. The Army has issued two approvals thus far that support this policy choice, and which evince authorization and support for the Proposed Project. On or

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about August 24, 2015, Paul D. Cramer, Deputy Assistant Secretary of the Army for Installations, Housing and Partnerships, issued an Approval of Concept for Corvias to Execute Renewable Energy Portfolio Project ("Portfolio Project") to provide solar-generated electricity to the housing areas at Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill, and Fort Riley. On or about March 21, 2016, Douglas G. Jackson, Chief of Housing Division, Director of Public Works, issued a Privatized Housing Renewable Energy Solar Project Major Decision Concept Memorandum recommending approval of Sunstone's development of solar energy capacity for military housing at Fort Bragg.

The Army did not seek the Commission's approval before it authorized these energy-generation projects within United States-controlled federal enclaves, and several projects in the Army's portfolio have been completed, are soon to be energized, or are significantly advanced on federal military bases in several states. (Swayze Aff. ¶ 12). However, Sunstone initiated discussions with DEP in advance of commencing work on the Proposed Project to explain its plans and seek DEP's cooperation.

Sunstone and DEP principals and counsel met in Raleigh on October 8, 2019 to discuss the Proposed Project, and a constructive discussion ended with DEP's indication that it wished to pursue review of how the Federal Enclave Doctrine applied to the situation. (*Id.* ¶ 13). After the meeting, Sunstone shared with DEP a draft version of the Request for Declaratory Ruling. (*Id.* ¶ 14). Further, Sunstone and DEP executed a Confidentiality Agreement under which Sunstone provided further information about the Proposed Project to DEP in response to follow-up questions. (*Id.*). Ultimately, on or about October 31, 2019 DEP's regulatory counsel informed Sunstone that because DEP believed there was no

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affirmative authority that a private power generator in a federal enclave is not subject to State utilities law, DEP would oppose Sunstone's request for a declaratory ruling from the Commission. (*Id.* ¶ 15). DEP confirmed that position in a November 20, 2019 meeting to discuss the Proposed Project that included representatives from Sunstone, DEP and the Public Staff. (*Id.* ¶ 16). Finally, DEP's regulatory counsel confirmed on December 9, 2019 that additional information Sunstone had provided did not alter DEP's views about the federal enclave issues at play with the Proposed Project. (*Id.*).

Sunstone respectfully submits that it is in an adversarial posture with DEP where (i) the Army acts with its sovereign authority to authorize Sunstone to carry out the Proposed Project within the Fort Bragg enclave on land leased to BCL, and (ii) DEP informs Sunstone that it will not cooperate without a Commission or court ruling that such activity does not contravene its franchised territory.

II. The Requested Ruling is a Specific Exercise to Affirm that Sunstone can Develop the Proposed Project on Fort Bragg Pursuant to the Army's Alternative Energy Program

Cube Yadkin also concluded that because Cube lacked an ownership or leasehold interest in the Business Park, and confirmed tenants, "[t]here is nothing to make it appear reasonably certain that" it "will engage in the covered activities rather than put [the opinion] on ice to be used if and when the occasion might arise." *Cube Yadkin*, *4, ¶ 15 (quoting *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 589-90, 347 S.E.2d 25, 32 (1986)).

Here, the Proposed Project is part of an Army-approved solar portfolio that is ongoing, and already has resulted in installation of solar energy capability at Aberdeen Proving Ground (7.1 megawatts ("MW") of rooftop and ground mount), Fort Meade (8.7

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MW, rooftop), and Fort Riley (10.5 MW, rooftop). An additional development phase at Fort Riley (1.7 MW, rooftop) is expected to be energized in December 2021, and a System Impact Study is underway at Fort Polk. (Swayze Aff. ¶ 12). At each military base, Sunstone enters into a contract to provide solar energy and energy efficiency services to the privatized entity that owns and operates on-base housing. Sunstone has entered ten (10) similar agreements with the private entities that own and control housing on military bases across the country. (*Id.* ¶¶ 7-8). It will enter a contract of similar form and substance with BCL for the Proposed Project. (*Id.* ¶ 9).

The Proposed Project is fully integrated into Sunstone's course of activities in developing and deploying on-base solar generation under the Army's portfolio. Sunstone previously has provided the Commission, in a confidential filing, with the Solar Energy Services Contract it entered with Riley Communities LLC for the second-phase project at Fort Riley. Sunstone intends to enter a contract of similar form and substance with BCL for the Proposed Project. (*Id.*). The authorized representative who will sign the Energy Services Agreement on behalf of BCL, as well as BCL's external counsel, have reviewed the Riley contract and anticipate that BCL will execute a contract of similar terms and structure with appropriate changes and additions that reflect considerations of North Carolina law and project-specific facts.[3] (*Id.* ¶ 10). Further, Sunstone and BCL have a letter of intent in place under which the parties will enter an agreement in substantially the same form as the Riley contact upon positive resolution of this docket. (*Id.*).

---

[3] BCL's Managing Member, Bragg-Picerne Partners, LLC, is appraised of the development, construction and operation of solar-generation facilities at the other bases in the Army's portfolio, and its representatives are aware of and monitor the proceedings in this docket. (*Id.* ¶ 11).

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There is no evidence of record that the Proposed Project presents other than as Sunstone sets forth. It is one in a series of solar projects approved by the Army, and Sunstone seeks to develop and operate it on a federal enclave pursuant to that authority. DEP has expressed it will not cooperate with the Proposed Project, given its views regarding its franchised service territory. Clarity from the Commission about the application of state and federal law to these facts can resolve the controversy between Sunstone and DEP.

III. Litigation Regarding Whether State Utilities Law Can Bar Sunstone from Developing the Proposed Project inside a Federal Enclave is Unavoidable

Cube Yadkin expresses concern over parties using the Commission, and the courts, as a means to ask for "either academic enlightenment or practical guidance concerning their legal affairs." *Cube Yadkin*, *2, ¶ 9 (quoting *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949). In service of this objective the Court of Appeals relied on the well-settled doctrine that a party seeking declaratory judgment about the meaning of a statute can only do so where it is "'directly and adversely affected' by application of the statute to their actual circumstances." *Id.* (quoting *Byron v. Synco Properties, Inc.*, 258 N.C. App. 372, 373, 377, 813 S.E.2d 455, 457, 460 (2018), *rev. denied* 371 N.C. 450 (2018). That is the situation here, where (i) the Army has approved an alternative energy program on Fort Bragg and a series of installations for on-base solar generation to be sold to private entities that own and operate on-base housing inside federal enclaves; (ii) the offtaker of the power has a ground lease in place for the areas of the federal enclave on which Sunstone's activities would occur; and (iii) DEP's advanced interpretation of State utilities law is that it should apply to prevent Sunstone from generating and selling power to a private entity inside a federal enclave.

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Cube Yadkin, and the Commission, articulate a similar standard in such situations. The Court of Appeals requires that "litigation appears unavoidable" to meet the "actual controversy" requirement (*id.*), and the Commission holds that the declaratory judgment sought must be "necessary to avoid future litigation." (Order, May 4, 2021) (quoting *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974). Sunstone and the intervening franchise holder, DEP, have a clearly delineated legal debate about whether State utilities law has any application to the Proposed Project.

Sunstone, operating within the guidelines of an Army-approved program within a federal enclave, thinks not:

> Fort Bragg is a federal enclave and is not subject to the Public Utilities Act because none of the three exceptions to the Federal Enclave Doctrine apply: (1) Fort Bragg was ceded to the federal government prior to the enactment of the Public Utilities Act; (2) North Carolina (the "State") did not retain or reserve any jurisdiction over the regulation of utilities, the purchase and/or sale of electricity, or energy efficiency services on federal property; and (3) there is no "clear and unambiguous" authorization from Congress to subject federal enclaves to state regulation over the generation, purchase and/or sale of electricity by or among private entities located wholly within a federal enclave.

Request for Declaratory Ruling, ¶ 21. DEP thinks otherwise:

> Sunstone's proposed activities of generating, furnishing, and selling solar power to retail customers fits squarely under the definition of 'public utility' subject to regulation under the Public Utilities Act[.]
>
> 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[.]

DEP Motion to Dismiss, at pp. 5-6.

Because Sunstone and DEP agree that Fort Bragg is a federal enclave, the Request for Declaratory Relief poses a narrow question that hinges on the limited waiver of sovereign immunity in 40 U.S.C. § 591 ("Section 8093") which allows for state regulation

of **purchases** of electricity **by the federal government** using **federally appropriated funds**. The question before the Commission is whether that waiver can be extended to allow state regulation *inside* a federal enclave of the construction, maintenance, and operation of an energy-producing facility that a state commission may regulate *outside* a federal enclave. It seeks neither academic guidance nor an advisory opinion. Instead, it asks the Commission to resolve a dispute that DEP itself told Sunstone the Commission or a court must resolve to provide clarity on the legal rights at issue.

Whether the Public Utilities Act may be interpreted so broadly fits within the traditional office of declaratory judgment actions to "determine the construction and validity of a statute." *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987). DEP's position suggests a novel interpretation of Section 8093 under which state utilities law could be applied inside a federal enclave where the federal government *is not* purchasing electricity using federal appropriated funds. Yet, as a district court considering the same issue observed, Congress could have granted state regulators that sort of broad utility jurisdiction over military installations, but "it did not." *Baltimore Gas & Elec. Co. v. United States*, 133 F. Supp. 2d 721, 744 (D. Md. 2001), *appeal dismissed by*, 290 F.3d 734 (4th Cir. 2002).

Sunstone respectfully seeks the Commission's consideration of the issue, and it is well-settled that it may be afforded. *See Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (declaratory relief is appropriate "when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding.").

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Absent a change in DEP's stated position, litigation over whether State utilities law bars Sunstone from proceeding with the Proposed Project under federal law is unavoidable.

A. The Commission's Declaratory Judgment Authority Allows It to Monitor and Address the Ability of Non-Franchise Holders to Conduct Business in the State

The Commission's earlier decision in this docket to deny DEP's motion to dismiss for lack of an actual controversy lends a balance to its exercise of authority over the Public Utilities Act that an unfiltered application of *Cube Yadkin* would abrogate. Under a statutory scheme that establishes franchised territories, the Commission's ability to consider declaratory requests and resolve controversies that involve those franchisees can temper the risk that the growth and stability of the State's utility infrastructure will be limited by the structural power that franchises afford. Disputes about whether particular fact patterns present the actions of a "public utility" that contravene the public policy underlying the State's regulated monopolies underscore the importance of the Commission's declaratory judgment authority. Indeed, the Commission itself noted its regular exercise of that authority in the order denying DEP's motion to dismiss.

If the Commission lacks declaratory judgment purview over the question raised here, then Sunstone seeks an illusory safe harbor between a rock and a hard place. If it does not seek declaratory review from the Commission before proceeding, then DEP can employ the argument it advanced in *In the Matter of Petition by NC WARN for a Declaratory Ruling Regarding Solar Facility Financing Arrangements and Status as a Public Utility,* where it criticized NC WARN for starting to generate and sell electricity to Faith Community Church "without waiting for the Commission to rule on the legality of its scheme." *Order Issuing Declaratory Ruling*, Docket No. SP-100, Sub 31 (April 15,

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2016). To avoid the *NC WARN* outcome, Sunstone fostered a thorough and transparent dialogue with DEP in advance of commencing the Proposed Project. That DEP ultimately indicated Sunstone would need a Commission or court ruling to clarify the parties' differences was neither surprising nor improper. But for Sunstone to then face DEP's arguments that the narrow, and plainly defined, controversy between it and DEP is beyond the Commission's declaratory judgment purview reserves smooth passage only for franchised territory holders; and rocks and hard places for those like Sunstone that seek to identify and navigate the waters available to them.

CONCLUSION

Cube Yadkin provides no basis for the Commission to revisit, or reverse, its order denying DEP's motion to dismiss in this docket. The Request for Declaratory Relief presents a compelling and important legal question about the intersection of the Public Utilities Act and the exclusive legislative jurisdiction the United States holds in its federal enclaves. Because Sunstone would act under the purview of Army approval in developing and providing solar energy and energy efficiency services inside the Fort Bragg enclave, the Commission's judgment about whether state utilities law acts to bar its efforts can resolve an "actual controversy" that this docket amply demonstrates.

Respectfully submitted this the 15th day of November, 2021.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing PRE-HEARING BRIEF OF SUNSTONE ENERGY DEVELOPMENT, LLC upon all parties of record by electronic mail as follows:

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This the 15th day of November, 2021.

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