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	)	RESPONSE TO
Sunstone Energy Development LLC that the Jurisdiction	)	MOTION TO DISMISS OF
of the North Carolina Utilities Commission does not	)	DUKE ENERGY
extend to the Federal Enclave within Fort Bragg	)	PROGRESS, LLC

Sunstone Energy Development LLC ("Sunstone") hereby responds to the Motion to Dismiss for Failure to Meet Requirements of North Carolina Declaratory Judgment Act of Duke Energy Progress, LLC ("DEP") as follows:

I. Sunstone's Petition Presents a Case and Controversy that is Evident in the Manner by which DEP Seeks to Avoid the Commission's Consideration of It

DEP suggests that Sunstone may be "ask[ing] for either academic enlightenment or practical guidance concerning [its] legal affairs" by way of its Petition. Motion, at 7 (quoting *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583-84, 347 S.E.2d 25, 29 (1986)). Yet, the issues presented in this docket are not playing out in a lecture hall or boardroom but on a federal military installation in Eastern North Carolina. Petitioner Sunstone proposes to enter into an energy services agreement with Bragg Communities, LLC ("BCL") 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.

Sunstone's proposed project has been approved by the Army, and upon completion Fort Bragg would be the fourth base with solar facilities developed by Sunstone to go live pursuant to the Army's broader efforts to comply with federal mandates to increase the

percentage of its energy consumption from renewable sources. Sunstone also has an operating, on-base facility on an Air Force base. *See*, Section II, *infra*.

DEP, though, contends that Sunstone has not taken sufficient, "meaningful steps" to develop the project, and that absent "important timelines and milestones, or agreements between the relevant parties" the Fort Bragg project presents as a "hypothetical" that does not evince a case or controversy that the Commission may entertain. Motion, at 8. To be sure, though, DEP forecasts its position that Sunstone's project would run afoul of its own "franchised service territory assigned by the Commission under North Carolina's Territorial Assignment Act." *Id.* at 2. DEP even frames the legal dispute it anticipates bringing before the Commission, presumably at some time after Sunstone might expend significant time and resources under the specter of DEP's anticipated litigation:

> 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.

Id. at 6.

DEP's suggestion that Sunstone is "fish[ing] in judicial ponds for legal advice" is hardly a reflection of where the issues stand before the Commission. *Id.* Sunstone contends that the Public Utilities Act would not govern its proposed activities inside a federal enclave, and that it should be able to proceed with its on-base project as it has in other states with the support and approval of the Army. Sunstone representatives engaged with Public Staff and representatives of DEP in advance of filing its Petition to provide information about the project and in an effort to reach a consensus that would allow the project to proceed without challenge. Most recently, this dialogue included a meeting in

October 2019 between Sunstone and DEP representatives at the offices of Sunstone's counsel, as well as a joint meeting in November 2019 at Public Staff's offices that included Sunstone, DEP and Public Staff participation. Moreover, Sunstone's attempts to communicate with DEP about its positions included its counsel providing to DEP an early draft of the Petition.

Sunstone's candid and constructive communications with DEP did not result in DEP indicating it would not oppose the project, but instead an understanding that any clarity Sunstone sought on the issue would need to come from the Commission. Sunstone accepted that outcome on its face and filed its Petition. Public Staff ultimately concluded that it would not file comments in this docket. DEP filed the instant motion. DEP's suggestion that this backdrop does not "satisfy the jurisdictional requirement of an actual controversy, [where] litigation appear[s] unavoidable," departs significantly from the reality of the clearly framed dispute. *Id.* at 7 (quoting *Sharpe*, 317 N.C. at 589, 347 S.E.2d at 32).

A. The Commission Commonly Entertains Declaratory Relief Requests in Situations Similar to Those in this Docket

DEP's position that the Commission should not entertain the Petition because it centers around only a "proposed" transaction is misplaced. For example, in Docket No. W-1260, Sub 0, Pharr Yarns, LLC requested a declaratory ruling from the Commission that the provision of bulk wastewater treatment service to the Town of McAdenville would not cause Pharr to be treated as a public utility under G.S. 62-3(23)a or under Commission Rule R10-2a. At the time of the request, Pharr had not entered into an agreement with the Town, but submitted a summary of the "proposed agreement" to provide up to 300,000 gallons per day of wastewater treatment services at a rate "to be negotiated by the parties."

Order on Petition for Declaratory Ruling, Docket No. W-1260, Sub 0 (November 22, 2005). In this setting, "[b]ased on its review of the Petition and the summary of the *proposed* agreement, the Commission concludes that Pharr should not be considered a public utility by virtue of *the activities described* in the Petition." *Id.* (emphasis added).

Similarly, in Docket No. P-119, Sub 192, et al., Windstream (and its subsidiaries, Incumbent Local Exchange Companies and Competing Local Providers) requested a declaratory ruling that the transfer of certain Windstream assets to Communications Sales & Leasing, Inc. did not require Commission approval under the Public Utilities Act. After reviewing the application, which included an outline of the master lease agreement, the Commission concluded: "As the *proposed transaction is currently structured*, the Applicants are not required to apply for and/or receive Commission approval[.]" *Declaratory Ruling*, Docket No. P-118, Sub 192 (October 13, 2014) (emphasis added). The Commission also fairly noted that its decision was "subject to review and revision should the facts upon which they are based changed, [or] the lease agreement be substantially modified by the parties[.]" *Id.*

B. DEP Itself has Requested Declaratory Review of "Proposed" Projects

DEP, itself, is no stranger to seeking declaratory relief from the Commission regarding "proposed" activities. In Docket No. E-7, Sub 819, DEP filed a petition for authority to recover development costs related to the "proposed" Lee Nuclear Station. The petition was converted to a declaratory ruling after the Public Staff advocated for such, "given the lack of specificity" and because there was no evidentiary hearing. The Public Staff noted the record showed contrary views with respect to DEP's obligations, supporting an "actual controversy." Further, DEP pointed out that the Commission "has from time to

time issued declaratory rulings in circumstances where there was no 'actual controversy or potential litigation by the parties'" and cited four decisions from the Commission: *Asheville Landfill Gas Company*, Docket No. SP-100, Sub 12, Order issued on May 3, 2003; *PF Net Construction Corp.*, Docket No. P-960, Sub 0, Order issued June 10, 2001; *North Carolina Power*, Docket No. E-22, Sub 363, Order dated March 26, 1996; and *Westmoreland and LG&E Partners*, Docket No. SP-100, Sub 2, Order issued October 13, 1993. Ultimately, the Commission concluded it had legal authority to make a declaratory ruling in the matter, noting an actual controversy existed "with regard to whether Duke's requested relief is consistent with its obligations under G.S. 62-2." *Order Issuing Declaratory Ruling*, Docket No. E-7, Sub 819 (March 20, 2007).

Moreover, in the past DEP has taken positions before the Commission that support the propriety of declaratory relief when, like here, the interpretation of key regulations and the possible application of preemption introduce uncertainty into the economic equation of an important project. In Docket No. E-7, Sub 858, DEP filed a joint petition for a declaratory ruling with the City of Orangeburg, South Carolina seeking clarification that DEP's new wholesale contracts with native load priority would be treated for ratemaking and reporting purposes in the same manner as existing wholesale contracts with native load priority. Many intervenors, including the Attorney General, argued a declaratory ruling was not appropriate and that DEP's appropriate path would be to seek reconsideration of certain regulatory conditions under a statutory mechanism. *Order on Advance Notice and Joint Petition for Declaratory Ruling*, Docket No. E-7, Sub 858 (March 30, 2009). DEP responded by arguing a declaratory ruling was appropriate since it was "actively pursuing additional new wholesale customers in North and South Carolina, its regulatory conditions

have introduced uncertainties that are inhibiting the negotiation of such contracts, and a declaratory ruling can resolve those uncertainties[.]" *Id.* The Commission explained the circumstances:

> With regard to the Commission's jurisdiction in this matter, Duke counsel stated that the declaratory relief mechanism is certainly appropriate given the uncertainties and controversy in this case regarding the proper interpretation of regulatory conditions and preemption. Finally, Duke counsel argued that it makes no sense to deny the request for a declaratory ruling as advocated by some intervenors. In so doing, Duke contends that the Commission would increase the risk that future action by the Commission would undo the economic basis upon which the wholesale contract is entered. Duke believes the effect of such a ruling would be to shut out Duke and any other North Carolina-based utility from serving the load of potential wholesale customers in the position of Orangeburg. In response to Commission questions, Duke counsel stated that the Commission clearly has a full record to appropriately make a decision on the relief sought by the Joint Petition.

Id. The Commission found merit to some arguments that a declaratory ruling was not appropriate, noting that during the course of the proceeding DEP's estimate of the impact of the additional load on North Carolina retail cost of service increased from approximately $6 million to $14 million. In granting relief to DEP, though, the Commission acknowledged that it has "on a few occasions in the past given declaratory rulings in circumstances which might not have supported such in a very strict sense." *Id.*

C. Commission Review is in Conformity with its Stewardship of the Boundaries of the North Carolina Utilities Act

DEP's purported "compelling arguments" regarding the application of state law to activities within a federal enclave, considered against Sunstone's position that it may develop its on-base project in the Fort Bragg enclave under the auspices of the Army's

approval, is a relatively stark indication that "litigation appears unavoidable." *Sharpe*, 317 N.C. at 589, 347 S.E.2d at 32. Declaratory judgments are meant for just these kinds of circumstances; "to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" N.C. Gen. Stat. § 1-264. Indeed, the statute itself confirms that its declaratory relief mechanism "is to be liberally construed and administered." *Id.*

Commission review of DEP's contention that state laws can govern activities proposed for conduct within a federal enclave presents not just a dispositive issue regarding the vitality of this Army-approved project, but also the interaction, if any, of relevant state and federal laws. It presents exactly the type of problem for which the Declaratory Judgment Act exists. Indeed, "the preeminent treatise on declaratory judgments sets forth two criteria to aid in the interpretation of the statute." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (citing Edwin M. Borchard, *Declaratory Judgments*, at 299 (2d ed.1941)). "According to Professor Borchard, a declaratory judgment should issue (1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Id.* (quotations omitted).

DEP may well wish to delay consideration of these types of declaratory requests because it could lead to the demise of projects that might otherwise survive within its franchised territory. However, it does not portend a healthy and productive use of Commission resources to delay determinations through the procedural vehicles at issue here. DEP made a similar argument in *In the Matter of Petition for Declaratory Ruling by Cube Yadkin Generation, LLC*, and the Commission rejected it. *Order Issuing Declaratory*

Ruling, Docket No. M-100, Sub 152 (September 4, 2019) ("Cube"). In Cube, a request was made for a declaratory ruling that Cube's proposed lease agreement with Badin Business Park would fall under a landlord-tenant exception to designation as a "public utility." DEP argued that Cube's request did not meet the requirements of the Declaratory Judgment Act because it was "largely speculative" in that Cube did not own the land it purported to lease, there was no lease agreement submitted for review, and the exact form of the lease was unknown. Despite this argument, the Commission thoroughly considered the request and declared that "if Cube engages in the activities proposed in the lease arrangement now before the Commission, it would be a 'public utility'[.]" *Id.*

Sunstone asserts that it has followed an appropriate path in engaging the Public Staff and DEP on the issues at play, and then filing its Petition to resolve the legal uncertainty occasioned by the inconclusive results of those discussions. Indeed, this course of conduct was designed to avoid the circumstances 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 DEP chastised 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, 2016). The Commission sided with DEP's requests for issuance of civil penalties for each day that NC WARN acted as a public utility in violation of state utilities law.

DEP certainly is not required to agree with Sunstone's interpretation of federal or state law. However, DEP proposes a "heads I win, tails you lose" metric that unnecessarily limits Sunstone's ability to seek a declaratory ruling from the Commission. DEP's position

that declaratory analysis by the Commission is premature leaves Sunstone with an Army-approved project subject to a threat of litigation from a franchise holder under state law. Sunstone can proceed with project development, expend time and resources, and then still face a lawsuit from DEP that raises exactly the issues that DEP forecasts here.

Sunstone respectfully suggests that North Carolina law supports the Commission's ability to resolve the issues raised in the Petition.

II. The Army is not a Necessary Party

To further its arguments that this docket should not continue without the Army's direct participation, DEP suggests in several ways that Sunstone may be proposing a project within the Fort Bragg enclave that does not have the Army's approval, or the military's appreciation of the impact it might have on the installation. Motion 14, 16-17.

DEP attempts a "sleight of hand" maneuver on the issue that is important to note. It quotes an early draft of the Petition that had been supplied to the Public Staff, and was produced to DEP in discovery (SUN00031-00044), which includes a sentence that is not in the Petition, as filed: [redacted]

However, what DEP does not say is that the early draft did not include Sunstone's direct assertion, *in the Petition as filed*, that Fort Bragg was included in a multi-base program of solar energy generation that the Army had approved. As the Petition states, "the Army approved Corvias[1] to develop and execute a renewable energy portfolio solar

[1] Sunstone is a limited liability company jointly owned by Corvias Solar Solutions, LLC and Onyx Development Group LLC. Petition, ¶ 2.

project ("Portfolio Solar Project") to provide solar electricity to Army installations across the United States, including bases such as Fort Bragg." Petition, ¶ 14. Sunstone also asserted in the Petition that this multi-base commitment to alternative energy sources is consistent with the energy policy of the United States Department of Defense ("DOD"):

> "to produce or procure not less than 25 percent of the total quantity of facility energy it consumes within its facilities during fiscal year 2025 and each fiscal year thereafter from renewable energy sources[.]"

10 U.S.C. 2911(g)(1)(A); Petition, ¶ 14.

Yet, despite the Army's approval of Fort Bragg as one of the installation sites in the Corvias portfolio, DEP contends there is nothing in particular to show "specific" approval by the Army of the Sunstone project at issue in this docket. Motion, at 17. Again, this requires some attention to the artful way that DEP has offered exhibits to its motion. Notably, an early draft of Sunstone's Petition produced in discovery makes the cut as an exhibit to the Motion, but not the public documents that evince the Army's approval of the portfolio project, and also a follow-on approval specific to the Fort Bragg project. Because DEP chides Sunstone for being a private entity making "representations for [the Army] without providing any project-specific support from the Army," Sunstone respectfully offers context by way of documents it produced to DEP that evince the Army's support and approval of an on-base solar energy generation program that includes Fort Bragg.

On or 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 solely to the housing areas at Aberdeen Proving Grounds, Fort

Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill, and Fort Riley. (Exhibit A). The Army's approval contained conditions regarding pricing and costs to the installations, the nature of solar arrays allowed, and that the power generated "will be consumed by the housing areas" at the respective bases. *Id.* Moreover, it provided specific guidance on amendment of relevant ground leases at each base as well as the disposition of Renewable Energy Credits (RECs). *Id.*

Then, 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. (Exhibit B). The approval memo issued out of the Army's Installation Management Command at Fort Bragg. The Fort Bragg-specific approval was in response to a memorandum from Corvias, attached to the approval, that discussed background information for the project that included the type of solar panels, the impact on rate stabilization and security for the on-base housing provider, and that "[l]ong term operation and maintenance will be provided by the solar developer." *Id.* The request approved by the Army also included contemplation of necessary amendments to the ground lease between BCL and the Army, as well as execution of a lease "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 solar panels." *Id.*

Against this backdrop, DEP wonders in its Motion "if the Army actually intended to pursue a policy of allowing third party ownership of generation" capacity at Fort Bragg.

Motion, at 13. The answer, of course, lies in the Army's approval of the on-base solar portfolio program and the progress made under it, where Sunstone and Corvias already have worked together under the program's auspices to install solar energy capability at Aberdeen Proving Ground (7.1 MW of rooftop and ground mount), Fort Meade (8.7 MW, rooftop), and Fort Riley (10.5 MW, rooftop). *See* Sunstone Energy Development LLC's Responses to Duke Energy Progress, LLC's First Data Request, at 5-6 (response to Interrogatory 1-5) (Ex. C). Sunstone also has developed, and its indirect affiliates operate, a solar-energy producing facility on Edwards Air Force Base (3.9 MW, rooftop). *Id.* at 8 (response to Interrogatory 1-8).

A. The Dispute Presented does not Require the Army's Appearance as a Party

DEP insists that the Army is a necessary party because its presence is needed to "resolve the complex Constitutional and federal law issues presented by the Petition." Motion, at 12. Any such complexity exists only in DEP's Motion. In essence, DEP advances this awkward scenario: the Army is a necessary party in determining how to analyze statutes and regulations that apply when the federal government purchases electricity to a situation where the federal government *is not purchasing electricity*. DEP's position depends on the confusion it seeks to create with this ill-fitting proposition.

DEP's focus is on a federal appropriations statute that requires a *federal agency* to follow applicable state laws when purchasing electricity with congressionally appropriated funds. Section 8093 of the Continuing Authorization Act of 1988 (commonly known as "Section 8093," and codified as 40 U.S.C. § 591) requires a federal agency purchasing electricity with appropriated funds to comply with relevant state laws on the purchase of electric power as a commodity. Section 8093 (a) provides:

> (a) General limitation on use of amounts. -- A department, agency, or instrumentality of the Federal Government may not use amounts appropriated or made available by any law to purchase electricity in a manner inconsistent with state law governing the provision of electric utility service, including--
>
> (1) state utility commission rulings; and
>
> (2) electric utility franchises or service territories established under state statute, state regulation, or state-approved territorial agreements.

40 U.S.C. § 591 (2006).

As Sunstone explains in its Petition, Fort Bragg is a "federal enclave" because Congress has exclusive authority to legislate over all areas purchased by the federal government with the consent of a state. U.S. Const. art. I, § 8, cl. 17. Generally, federal enclaves are not subject to regulation by any state. *Hancock v. Train*, 426 U.S. 167, 178 (1976). There are some very limited exceptions to this doctrine, and the one on which DEP seeks to rely is that state regulation can be permitted inside a federal enclave when the federal government has made a "clear and unambiguous" authorization that the enclave be subject to state law. *Id.* at 179. DEP asserts that Section 8093 effectively serves as a waiver of enclave protection that allows the Public Utilities Act to apply to Fort Bragg "through federal law." Motion, at 6.[2] The point of this analytical exercise to DEP, of course, is its assertion that Fort Bragg "is exclusively located within DEP's franchised service territory" and that the Sunstone project inside the Fort Bragg enclave is a violation of its statutory rights as an exclusive service provider within its territory. *Id.* at 2.

[2] It makes a similar assertion about 48 C.F.R. § 41.201(e), which provides that *the Department of Defense* must comply with Section 8093 when it purchases electricity. *Id.* at 13.

B. The Department of Defense Analysis of Section 8093 is Consistent with Sunstone's Position

DEP invents an argument and falsely attributes it to Sunstone, claiming that the Petition "argues that [Section 8093] has no applicability to the Army's procurement of electricity within federal enclaves, such as Fort Bragg[.]" *Id.* at 12. That misrepresents Sunstone's position, which is set forth again here for clarity:

> Section 8093 provides a limited and specific waiver of the Army's sovereign immunity to the extent it purchases electricity with federal funds. It is not an all-purpose waiver of federal enclave protection over Fort Bragg, or activities undertaken on the base. Under the proposed energy services agreement, where the Army is not "purchas[ing] electricity" with federally appropriated funds, the Section 8093 waiver is not at issue.

Petition, ¶ 31.

Sunstone asserts that Section 8093 is actor-specific, in that it requires "[a] department, agency, or instrumentality of the Federal Government" to comply with state law when it purchases electricity. 40 U.S.C. § 591. In this docket, the proposed purchaser of electricity, BCL, is a business partner of the Department of Defense for the purposes of operation and management of on-base military housing. 10 U.S.C. § 2871(5). BCL is not a federal department, agency or instrumentality. Instead, by federal statute BCL is an "eligible entity" under 10 U.S.C. § 2871(5), defined as:

> any private person, corporation, firm, partnership, company, State or local government, or housing authority of a State or local government that is prepared to enter into a contract as a partner with the Secretary concerned for the construction of housing units and ancillary supporting facilities.

Sunstone is a private entity that would develop a proposed solar project that would provide solar energy and energy efficiency services "behind the meter" – entirely within the Fort Bragg federal enclave, serving only the military housing units operated by BCL on Fort Bragg.

The Department of Defense has examined Section 8093 in the context of military installations, and in a February 24, 2000 memorandum[3] ("DOD Memo") directed to the general counsel of the Army, Navy and Air Force, it concluded: "The Department must comply with state laws and regulations only when ***it*** is acquiring the electricity commodity." (emphasis added) (DOD Memo, at 9.) DEP references this DOD interpretation in its Motion, but omits the portion of DOD's analysis that most closely applies to the operative question of whether Section 8093's waiver would allow Public Utilities Act regulation within a federal enclave. Motion, at 6, n. 19. DOD concluded that Section 8093 *did not* mean that state utilities laws were applicable to the Army's disposition of an on-base utility system, or its subsequent acquisition of utility services from that system – as opposed to acquiring the commodity of electricity.

The specific analysis by DOD, in the memorandum quoted by DEP, is particularly notable given that DEP insists in its motion that "there has been no indication – either cited by Sunstone or otherwise – that the Army and/or Department of Defense supports Sunstone's position" that Section 8093 does not permit state utility regulation within a federal enclave such as Fort Bragg. Motion, at 13. The DOD memo selectively quoted by DEP confirms exactly that:

[3] Memorandum of General Counsel of the Department of Defense, February 24, 2000, *The Role of State Laws and Regulations in Utility Privatization* (Ex. D) (originally, DEP Ex. 5 to Motion to Dismiss).

> 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. There is nothing in this section to indicate that "purchase electricity" should be read in any way other than its plain language.

DOD Memo, at 5.

1. DEP Misapprehends the Purpose and Application of Section 8093

DEP's approach to the interests designated for protection by Section 8093 is misplaced. The measure is not meant to protect DEP's "franchised service territory assigned by the Commission under North Carolina's Territorial Assignment Act," (Motion, at 2-3) but instead the interests of consumers who might be adversely impacted if a major customer like Fort Bragg fled its electricity-acquisition relationship with a regional monopolist such as DEP.

Congress highlighted this as the animating concern of Section 8093, noting 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." S. Report No. 100-255, at 70 (1988).

In considering Section 8093, the United States Court of Appeals for the Eighth Circuit acknowledged that Congressional intent, noting that "the legislative history clearly states that this legislation was intended to protect against utility abandonment by their

federal customers."[4] *West River Elec. Assn., Inc. v. Black Hills Power & Light Co.*, 918 F.2d 713, 719 (8th Cir. 1990). No such abandonment would occur here, where steps that include energy efficiency measures are taken "behind the meter" in a federal enclave to reduce the demand on the local grid attributable to military housing. DEP, though, maintains its longstanding relationship as one of several suppliers to the Fort Bragg Department of Public Works.

WHEREFORE, Sunstone respectfully requests that the Commission deny DEP's Motion to Dismiss and find that: (1) the Petition presents a case or controversy that the Commission is empowered to review and resolve; (2) the Army is not a necessary party to the docket; but (3) if the Army is deemed to be a necessary party, that the Commission act within its authority to order the Army's joinder and allow this proceeding to continue.

Respectfully submitted this the 12th day of March, 2021.

[4] Given the consumer-protection provenance of Section 8093 it is notable that the Public Staff, which represents the interest of the using and consuming public in matters before the Commission, elected not to file comments in response to Sunstone's request for declaratory relief. Letter from Public Staff, February 26, 2021. (Ex. E).

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing RESPONSE TO MOTION TO DISMISS OF DUKE ENERGY PROGRESS, LLC upon all parties of record by electronic mail as follows:

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NC Public Staff – Legal
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This the 12th day of March, 2021.

Bradley M. Risinger

DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
FOR INSTALLATIONS, ENERGY, AND ENVIRONMENT
110 ARMY PENTAGON
WASHINGTON, DC 20310-0110

AUG 24 2015

SAIE-IHP

MEMORANDUM FOR: Mr. Chuck Parker, 7437 Village Square Drive Suite 210, Castle Pines, Colorado 80108

SUBJECT: Approval of Concept for Corvias to Execute Renewable Energy Portfolio Project

1. I approve in concept Corvias Military Living's proposal to execute a renewable energy Portfolio Solar Project with Corvias Solar Solutions to provide solar electricity to Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill, and Fort Riley. This approval is contingent upon completion of the following requirements:

a. Prior to execution of each individual Photovoltaic (PV) project, an individual Major Decision will be executed to determine approval of that project

b. Prior to execution of each individual PV project, a Power Purchase Agreement (PPA) must be negotiated for that installation and endorsed by the Director of Public Works

c. The PPA price for the PV project will be at or below the utility rate currently paid by the housing project at each installation. Additionally, the installation's overall energy costs will not increase as a result of the PV project

d. PV projects are limited to roof-mounted arrays, unless specifically approved in writing by this office

e. All power generated by the PV project will be consumed by the housing areas, and may require curtailment

f. All PV project ground leases will be modified within 6 months of the beginning of installation in order to facilitate transfer of Renewable Energy Credits (RECs) to the Army

g. All RECs associated with a PV project (or a comparable amount of swapped RECs) will be transferred to the Army

h. Execution of the PV projects will be at no expense to the Residential Communities Initiative(RCI) or Unaccompanied Housing (UH) project company

i. Execution of any PV project shall not cause the installation to face additional charges upfront or on a recurring basis (e.g. utility charges, impacts to existing or planned third-party financed energy projects, impacts on utility privatization, damage and/or upgrades to installation infrastructure)

SAIE-IHP
SUBJECT: Approval of Concept for Corvias to Execute Renewable Energy Portfolio Project

j. Any signed PPA must incorporate the PV Project Proposed Design Approval & Interconnection Process (See enclosed template)
k. Obtain concurrence of the Office of Energy Initiatives for all PV projects (this office will facilitate)

l. PV project PPAs will include the appropriate cybersecurity requirements in accordance with Army requirements

2. While the Army supports the portfolio approach, installations not able to meet the above conditions are subject to removal from consideration for installation of Photovoltaic Systems.

3. Point of contact for this action is Rhonda Hayes, 703-614-4601.

Rhonda Hayes
for

Enclosure

PAUL D. CRAMER
Deputy Assistant Secretary of the Army
(Installations, Housing and Partnerships)

Copy Furnished:
OACSIM ISP Program Director
OEI Program Director

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

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"

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

DOCKET NO. SP-100, SUB 35

In the Matter of	)	
Request for Declaratory Ruling by Sunstone	)	SUNSTONE ENERGY
Energy Development LLC that the Jurisdiction	)	DEVELOPMENT LLC'S
of the North Carolina Utilities Commission	)	RESPONSES TO DUKE
does not extend to the Federal Enclave within	)	ENERGY PROGRESS, LLC'S
Fort Bragg	)	FIRST DATA REQUEST

Sunstone Energy Development LLC ("Sunstone"), by and through legal counsel, hereby responds to Duke Energy Progress LLC's First Data Request as follows:

General Statement

In responding to these general data requests, interrogatories and document requests, Sunstone has made reasonable efforts to research documents and data regarding the subject matter of the proceeding. These responses are based upon information presently available to Sunstone and its attorneys, and specifically known to the individuals who are preparing these responses. It is possible that future discovery and independent investigation may supply additional facts or information, add meaning to known facts, and may establish entirely new factual conclusions and contentions, all of which may lead to substantial additions to, changes in, and variations from the responses set forth herein.

These responses are made without prejudice to Sunstone's right to provide additional evidence at the time of any proceeding before the Commission. Sunstone reserves the right to supplement or correct these responses. Sunstone also reserves the right to object to future discovery on the same or related matters and does not waive any objection by providing the information in these responses. Finally, Sunstone reserves the right to object to the admissibility

of any of these responses, in whole or in part, at any further proceeding of this matter, on any grounds, including but not limited to timeliness, materiality, relevance, and privilege.

Objections

1. Sunstone objects to the General Data Request, Interrogatories and Document Requests to the extent they are vague, ambiguous, and/or incapable of reasonable ascertainment.

2. Sunstone objects to the General Data Request, Interrogatories and Document Requests to the extent they seek information, documents and/or things protected from disclosure by the attorney-client privilege, the work-product doctrine, consulting expert privilege, and/or the common-interest privilege. Inadvertent disclosure of any such information, documents and/or things shall not operate as a waiver of any applicable privilege or immunity.

3. Sunstone objects to the General Data Request, Interrogatories and Document Requests to the extent they seek discovery of documents available by means that are less burdensome, less expensive, or more appropriate.

GENERAL DATA REQUEST

1-1. **Please provide copies of any formal or informal data requests sent to Sunstone by the Public Staff or any other party in this docket, and responses thereto, related to this Docket or the issues raised by Sunstone in their petition for declaratory ruling in this Docket.**

Response: Without waiving any of its objections, Sunstone states that it has received data requests from the Public Staff on three occasions, and has responded in writing to each of them. Those requests, and Sunstone's responses to same, are produced in response to Request for Production 1-1 and bear the Bates Stamp Nos. SUN00005-SUN00006; SUN00017; SUN00103-SUN00105.

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.

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?**

Response: 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.

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.

1-5. **Regarding Sunstone's statement in Paragraph 14 of the Request that "[i]n 2015, the Army approved Corvias to develop and execute a renewable energy portfolio solar project ("Portfolio Solar Project") to provide solar electricity to Army installations across the United States, including bases such as Fort Bragg", please:**

a. **Identify the person or persons within the Army that "approved Corvias" as well as any Documents memorializing that approval;**
b. Explain whether the Army's approval of Corvias to develop a Portfolio Solar Project was in any way specific to Fort Bragg;
c. Identify any other military installation where the Army provided approval of Corvias, Sunstone or another affiliated entity, to develop a Portfolio Solar Project or other on-base renewable generation facility.
d. **Identify any other military installation where Corvias, Sunstone, or an affiliated entity, have developed a Portfolio Solar Project or other on-base renewable generation facility.**

Response: On or 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 solely to the housing areas at Aberdeen Proving Grounds, Fort Meade, Fort Bragg, Fort Polk, Fort Rucker, Fort Sill, and Fort Riley. The Army's memorandum of approval is produced in response to Request for Production 1-1 and bears the Bates Stamp Nos. SUN00922-SUN00923. The Army's memorandum approves the Portfolio Project pursuant to a series of requirements and conditions, and contains a specific affirmation that "the Army supports the portfolio approach."

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's memorandum is produced in response to Request for Production 1-1 and bears the Bates Stamp Nos. SUN00010-SUN00012. A separate Major Decision approval is anticipated, pursuant to the Army's memorandum of approval of the Portfolio Project, for the solar energy projects at each installation.

To date, Sunstone and Corvias have worked together under the auspices of the Portfolio Project to install solar energy capability at Aberdeen Proving Ground (7.1 MW of rooftop and ground mount), Fort Meade (8.7 MW, rooftop), and Fort Riley (10.5 MW, rooftop).

1-6. **Regarding Sunstone's statement in Paragraph 6 that the under Municipal Services Agreement ("MSA") between the Army and Bragg Communities, LLC, "[Bragg Communities] may seek alternative sources for the MSA utility services, and the MSA permits [Bragg Communities] to negotiate directly with private providers for such services", please:**

- **a. Identify the specific provision of the MSA relied upon to support this statement;**
- **b. Identify any Documents other than the MSA in which the Army has taken the position that Bragg Communities may seek alternative sources of electric power;**
- c. **Identify any Documents in which the Army has taken the position that either the Army or Bragg Communities is not subject to North Carolina law governing the provision of electric utility service within Fort Bragg as it relates to purchasing electric power.**

Response: The Municipal Services Agreement ("MSA") between the United States of America and Bragg Communities LLC provides for the government to furnish electricity, natural gas, water, wastewater, police, and fire protection services to BCL. Paragraph 4 of

the MSA provides that "[i]n the event that alternate source(s) of service become available to [BCL] at a more beneficial rate, then [BCL] may elect to seek an alternate source for the service or services and terminate this agreement in accordance" with the MSA's other controlling terms. The MSA further allows BCL to "negotiate connection charges, relocation fees and construction standards directly with any privatized utility service provider." Those provisions are consistent with statutory authorization, under which the Secretary of Defense "may furnish utilities and services," including "electric power," to entities operating in the capacity of BCL, but is not required to do so. 10 U.S.C. § 2872a(a), (b). Sunstone's inquiry as to requests for other documents continues, and it will supplement this response as appropriate. The MSA will be produced in response to Request for Production 1-1.

1-7. **Paragraph 14 of the Request speaks to "the energy policy of the United States Department of Defense ("DOD")." Regarding DOD's energy policy promoting renewable energy and the applicability of Section 8093 of the Continuing Authorization Act of 1988 ("Section 8093") to the issues presented in the Petition, please:**

- **a. Identify any example known to Sunstone where the Army or DOD has supported or condoned the provision or purchase of electricity in a manner inconsistent with the requirements of Section 8093 at Fort Bragg;**
- **b. Identify any Documents in which the Army or DOD has supported or condoned the provision or purchase of electricity in a manner inconsistent with the requirements of Section 8093 at Fort Bragg.**
- **c. Identify any example known to Sunstone where the Army or DOD has supported or condoned the provision or purchase of electricity in a manner inconsistent with the requirements of Section 8093 at any federal enclave or Army installation other than Fort Bragg;**
- d. **Identify any Documents in which the Army or DOD has supported or condoned the provision or purchase of electricity in a manner inconsistent with the requirements of Section 8093 at any federal enclave or Army installation other than Fort Bragg.**

Response: Without waiving any of its objections, Sunstone states that it is aware of no documents or examples of the sort specified in the request that relate to this proposed

project involving two private entities. As has been shared with DEP previously, "the requirements of Section 8093" to which the request refers apply only when a federal agency is purchasing electricity with appropriated funds. In the setting of Sunstone's proposed solar energy project, BCL – a private entity – would purchase electricity from Sunstone. By federal statute, BCL is not a federal department, agency or instrumentality, but instead an "eligible entity" under 10 U.S.C. § 2871(5) that "partner[s] with the [Army] concerned for the construction of housing units and ancillary supporting facilities." Sunstone further states, upon information and belief, that the United States Department of Justice and the Army each share the view that entities functioning in the manner of BCL are not instrumentalities of the federal government or its agencies. Sunstone is producing documents in response to Request for Production 1-1, bearing Bates Stamp Nos. SUN00001, SUN00945-SUN00953, which inform its statement.

1-8. **Please identify any other renewable generating facilities that Sunstone, or its affiliates, operates at any other military installations.**

Response: Without waiving any of its objections, Sunstone states that it has developed, and its indirect affiliates operate, solar energy-producing facilities within the military installations at Aberdeen Proving Ground (7.1 MW of rooftop and ground mount), Fort Meade (8.7 MW, rooftop), Fort Riley (10.5 MW, rooftop) and Edwards Air Force Base (3.9 MW, rooftop).

DOCUMENT REQUESTS

1-1. **Produce all documents and data identified in response to the foregoing Set 1 general data request and interrogatories.**

Response: Without waiving any of its objections, Sunstone states that is producing documents bearing the Bates Numbers as indicated in the text of its responses to the general data request and the interrogatories.

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.

1-3. **Please identify and produce a copy of any agreement, including all executed and unexecuted versions of each agreement, between Sunstone and Fort Bragg and/or the Army related to the furnishing of and/or payment for electricity.**

Response: Without waiving any of its objections, Sunstone states there are no such agreements, nor will there be in the future, because Sunstone would not be furnishing electricity to the Army or receiving payment from the Army for electricity.

1-4. **Please identify and produce a copy of any agreement, including all executed and unexecuted versions of each agreement, between Bragg Communities and Fort Bragg and/or the Army related to the furnishing of and/or payment for electricity.**

Response: Without waiving any of its objections, the MSA between the United States and BCL, described herein in response to Interrogatory 1-6, will be produced.

1-5. **Please identify and produce any agreement, including all executed and unexecuted versions of each agreement, between Sunstone and/or Bragg Communities and Sandhills Utility Services related to the furnishing of and/or payment for electricity.**

Response: Without waiving any of its objections, Sunstone states that there are no existing agreements between it and Sandhills Utility. Further, Sunstone states upon information and belief that it anticipates there will be an Interconnection Agreement between BCL and Sandhills Utility, though it is not aware that there is any draft or unexecuted version of such an agreement at this time.

1-6. **Please identify and produce a copy of the Municipal Services Agreement, including all executed and unexecuted versions of the agreement, between the Army and Bragg Communities as referenced in Paragraph 6 of the Request.**

Response: Without waiving any of its objections, Sunstone states that the MSA between the United States and BCL, described herein in response to Interrogatory 1-6, will be produced.

1-7. **Please identify and produce all correspondence and other Documents between Sunstone and the Public Staff regarding the Request. To the extent Documents relating to the subject matter of the Request were shared with the Public Staff prior to the Request's filing on December 8, 2020 (corrected December 9, 2020), this request is intended to request production of those Documents as well.**

Response: Without waiving any of its objections, Sunstone is producing responsive documents bearing the Bates Stamp Nos. SUN00002-SUN00009; SUN00013-SUN00921; SUN00924-SUN00944; SUN00954-SUN00974.

1-8. **Please identify and produce all correspondence and other Documents providing or memorializing the Army's approval of Corvias to develop a Portfolio Solar Project.**

Response: Without waiving any of its objections, Sunstone is producing responsive documents, described herein in response to Interrogatory 1-5, that bear the Bates Stamp Nos. SUN00922-SUN00923.

1-9. **Please identify and produce all correspondence and other Documents between Sunstone and the Army relating to the issues presented in the Petition.**

Response: Without waiving any of its objections, Sunstone states that it is producing responsive documents that bear the Bates Stamp Nos. SUN00001 and SUN00945-SUN00953, and is conducting a search to identify any additional, responsive materials.

1-10. **Please identify and produce any documents evidencing Fort Bragg's and/or the Army's support or opposition to development of the proposed solar generating facility.**

Response: Without waiving any of its objections, Sunstone is producing responsive documents, described herein in response to Interrogatory 1-5, that bear the Bates Stamp Nos. SUN00010-SUN00012 and SUN00922-SUN00923.

This the 1st day of Februrary, 2021.

ONLY AS TO OBJECTIONS

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CERTIFICATE OF SERVICE

I hereby certify that the following parties have been served true and accurate copies of Sunstone Energy Development LLC's Responses to Duke Energy Progress, LLC's First Data Request by first class mail deposited in the U.S. mail, postage pre-paid, or by e-mail transmission.

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PUBLIC STAFF - NC UTILITIES COMMISSION

This the 1st day of February, 2021.

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By:

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GENERAL COUNSEL

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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

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

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

> 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

> [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.").

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[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.

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.

> 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).

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

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

NORTH CAROLINA
PUBLIC STAFF
UTILITIES COMMISSION

February 26, 2021

Kimberley A. Campbell, Chief Clerk
North Carolina Utilities Commission
4325 Mail Service Center
Raleigh, North Carolina 27699-4000

Re: Docket No. SP-100, Sub 35
Request for Declaratory Ruling by Sunstone Energy Development, LLC

Dear Ms. Campbell:

On January 12, 2021, the Commission issued an Order Requesting Comments in the above-captioned docket, with petitions to intervene and initial comments to be filed on or before February 12, 2021 and reply comments on or before February 26, 2021. On February 5, 2021, Duke Energy Progress filed a motion requesting that the date to file initial comments be extended to today, February 26, 2021, and for reply comments to March 12, 2021. On February 9, 2021, the Commission granted the request for extension.

The Public Staff has reviewed the Request for Declaratory Ruling by Sunstone Energy Development, LLC (Applicant) and has considered the complex legal issues raised by the Applicant. By this letter, we would like to inform the Commission and the parties that we do not intend to file comments at this time.

Sincerely yours,

/s/ Layla Cummings
Staff Attorney
layla.cummings@psncuc.nc.gov

CC: Parties of Record