

1 PLACE: Dobbs Building, Raleigh, North Carolina

2 DATE: Monday, November 29, 2021

3 TIME: 2:00 p.m. - 4:30 p.m.

4 DOCKET NO: SP-100, SUB 35

5 BEFORE: Chair Charlotte A. Mitchell, Presiding

6 Commissioner ToNola D. Brown-Bland

7 Commissioner Lyons Gray

8 Commissioner Daniel G. Clodfelter

9 Commissioner Kimberly W. Duffley

10 Commissioner Jeffrey A. Hughes

11 Commissioner Floyd B. McKissick, Jr.

12
13 IN THE MATTER OF:

14 Request for Declaratory Ruling

15 by Sunstone Energy Development, LLC

16 Regarding the Provision of Solar Energy

17 and Energy Efficiency Services

18 Within Fort Bragg

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NORTH CAROLINA UTILITIES COMMISSION

1 A P P E A R A N C E S:

2 FOR SUNSTONE ENERGY DEVELOPMENT, LLC:

3 Brad Risinger, Esq.

4 Gray Styers, Esq.

5 Fox Rothschild, LLP

6 434 Fayetteville Street, Suite 2800

7 Raleigh, North Carolina 27601

8

9 FOR DUKE ENERGY PROGRESS, LLC:

10 Brett Breitschwerdt, Esq.

11 McGuireWoods, LLP

12 501 Fayetteville Street, Suite 500

13 Raleigh, North Carolina 27601

14

15 Jack Jirak, Esq.

16 General Counsel

17

18 Duke Energy Corporation

19 410 South Wilmington Street

20 Raleigh, North Carolina 27601

21

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P R O C E E D I N G S

CHAIR MITCHELL: All right. Good afternoon. Let's come to order and go on the record, please. I'm Charlotte Mitchell, Chair of the Utilities Commission, and with me this afternoon are Commissioners ToNola D. Brown-Bland, Lyons Gray, Daniel G. Clodfelter, Kimberly W. Duffley, Jeffrey A. Hughes, and Floyd B. McKissick, Jr.

I now call for oral argument, Docket Number SP-100, Sub 35, In the Matter of Request for Declaratory Ruling by Sunstone Energy Development, LLC, Regarding the Provision of Solar Energy and Energy Efficiency Services Within Fort Bragg.

Before I proceed further, as I'm required to do, in compliance with the State Government Ethics Act, I remind Members of the Commission of their duty to avoid conflicts of interest and inquire, at this time, as to whether any member has a known conflict of interest with respect to matters coming before us this afternoon.

(No response)

CHAIR MITCHELL: The record will reflect that no conflicts have been identified, so we'll

1 proceed. On December 8th, 2020, Sunstone Energy
2 Development filed, in this proceeding, a request for
3 Declaratory Ruling requesting that the Commission
4 conclude that:

5 1) Fort Bragg is not subject to the North
6 Carolina Public Utilities Act because it is a Federal
7 enclave.

8 2) Sunstone's provision of energy and energy
9 efficiency services within the Federal enclave of Fort
10 Bragg does not subject Sunstone to the Public
11 Utilities Act.

12 3) The activities Sunstone proposes to
13 undertake will not cause it to be considered a public
14 utility under North Carolina General Statute Section
15 62-3, Sub 23.

16 On December 9th, 2020, Sunstone filed a
17 corrected Petition.

18 On January 13th, 2021, Duke Energy Progress
19 filed a petition to intervene.

20 On January 21, 2021, the Commission granted
21 that petition.

22 On February 25th, 2021, DEP filed a Motion
23 to Dismiss for Failure to Meet the Requirements
24 of North Carolina Declaratory Judgment Act.

1 On March 12, 2021, Sunstone filed a Response
2 to Duke's Motion to Dismiss requesting that the
3 Commission deny that Motion to Dismiss.

4 On May 4th, 2021, the Commission issued an
5 order Denying Motion to Dismiss. The Commission also
6 found good cause to establish new deadlines for the
7 filing of comments from interested parties on the
8 merits of the Petition.

9 On June 8th, 2021, Duke filed the initial
10 comments -- Duke filed its initial comments.

11 On June 15th, 2021, Sunstone filed a Motion
12 for Extension of Time in which to file its reply
13 comments, and on June 23rd, 2021, the Commission
14 granted that motion. And, thereafter, on July 20th,
15 2021, Sunstone filed its reply comments.

16 On October 20th, 2021, the Commission issued
17 an Order Scheduling Oral Argument, allowing briefing,
18 and requiring responses to Commission questions.

19 Among other things, the Order scheduled oral
20 argument to be held today, November 29th, at this time
21 and in this place. The Order also set the deadline
22 for any Pre-argument Briefs to be filed on or
23 before November 9th, 2021.

24 On November 9th, both Sunstone and DEP filed

1 Verified Responses to Commission's questions,
2 including one confidential exhibit and four public
3 exhibits.

4 On November 15th, Sunstone filed its
5 Pre-argument Brief, and also on November 15th, DEP
6 filed its Pre-argument Brief and Request for
7 Reconsideration. That brings us to today.

8 I now call upon counsel for the parties to
9 announce their appearances, for the record, beginning
10 with Sunstone.

11 MR. STYERS: Thank you, Madam Chair. My
12 name is Gray Styers with the law firm of Fox
13 Rothschild, on behalf of Sunstone Energy Development.

14 MR. RISINGER: Brad Risinger, also with Fox
15 Rothschild, on the behalf of Sunstone.

16 CHAIR MITCHELL: Good afternoon,
17 Mr. Styers, Mr. Risinger. Duke.

18 MR. BREITSCHWERDT: Chair Mitchell, Brett
19 Breitschwerdt with the law firm of McGuireWoods, on
20 behalf of Duke Energy Progress. With me today is Jack
21 Jirak, Deputy General Counsel for the Duke Companies.

22 CHAIR MITCHELL: Good afternoon,
23 Mr. Breitschwerdt and Mr. Jirak.

24 MR. STYERS: Madam Chair, if I can just --

1 since there are folks in the room that the Commission
2 may not know, I'd just like to also just state, for
3 the record, that we have in the room today Mr. Dan
4 Swayze, who is manager of Sunstone Energy Development,
5 and Ms. Beth Worley, and Kevin Cox, who are members of
6 Sunstone Energy Development.

7 CHAIR MITCHELL: Good afternoon. Any other
8 preliminary matters to take up?

9 MR. BREITSCHWERDT: Chair Mitchell, if
10 we're going to introductions now, I'd also like to
11 recognize that Mark Tabor is here who is the large
12 account manager for the Fort Bragg Department of
13 Public Works, and then also Mr. Bo Summers, who we all
14 probably know well in his former role as Deputy
15 General Counsel, who is now the Vice-President of
16 Strategic Regulatory Initiatives with the Company.

17 CHAIR MITCHELL: Good to see you,
18 Mr. Summers. I've forgotten what you look like. Any
19 other preliminary matters before we begin?

20 (No response)

21 CHAIR MITCHELL: If there are none, this is
22 how we're going to proceed this afternoon. So counsel
23 for Petitioner will proceed with its argument, and
24 then we'll be followed by Duke.

1 Sunstone and Duke are each afforded
2 30 minutes in which to make their arguments. Use your
3 time wisely. Make every word, every minute count.

4 We'll be given the opportunity -- we, the
5 Commissioners, will be given the opportunity to ask
6 questions at the end of each party's arguments, so
7 I'll check in with my colleagues to see if they have
8 questions for you-all after you deliver your
9 arguments. We may also ask you questions while you
10 are arguing to us, so just be on your toes and be
11 ready.

12 Sunstone, if you'd like to reserve any of
13 your time for rebuttal, you may do so. Just let me
14 know. It's your preference that you-all proceed in a
15 manner that doesn't require that we clear the hearing
16 room, so do your best to avoid the use of confidential
17 information.

18 If you must use it, please alert me to that
19 fact before you launch off and say something that's
20 confidential so that I can go off the record, clear
21 the hearing room, and then go back into confidential
22 session. Questions on process for today?

23 (No response)

24 CHAIR MITCHELL: If there are no

1 questions --

2 MR. BREITSCHWERDT: Just very briefly. I
3 have three -- what I marked as exhibits to provide the
4 Commission. The first is already in the record. The
5 second is two statutes that are generally available,
6 and the third is an excerpt from my case.

7 That's also generally available, so I don't
8 need or anticipate the Commission will need them to be
9 entered into the record, but I have premarked them.
10 I've shared them with counsel for Sunstone.

11 I shared them with the court reporter, so I
12 would plan to pass those out to the Commission at the
13 time of my argument, but I just wanted to identify
14 that up front of the Commission's information.

15 CHAIR MITCHELL: Thank you,
16 Mr. Breitschwerdt. Please, do pass them out before
17 you get started, just so we have them and can
18 reference them easily. And we'll take judicial notice
19 of whatever points of law you're using, so we'll do
20 that when we get to that point in the argument.

21 MR. BREITSCHWERDT: Thank you.

22 CHAIR MITCHELL: Okay. Any other --
23 Mr. Styers, any other questions?

24 MR. STYERS: No.

1 CHAIR MITCHELL: Then let's go ahead and get
2 started.

3 (Pause)

4 MR. RISINGER: I'm not athletic, in the
5 slightest. Being tall has only served me to get tall
6 things off of shelves and kitchens, and being too far
7 away from a microphone when it's on a table top, so
8 I'm going to do my best. And if it please the Chair,
9 we'd like to reserve five minutes.

10 The project that's here before you today,
11 I'll discuss, sort of briefly, the facts of the
12 project. And I'm happy to answer any questions, but I
13 think the interest of the Commission, given the orders
14 that you've issued, lie beyond the basic facts.

15 This is a roof and ground mount Solar
16 project that would be constructed solely within Fort
17 Bragg on land controlled by the United States of
18 America and leased to Bragg communities.

19 Sunstone would build the plant, and either
20 Sunstone or an assignee would operate it and sell
21 electricity to BCL. BCL is the private entity that
22 owns and controls military housing on the base.

23 And just as a background manner across,
24 really now, all the branches of the -- the military

1 branches of the -- Federal military branches,
2 privatized housing is the norm across bases now, in
3 general.

4 Go straight to the issue that some questions
5 have been asked about, and the Court of Appeals'
6 decision in Cube Yadkin has been brought to your
7 attention, and we'd like to talk about it in a couple
8 different ways.

9 One way is the criteria that the Court of
10 Appeals has set down in Cube Yadkin and why they're
11 not an obstacle to the Commission being able to render
12 a decision, and a second is a second path that we
13 would respectfully suggest that the Commission think
14 about in tandem with the factual criteria that Judge
15 Griffin enunciated on behalf of the Court in Yadkin.

16 So under the fact-based criteria of Cube
17 Yadkin, Sunstone feels like there's a defined existing
18 controversy based only on, you know, following the
19 criteria that are set forth in the case.

20 The Court of Appeals' opinion is animated by
21 a concern about the Commission and the courts getting
22 into the business of rendering speculative and
23 hypothetical decisions that amount to, as the Court of
24 Appeals said, offering General Counsel services,

1 offering an opinion on the wisdom of someone's
2 business plan, and getting involved in speculative
3 decisions that neither the Commission or the Court
4 should be involved in.

5 And what's missing -- and so what the Court
6 of Appeals alighted upon in Cube Yadkin were a series
7 of issues that it felt on those facts didn't establish
8 that there was yet an existing controversy, and so the
9 Court of Appeals was concerned that a controversy
10 didn't yet exist in that case.

11 Cube didn't own, own a property or a
12 leasehold interest in the property, in the business
13 park that it proposed to develop.

14 It didn't have tenants, nor any particular
15 prospects for tenants, and the Court of Appeals, in
16 pretty choice words, you know, had the feeling that it
17 was being asked to serve as the General Counsel for a
18 relatively speculative investment and wanting advice
19 as to the propriety or the legality of that adventure.

20 What's important, we think, about Cube
21 Yadkin, and the fact-based nature of its opinion, is
22 that the indicia that are present in Yadkin, that are
23 being asked about, aren't present, in this case.

24 And, so, if you're only looking within

1 Yadkin and you're going how well the Court of Appeals
2 look upon me if I determine, in the wake of Cube
3 Yadkin, that I had jurisdiction as a Commission to act
4 here, I think it's the things that are missing from
5 the record, in this case, that distinguish it from
6 Cube Yadkin.

7 Here, you don't have a party that's offering
8 to the Commission, "You know, I'm thinking about
9 approaching the Army about getting into the Solar
10 business, and I'm a little concerned about the overlay
11 of rules and regulations that might apply there. Help
12 me out, if you would."

13 The party here is not saying, "Well, I don't
14 have a relationship with this entity that owns and
15 controls the housing within Fort Bragg, but I'll sure
16 go get one if you give me a positive reaction as to,
17 you know, the question that I'm asking before the
18 Commission."

19 Nor is it the case where the party is like
20 Cube Yadkin in that we're thinking about what a
21 business relationship might look like, and we'll get
22 to it if the Commission tells us it's okay for us to
23 proceed, but we'll get to that down the road.

24 And so none of those -- all of those missing

1 things distinguish the case from Cube Yadkin in a way
2 that should leave the Commission comfortable that Cube
3 Yadkin is not an obstacle to entertaining the question
4 that's before the Commission.

5 This is one project and, overall, a Solar
6 portfolio program that's been approved by the Army.
7 It is up and running on bases across the country.

8 As we said in brief, there's two projects in
9 Maryland, there's one in Kansas. There's another in
10 Louisiana that's at the system impact stage, all under
11 the portfolio of approvals that the Army has said.

12 That in reaction to our responsibilities as
13 the Federal government, by Federal statute, and our
14 obligations with regard to alternative energy
15 generation, we're proceeding down this path.

16 And, so, Sunstone doesn't come to you with a
17 speculative enterprise solely about Bragg. It comes
18 to you with one piece of a larger Federal program that
19 is proceeding apace in many other states and on many
20 other similar situated Federal enclaves.

21 It's also not a case like Yadkin, Cube
22 Yadkin where the property is in flux. Cube Yadkin's
23 Court of Appeals is concerned about not having a
24 leaseholder interest or owning the property.

1 The property is taken care of here in that
2 the United States Government owns the property. The
3 United States Government has entered a ground lease
4 with BCL, which owns and operates the housing on the
5 base, and the energy production would occur on lease
6 that BCL holds -- on land that BCL holds the lease on.

7 The contracting is also not a hypothetical
8 situation. The parties involved in these transactions
9 and bases across the country have engaged in similar
10 contracting enterprises.

11 And, as part of the record, the Commission
12 has seen on a confidential basis -- I'm not going to
13 discuss details on it, but on a confidential basis,
14 the most recent contract that Sunstone entered at Fort
15 Riley.

16 And it follows a template that has been used
17 in bases across the country, and we've also submitted
18 a proposed contract that based on the usage of the
19 contracts at Riley and Aberdeen and meeting on other
20 bases that would be entered here.

21 So the contracting, the way the
22 relationships would be structured, is also not akin to
23 Yadkin where the Court of Appeals was concerned about
24 the speculative and hypothetical nature of it.

1 There's a second aspect about Cube Yadkin
2 that we think is important for the Commission to
3 consider as part of its deliberations, and that's that
4 in -- under the Cube Yadkin factors, and in that case,
5 the Commission is being asked whether there's
6 jurisdiction to ultimately render a question under
7 State law, and to render an answer under State law.

8 There's really a different situation
9 occurring here where the petition actually frames a
10 request as to whether State law's going to apply at
11 all.

12 And we would suggest that not only does the
13 dispute present cleanly with regard to the Cube Yadkin
14 factors to present an active controversy that's
15 justiciable by the commission of the courts, but
16 there's also an active controversy as to whether State
17 law applies at all inside the enclave, and whether one
18 particular exception in Federal law applies to the
19 enclave.

20 Sunstone with, you know, all due respect,
21 Sunstone, in concert with the Army and Sandhills
22 Utility, feels like that it can proceed apace with the
23 project under Federal law, and that State law does not
24 govern its activities.

1 The Public Utilities Act does not govern its
2 activities in a way that would, for instance, allow
3 Duke Energy to say that should be my project because
4 I'm the franchise holder of the area in which the
5 bases is situated.

6 Duke has a very clearly articulated position
7 on that issue of whether State law can apply inside
8 the base. Duke has a particular position that through
9 Section 8093, that State law can apply through Federal
10 law to allow the Commission to apply principles of the
11 Public Utilities Act inside of Bragg.

12 There's a wholly -- apart from the factors
13 in Cube Yadkin, there's a clearly delineated actual
14 controversy between the parties. The parties engaged
15 in cordial discussions before the proceeding that
16 we're here before you today was initiated.

17 And, ultimately, Duke's answer, as is
18 indicated in the filings that Sunstone has made,
19 Duke's answer was if you need clarity on this issue,
20 we can't give it to you. You need to go to the
21 Commission or a court to get it.

22 You know, in that sense, on the issue of
23 unavailability of litigation, Sunstone believes that
24 on the issue of issuing Declaratory relief, litigation

1 is unavoidable on either of these treaties, on the
2 issue of whether all the criteria are met that makes
3 us different, and the issue of this finally
4 articulated controversy between the parties as to
5 whether State law has any role to play at all.

6 We were ultimately going to be here. We
7 were going to be in a justicial position either way,
8 and so we believe that the test on either of those
9 avenues of analysis as to whether litigation is
10 unavoidable has been met.

11 The substantive issue for 8093 is a simple
12 one, we believe, and that's that state law doesn't
13 apply inside the Fort Bragg enclave unless a specific
14 exception has been met.

15 And the specific exception that has been
16 suggested by Duke, and that both parties have briefed
17 at length, is Section 8093, and the exception is that
18 Congress meant to allow the regulation of purchases of
19 electricity by the Federal Government.

20 That's not occurring here. The Federal
21 Government is not buying any electricity. BCL is
22 purchasing electricity from Sunstone.

23 On the face of waivers of sovereign immunity
24 are, under Federal law, to be construed very narrowly.

1 And, here, it can be construed only when both parties
2 discussed at length the BG&E case, Federal District
3 Court in Maryland.

4 And what the BG&E Court and the Department
5 of Defense has said in its own Memoranda -- the DEP is
6 going to mark a 2000 Memoranda from the Department of
7 Defense. What the Department of Defense and BG&E both
8 say is that the exception is read exactly the way it's
9 written.

10 And if it's not a purchase for electricity
11 by the Federal Government, there's not been a waiver
12 of sovereign immunity that would provide an avenue for
13 state regulation inside the enclave.

14 The parties have had a reasonable amount of
15 discussion as to whether -- and raised by Duke and
16 answered by Sunstone -- as to whether the fact that
17 the service members are ultimately purchasing power
18 indirectly from BCL because they're paying to BCL for
19 their rent, including their utilities.

20 And I think that the attenuated argument
21 that Duke suggests is that somehow because the Army is
22 paying the basic allowance for housing to a service
23 member, that if a service member elects to use that to
24 live on base, that somehow that's the Federal

1 Government paying for power.

2 That's not how the basic allowance for
3 housing operates. It's paid out to the service
4 member. The service member has to make an election
5 about what to do with his or her money on behalf of
6 himself or herself or her family.

7 They can pay that money to BCL for on-base
8 housing to cover 100 percent of those obligations.
9 They can take all of that money and live off base. So
10 we think that it's a bit of an illusory argument to
11 suggest that the Federal government is somehow buying
12 power itself because it's paying that allowance for
13 housing to its service members.

14 There's also a broader aspect that --

15 CHAIR MITCHELL: Mr. Risinger, I'm going to
16 stop you right there. So service members who elect to
17 live on base, what do they pay for electricity? How
18 do they pay for electricity?

19 MR. RISINGER: Service members themselves
20 pay for electricity as part of conveying their basic
21 allowance for housing to BCL. So as a lump unit, they
22 pay for the right to live in the housing and the
23 municipal services that are provided to the on-base
24 housing.

1 CHAIR MITCHELL: So, essentially, make sure
2 I understand it correctly, the service member that
3 elects to live on base, lives in on-base housing and
4 all of the utility services are supplied to that
5 service member, that end user, and as a consequence of
6 his or her election to use that on-base allowance. Is
7 that right?

8 MR. RISINGER: That's right, Commissioner.
9 The election by the service member, it is the fulcrum.

10 CHAIR MITCHELL: Got it.

11 MR. RISINGER: It's either an election to
12 spend that money on on-base housing or an election to
13 take that money and use it outside the base on private
14 housing.

15 CHAIR MITCHELL: And so who is buying the
16 power? Who is paying Duke Energy Progress for the
17 power that is supplied to the base?

18 MR. RISINGER: So as the -- Fort Bragg,
19 Department of Public Works, acquires power from Duke,
20 and the Department of Public Works bills entities on
21 the base for the dispersion of power that's used for
22 their enterprises. And so --

23 CHAIR MITCHELL: So is BCL one of the
24 substantive --

1 MR. RISINGER: BCL does not have a
2 relationship with Duke. BCL is billed by DPW. And
3 the power that's generated, generates a credit against
4 the power, you know, that's used, and that BCL pays
5 DPW for.

6 CHAIR MITCHELL: And, so, again, just making
7 sure I understand the facts here, BCL buys from Fort
8 Bragg directed to Public Works pursuant to the
9 Municipal Services Agreement?

10 MR. RISINGER: Yes.

11 CHAIR MITCHELL: And the rates that are set
12 forth in the Municipal Services Agreement, I'm looking
13 at Special Provision A, electric service. This
14 is Exhibit 3 that was provided by Sunstone. Those
15 rates are Duke Energy Progress tariff rates. What are
16 those rates?

17 MR. RISINGER: I want to make sure that I
18 get the answer right. I think the answer is that
19 those are negotiated rates between the Government and
20 BCL. Hang on one second. I'll just check and come
21 back and give you an answer.

22 (Pause)

23 MR. RISINGER: Sorry. DPW tells BCL what
24 the rates are going to be for each calendar year, at

1 the beginning of each calendar year.

2 CHAIR MITCHELL: And you don't know what the
3 basis of those rates is?

4 MR. RISINGER: I don't. I don't.

5 CHAIR MITCHELL: Okay.

6 MR. RISINGER: Oh. Equal to the rates
7 they're charged.

8 CHAIR MITCHELL: And then also, again,
9 looking at Special Provision A, electric service to
10 the Exhibit 3 that you-all provided, there's a note
11 that says:

12 "Sandhills Utility Services Facilities
13 charge began January of 2007. Include BC, LLC
14 prorated operation and maintenance shared cost charged
15 to DPW."

16 So are there charges that are being passed
17 on to BCL other than the rates that -- the rates that
18 DPW pays DEP for electricity?

19 MR. RISINGER: We're not provided a
20 breakdown on the charge that's stated from DPW to BCL.

21 CHAIR MITCHELL: What I'm getting at is, is
22 BCL paying something, paying DPW a different rate or a
23 different charge than DEP charges DPW?

24 MR. RISINGER: As I tried to answer before,

1 I didn't do a very good job, that that rate is the
2 same -- DPW tells us that rate is the same. That the
3 rate DPW passes to BCL, they represent to us as the
4 rate they pay from.

5 CHAIR MITCHELL: And with respect to
6 electric service, there are no other charges other
7 than perhaps a charge associated with Sandhill's
8 Utility Service Facilities? There are no other
9 charges for electric service than the pass-through of
10 the DEP charges?

11 MR. RISINGER: I'm sorry. Not that are
12 revealed to us individually, as part of the component
13 number that's charged in on.

14 CHAIR MITCHELL: Okay.

15 MR. RISINGER: As my time -- to understand,
16 I want to make sure on the 8093 issue and whether the
17 exception even applies. And, again, Sunstone's
18 position is that Section 8093 has a limited waiver
19 that only allows for the role of state regulation to
20 occur when the Federal Government is purchasing power.

21 And to find here, in this case, in favor of
22 Sunstone is entirely consistent with the way the
23 Statute is written and the way legislative history
24 reflects the Statute was purposed.

1 The legislative history of Section 8093
2 indicates that it was designed to avoid abandonment of
3 local utilities. There's no abandonment of DEP is
4 occurring here.

5 DEP is still supplying most of the power to
6 the base. But what we know about Section 8093 is that
7 Congress, in drafting an exception to allow for the
8 regulation, only when the Federal Government is
9 purchasing electricity, we know, for certain, that
10 Congress was not intending to get at self-generation
11 behind the meter on the base because it's specifically
12 accepted in the Statute.

13 The Statute specifically provides that a
14 secretary of a military branch can contract for the
15 provision and operation of energy development of
16 entities on its land.

17 And the provision was originally intended as
18 a geothermal provision, and the Department of Defense,
19 on repeated occasions, has indicated that this covers
20 all forms of energy production.

21 And so the Statute itself was not designed
22 to target what's going on here, generation behind a
23 meter. It was designed to attack another issue. And
24 I'm sorry. I'll stop. You're coming back to the

1 microphone.

2 CHAIR MITCHELL: Yes. Just clarify for me.
3 Is it Sunstone's position that this is a type of self-
4 generation or is it Sunstone's position that this is a
5 behind-the-meter generation?

6 MR. RISINGER: Yeah. It is akin to the ways
7 in which the Commission would think about
8 self-generation. The art -- under --

9 CHAIR MITCHELL: Just to be clear, it's
10 Sunstone's position that this is self-generation?

11 MR. RISINGER: It's generation that's
12 allowed for the same reason. Yeah. I mean, for
13 example -- for instance, let me try answer it.

14 It's our position that the United States
15 could contract directly with Sunstone for energy
16 generation.

17 Under 8093, that's a specific exception, and
18 it's our position that BCL can act in the same way
19 that the United States could act as the privatized
20 entity that controls the housing, and that BCL can
21 acquire -- can allow for energy to produce on the base
22 and acquire it in the same way.

23 It's self-generation in the broader sense
24 that it's behind-the-meter generation that the Federal

1 government allows and approves, that reduces the
2 overall demand that the base pulls down from DEP.

3 COMMISSIONER CLODFELTER: All right. Let me
4 take you up on the invitation you just gave me. So I
5 agree with you completely.

6 I mean, the exception, B2B exception in 8093
7 says it does not prevent the department from
8 purchasing electricity from any provider pursuant to
9 2394, now codified as 2292.

10 Why is yours not structured that way? Why
11 have you structured the transaction -- I'm curious.
12 Why have you structured the transaction other than
13 having the Army purchase from Touchstone (sic) and
14 then resell at the same price to BCL, problem solved?

15 MR. RISINGER: Yeah.

16 COMMISSIONER CLODFELTER: Why isn't it
17 structured that way?

18 MR. RISINGER: Well, the answer,
19 Commissioner, is that it's structured in the fashion
20 that we brought it before the Commission today because
21 that's how the United States tells us how to do it.

22 The United States makes an election not to
23 do it directly with us, and they're making an election
24 to use the privatized structure that they have set up

1 for -- you know, for how a private housing is
2 governed, you know, to get the Federal Government out
3 of the business of doing the things they're not so
4 good at and focusing on the Army things they're good
5 at.

6 The United States' preference is that it's
7 done this way. It's negotiated that way. All the
8 parties are at the table together in approving the
9 portfolio.

10 It's done -- I agree it's totally
11 frustrating. It's totally frustrating to us, but it
12 is a choice that the United States makes as to how
13 it's structured.

14 COMMISSIONER CLODFELTER: Well under your
15 proposal, who pays Touchstone, (sic) I mean Sunstone,
16 excuse me. I'm thinking of another item. Who pays
17 Sunstone?

18 MR. RISINGER: BCL.

19 COMMISSIONER CLODFELTER: BCL? And that's
20 done because that's the Army's preference?

21 MR. RISINGER: Yeah. I mean, essentially
22 the answer is yes.

23 COMMISSIONER CLODFELTER: Can I read more
24 about that anywhere in the record? Are there

1 regulations, manuals, program guidelines, anything
2 else that would help me understand how the Army
3 arrived at that position? Because, again, under the
4 statutes, it's crystal clear that Fort Bragg
5 Department of Public Works could buy this directly
6 from Sunstone and resell it to BCL, and we wouldn't be
7 here.

8 So I want to understand a little bit more
9 about why the Army wants it structured this way. What
10 can I read in the record?

11 MR. RISINGER: Well, to be honest, you can't
12 read that -- you can't read that in the record. The
13 inference that's in the record is that as an eligible
14 entity under the Statute, BCL, in taking this function
15 away from the Government, that's been given to them
16 under the Privatization Act, is acting as the
17 Government, you know, inside the enclave.

18 And the Government, you know, feels that
19 it's the -- the Government doesn't feel like it has to
20 do it, Commissioner, because the Government feels like
21 that BCL, as a privatized entity, that's an eligible
22 entity under the Statute, can do it just like the
23 Government. That's it.

24 And so that's why there's not clarity on

1 that position in the record because, you know, we're
2 provided the clarity that the Government, you know,
3 gives us, you know.

4 CHAIR MITCHELL: Mr. Risinger, the proposed
5 project that we're talking about today, is it 1
6 Megawatt of generation or is it 25 Megawatts of
7 generation?

8 MR. RISINGER: It's up to 25. And the
9 reason why I say up to 25 is that the system impact
10 study process, you know, is designed, as it has been
11 designed and carried out of all the other bases that
12 we've done the project, to develop a project where
13 there's no backfeed outside of the base.

14 And so there are places that system upgrades
15 are required by the distribution system, you know,
16 inside the military base.

17 We anticipate, you know, that we may reduce
18 the name plate capacity in combination with some
19 upgrades with the ultimate goal of the end of the
20 system impact process, as it is with all the other
21 bases, that there's no impact outside the base.

22 CHAIR MITCHELL: So it sounds like some
23 preliminary engineering has been done on this project?

24 MR. RISINGER: I mean the preliminary

1 engineering is -- the general architecture has been
2 done multiple times at multiple bases, but the
3 specific engineering of the project has not occurred,
4 and the specific engineering is a product of the SIS
5 that occurs in cooperation with Sandhills, the
6 federally regulated distribution entity on the base.

7 CHAIR MITCHELL: The other bases in which
8 these projects have been implemented by the United
9 States, what states are those bases located in?

10 MR. RISINGER: So two in Maryland; Meade in
11 Aberdeen; Fort Riley in Kansas; Fort Bragg in North
12 Carolina, and Polk in Louisiana.

13 And the Fort Riley facility in Kansas is a
14 similarly structured monopoly jurisdiction where
15 Sunstone operates with the cooperation of the
16 franchised territory.

17 Louisiana has a somewhat similar structure.
18 It's not as far along as Fort -- as that system impact
19 study is being conducted at Polk currently.

20 CHAIR MITCHELL: So Riley is in service?

21 MR. RISINGER: Riley -- one is in service
22 and the other one -- the second phase of Riley is
23 going in December of this year. Aberdeen and Meade
24 are in service. The -- I'm sorry.

1 The numbers officially in the record, it's
2 7.1 Megawatts of roof and ground at Aberdeen, 8.7 of
3 Roof at Meade, 10.5 at Roof and Riley, with 1.7 to
4 come in the next energizing event, which I think is in
5 December, and then Polk yet to be determined.

6 CHAIR MITCHELL: What can you tell me about
7 the -- I don't know if I'm going to say this correctly
8 but the Camp McCall. Is that how it's pronounced?

9 MR. RISINGER: Yes.

10 CHAIR MITCHELL: The Camp McCall project?

11 MR. RISINGER: Yes.

12 CHAIR MITCHELL: What do you know about the
13 transaction for that project? Who owns that project?
14 What is the arrangement for the sale of power
15 generated by that facility?

16 MR. RISINGER: With deference, I'm going to
17 say counsel is going to tell you exactly -- we know
18 what the publicly conveyed facts are.

19 What we believe the publicly conveyed facts
20 to be is that the Army contracted with Duke and
21 Ameresco to build the floating Solar project for them
22 on Camp McCall, and the public statements issued by
23 both parties is that the Army will own and operate
24 that project on base post the construction.

1 And at the last public meeting at Bragg to
2 discuss their multiple alternative projects, they said
3 that the floating Solar project was essentially done.
4 But the public knowledge is that the Government will
5 own and operate it, and that it was built for them on
6 contract by Duke and Ameresco.

7 CHAIR MITCHELL: When you say "the
8 Government" or "the Army," do you mean BCL or do you
9 mean some other entity?

10 MR. RISINGER: Not BCL. The Department of
11 Public Works or an adjunct to the Department of Public
12 Works, but the United States, itself, is -- at least
13 in the public documents that we've seen, is going to
14 be the owner and operator of the facility.

15 CHAIR MITCHELL: And why did Sunstone feel
16 that it was relevant to bring that project to the
17 Commission's attention and its reply comments?

18 MR. RISINGER: Well, I mean, I think that
19 the McCall project, I think, is emblematic of the
20 Army's approach to what it believes its sovereign
21 authority is on the base.

22 To have the authority to engage in multiple
23 partnerships on the base that produce electricity that
24 is then not needed to be pulled down in demand from

1 the franchise provider that provides power at the
2 distribution points, you know, into the base.

3 And so, you know, from our standpoint, that
4 project is of similar ilk to the authority that the
5 United States has under 8093 to contract with someone
6 to produce it on their property. It can also own and
7 operate in a self-generation sense, the property in
8 that way.

9 CHAIR MITCHELL: Has the sort of -- just
10 following on here, has the Fort Bragg specific Letter
11 of Intent been executed yet?

12 MR. RISINGER: Yes.

13 CHAIR MITCHELL: It has it been?

14 MR. RISINGER: Yes.

15 CHAIR MITCHELL: Has it been put in the
16 record in this proceeding?

17 MR. RISINGER: Yes. And that's a Letter of
18 Intent on -- from the parties on really our side of
19 the aisle that they're going to follow through just,
20 you know, like they did at Bragg. It's a BCL/Sunstone
21 Letter of Intent, but that's executed and that's in
22 the record.

23 CHAIR MITCHELL: And is it contingent on a
24 decision by this Commission?

1 MR. RISINGER: Being able to move forward,
2 yes.

3 CHAIR MITCHELL: Okay. Go ahead.

4 MR. RISINGER: Have I successfully reserved
5 five or --

6 CHAIR MITCHELL: Yes, you have. You can
7 finish up.

8 MR. RISINGER: Okay. The thing I would like
9 to leave you with is that it is a complex collision of
10 State and Federal law, and we understand that.

11 We also understand that it comes with the
12 Commission observing its authority through the prism
13 of Yadkin, but this is a really unique project.

14 It is -- the scope of the project is limited
15 to what occurs, you know, in a Federal enclave on
16 Federal property.

17 It does not implicate the functions that the
18 Utilities Commission has in other settings to
19 determine, you know, that someone is acting or not
20 acting as public a utility if they're in Greensboro or
21 Fayetteville, you know, outside of the enclave.

22 A ruling for Sunstone, you know, on these
23 facts is simply a ruling that says we're keeping the
24 waiver of Section 8093 to its terms. That's

1 what we're suppose to do as state regulators and
2 judges.

3 We're supposed to look at the waiver,
4 interpret it narrowly, interpret it as applying only
5 to purchases of electricity. That's not what's going
6 on here.

7 There's a way to cleanly rule for Sunstone
8 in the proceeding without implicating the Commission's
9 authority or having any kind of slippery or even
10 non-tactile slope that you've got to deal with later
11 on. Thank you for your time. And, again, we'd like
12 to reserve our time.

13 CHAIR MITCHELL: Let me check in with
14 Commissioners to see if there are questions.
15 Commissioner Brown-Bland.

16 (No response)

17 CHAIR MITCHELL: Commissioner Duffley?

18 (No response)

19 CHAIR MITCHELL: Commissioner McKissick.

20 (No response)

21 CHAIR MITCHELL: No questions?

22 COMMISSIONER McKISSICK: No.

23 CHAIR MITCHELL: Okay. Just a few more for
24 you here from our side. You mentioned the Letter of

1 Intent. Any other binding contracts that Sunstone has
2 entered into at this point in time or BCL --

3 MR. RISINGER: Um --

4 CHAIR MITCHELL: -- related to the proposed
5 project?

6 MR. RISINGER: Well, yeah. I mean,
7 tangentially, BCL has entered into a ground lease with
8 the United States for 50 years, so the control of
9 property, that factor we were talking about in Cube
10 Yadkin, you know, that's a firm contract, for sure.

11 CHAIR MITCHELL: And the proposed project
12 won't necessitate any amendment to that ground lease?

13 MR. RISINGER: Not that we're aware.

14 CHAIR MITCHELL: Any interconnection
15 requests submitted?

16 MR. RISINGER: No.

17 CHAIR MITCHELL: Is the proposed project
18 planning to interconnect on the Sandhills system or
19 the DEP system?

20 MR. RISINGER: Sandhills.

21 CHAIR MITCHELL: And is it possible that a
22 25-megawatt Solar generating facility can interconnect
23 the distribution, at the distribution level?

24 MR. RISINGER: Well, I mean, it's a question

1 that we -- you know, that we cooperatively approach
2 with, you know, Sandhills. We believe that the
3 initial take of information from Sandhills is that
4 it's possible, but we're prepared, you know, to
5 negotiate with Sandhills, the face plate size of the
6 project and necessary upgrades, you know, to get up to
7 or as close to the capacity as we can.

8 CHAIR MITCHELL: There's some discrepancy in
9 the numbers you-all -- in the percentages that you-all
10 have cited as to on-base housing relative to total
11 demand at Fort Bragg. What's the percentage of total
12 demand represented by on-base housing?

13 MR. RISINGER: I think what we originally
14 said was it's 25. And the most recent information we
15 got, that we supplied in the responses to the
16 Commission's question, was that it was 18.

17 The 18 was the most recent information we've
18 been provided by DPW as to the size of that usage by
19 military housing.

20 CHAIR MITCHELL: Okay. You've described,
21 both in your argument and the papers filed so far in
22 this docket, how excess energy would be, really, the
23 billing arrangement that will occur between FB, DPW,
24 and BCL, and you've made some remarks regarding

1 treatment of excess energy.

2 If there are no contracts in place to -- you
3 know, how can you speak with authority about how
4 billing will occur and how excess energy will be
5 treated, I mean, if you-all haven't really put -- you
6 know, come to terms on those issues?

7 MR. RISINGER: You know, well, I think --
8 Commissioner, I think the fairest way to answer that
9 is that first, as to the billing issue, that follows a
10 template of how the billing is occurring at multiple
11 other sites within the overall Army portfolio, and so
12 the billing is occurring in the fashion and manner
13 that it's occurring in other parts of the portfolio.

14 In our inner changes with DPW and Sandhills,
15 we have no impression that that's, you know, going to
16 be any different.

17 As to the excess energy, I mean that -- we
18 have not had a curtailment issue come up at a previous
19 project, but, you know, curtailment is -- you know,
20 Sandhills Utility ultimately wouldn't have that kind
21 of authority in a dire situation in overproduction.

22 That's a matter by contract, you know, when
23 we're tapping and interconnecting into Sandhills, what
24 we would expect to negotiate with Sandhills.

1 CHAIR MITCHELL: Okay. Let's see. I have
2 one additional question for you. Bear with me here.

3 (Pause)

4 CHAIR MITCHELL: Mr. Risinger, on one of
5 these decisions, there's discussion about the
6 legislative history of 591. The discussion pertains
7 to concern related to reduction and load. I'm trying
8 to find it for you right now, just to get you
9 oriented.

10 Anyway, my question -- as soon as I find it,
11 my question will be how do you reconcile Sunstone's
12 position with that, the discussion of legislative
13 history about concern related to reduction and load?

14 MR. RISINGER: Yeah.

15 CHAIR MITCHELL: Do you know enough?

16 MR. RISINGER: Yeah.

17 CHAIR MITCHELL: Okay.

18 MR. RISINGER: That's plenty. Holler at me
19 if you want me to stop.

20 CHAIR MITCHELL: Go ahead. Go ahead. Thank
21 you.

22 MR. RISINGER: So with respect to the
23 legislative history, we think that the predominant
24 legislative history concern of Section 8093 is

1 abandonment of local utilities by the Federal
2 Government.

3 And, you know -- and we think that the
4 abandonment has to be read in concert with what does
5 Congress think abandonment is. Congress doesn't think
6 abandonment is producing energy behind the meter in a
7 self-generation, or, you know, on-site production
8 sense, because Congress specifically accepted that
9 from the Statute.

10 And so when Congress said we're really
11 concerned, we want to make sure that there's no
12 abandonment of DEP, they weren't saying oh, yeah, in
13 the United States, you can't generate any power behind
14 the meter that would reduce the demand.

15 It was saying United States, our concern is
16 you walking away from local providers and disturbing
17 the Matrix of regulations and policies that provide
18 power, you know, in a given state, so we read those
19 provisions together. Is that a fair response to your
20 question, Commissioner?

21 CHAIR MITCHELL: It is a --

22 MR. RISINGER: It's a response.

23 CHAIR MITCHELL: Yes, you're responding, so
24 thank you. Thank you, Mr. Risinger. Anything else

1 before he sits down? Commissioner Brown-Bland.

2 COMMISSIONER BROWN-BLAND: Just following up
3 on that last exchange, so reading the 8093 and the
4 Statute, I think it's 2922?

5 MR. RISINGER: Um-um.

6 COMMISSIONER BROWN-BLAND: Reading those
7 together, how do you get that assurance that the
8 Federal installation doesn't abandon or walk away from
9 the local provider?

10 MR. RISINGER: Well, it's an interesting
11 question, Commissioner. The Statute doesn't provide,
12 you know, a guidepost other than indicating that as
13 part of the United States' abilities to tend to its
14 own interests as a sovereign of an enclave, that it
15 can generate power within that enclave.

16 I mean, there is -- you know, you reach a
17 theoretical touchpoint where some day, the question
18 may be litigated if the Government comes along and
19 says I'm going to, you know, generate 80 percent of my
20 power, you know, on base, and I'm no longer going to
21 need only but 20 percent of that power.

22 I mean, that's going to be -- I assume that
23 question's going to come up in a fact-based setting,
24 and some other setting, other than a place where what

1 we're talking about is, you know, 8 percent of the
2 power, but there aren't bumpers on the lanes or a
3 particular safeguard built into the Statute on that
4 exact question, Commissioner.

5 COMMISSIONER BROWN-BLAND: So just in terms
6 of statutory construction, I mean, those two fit
7 together, in your mind, and aren't in conflict with
8 each other such that they need some resolution?

9 MR. RISINGER: Well, I mean, in terms of a
10 resolution from this Commission, we would say no
11 because we think that those -- you know, this
12 Commission's interpreting those provisions, but in
13 terms of the Congressional concern about abandonment.

14 But, also, the Congressional endorsement of
15 self-generation, you know, we're in that generation
16 behind, you know, a metered point, and it's quite
17 small, you know, in the instance of this project, you
18 know, whether there would be a touchpoint down the
19 line later where a Commission in the state or a court
20 may look at that differently if the numbers were
21 vastly larger and different. I mean, it's hard to
22 say, to be honest.

23 COMMISSIONER BROWN-BLAND: Thank you.

24 CHAIR MITCHELL: Mr. Risinger, you may sit

1 down, and we'll give you your five minutes.

2 MR. RISINGER: Thank you.

3 CHAIR MITCHELL: All right. Duke.

4 (Pause)

5 CHAIR MITCHELL: Mr. Breitschwerdt, make
6 sure you pull the mic.

7 MR. BREITSCHWERDT: Is that coming in well
8 on your end?

9 CHAIR MITCHELL: (Nods affirmatively).

10 MR. BREITSCHWERDT: Very good. Thank you,
11 Chair Mitchell, Members of the Commission, Brett
12 Breitschwerdt, again, with McGuireWoods, on behalf of
13 Duke Energy Progress.

14 The Company appreciates the opportunity to
15 appear before the Commission today to address the
16 important issues presented in Sunstone's petition, as
17 their proposal violates the Company's exclusive
18 franchise providing regulated electric service to Fort
19 Bragg, through its retail customer, Fort Bragg
20 Department of Public Works.

21 And, if allowed by the Commission, would
22 potentially indirectly affect all of DEP's customers
23 through shifting costs and higher rates for electric
24 service.

1 Now, as the Commission may be aware, Fort
2 Bragg is one of the largest major military complexes
3 in the world totaling over 70,000 military personnel
4 and civilian employees.

5 The Company delivers power to the Fort Bragg
6 Department of Public Works, as you've heard, which
7 that power is then distributed through the base by
8 Sandhills Utility System, which is a privatized owner
9 of the distribution system under prior privatization
10 legislation passed in the late 90's by Congress.

11 The Fort Bragg Department of Public Works is
12 a large and important retail customer of DEP with an
13 annualized peak demand in 2020 of well over Megawatts,
14 so a significant customer for the Company.

15 And the risk of having its load reduced
16 are a material concern. And, finally, the Company's
17 very proud of the opportunity to reliably serve Fort
18 Bragg along with other major military installations in
19 eastern North Carolina.

20 And, for the State itself, it's important to
21 provide reliable, affordable, resilient, and
22 increasingly clean electric service to Fort Bragg.

23 As the Commission noted in its order on the
24 Company's Motion to Dismiss, the Department of Defense

1 has been an active advocate on behalf of Fort Bragg
2 and other major military installations at North
3 Carolina to ensure just and reasonable rates.

4 To DEP's knowledge, in former rate cases and
5 other proceedings, the Department of Defense has never
6 questioned, as a Commissioned authority, to save rates
7 for electric service provided to Fort Bragg or other
8 bases in North Carolina.

9 The North Carolina General Assembly has also
10 recently enacted state laws to provide expended
11 renewable energy opportunities at major military
12 installations.

13 The Commission will recall in House Bill 589
14 passed in 2017. The Commission -- or excuse me, the
15 General Assembly specifically carved out providing
16 direct and renewable energy procurement two major
17 military installations under the Green Source
18 Advantage Program, and those carve-outs are available
19 today.

20 Duke Energy, as you heard earlier, and I'll
21 speak a little bit more to, is also working with the
22 Department of Defense at Camp McCall, which is an Army
23 training facility southwest at Fort Bragg, to develop
24 a floating Solar array and battery-stored project.

1 Importantly, that project will be owned by
2 the Army and will be used to help achieve the Army's
3 renewable energy and resiliency goals. The Companies
4 have developed this project consistent with State law
5 and regulation on behalf of the Army.

6 The Company's -- it's a less than two
7 Megawatt generating facility, so it's not subject to a
8 CPCN by the Commission.

9 The Companies have submitted -- and when I
10 say "the Companies," Duke Energy's unregulated
11 subsidiary Amaresco, who's the contractor development
12 project, has submitted a report of proposed
13 construction which is a requirement under the
14 Commission's regulations.

15 And the Army will own the project and
16 self-generate power, so I know that you had the
17 discussion with Mr. Risinger about whether the BCL and
18 Sunstone arrangement is self-generation.

19 The Company's view and why we're here today
20 is that that is a third-party sale of electricity and
21 is distinguishable from self-generation, which is
22 especially carved out of the definition of public
23 utility under the statutory framework.

24 And contrast that with the project at Camp

1 McCall where the Fort Bragg Department of Public Works
2 will be the owner and operator of that facility at the
3 time it's placed into service, and will, in fact,
4 self-generate.

5 So it's been developed to be consistent with
6 State Public Utility Law, and we think it's very
7 distinguishable from the proposed transaction that
8 Sunstone is seeking to enter into with its affiliate
9 BCL.

10 And just -- I think as a point of
11 background, to DEP's knowledge, the Department of
12 Defense of North Carolina, the Army's never questioned
13 whether the Commission regulation of public utility
14 service to Fort Bragg exceeds its jurisdiction or is
15 inconsistent with Federal law not found in any cases,
16 either at the Commission or in the appellate courts in
17 North Carolina that would have the Army or the
18 Department of Defense taking that position.

19 And we've never seen or not aware of the
20 Department of Defense ever advocating that would have
21 the authority to allow unregulated, independent power
22 producer generating facilities to be located within
23 Fort Bragg, and to then sell power at retail within
24 the Federal enclave without Commission oversight.

1 So we do think what Sunstone is proposing
2 here, in its petition, is unprecedented, and there's
3 no case law, Commission guidance that would be
4 precedential to the situation proposed here.

5 CHAIR MITCHELL: Mr. Breitschwerdt, I'm just
6 making sure I understand Duke's position here. Is it
7 the ownership of the asset, are the proposed ownership
8 of the asset, in this situation, that distinguishes it
9 from the otherwise allowable or unobjectionable Camp
10 McCall project, or is there some element of a sale of
11 the power that makes it objectionable?

12 MR. BREITSCHWERDT: I think those two
13 components are related, so the fact that it's not
14 owned by BCL. So, for example, BCL owns the housing.
15 If it were to put Solar panels on its own roof and not
16 enter into a third-party arrangement where it was an
17 unrelated entity, an affiliate or unaffiliate entity,
18 but a separate legal entity that was entering into a
19 power personal arrangement to sell the power, then
20 that would be self-generation, which would be accepted
21 from the definition of public utility, and would be
22 not controversial.

23 So, frankly, we wondered from the beginning
24 why they didn't approach it in that manner and just

1 have BCL own the Solar project.

2 CHAIR MITCHELL: Okay. And just to clarify,
3 I'm not hearing -- so there is no concern or is there
4 less concern about excess energy than there is about
5 the sale from a third-party?

6 MR. BREITSCHWERDT: Excess energy that is --

7 CHAIR MITCHELL: So energy that wouldn't
8 otherwise be consumed by the on-base housing that
9 might go backfeed onto the system?

10 MR. BREITSCHWERDT: Well, I think it would
11 initially backfeed onto the Sandhills Utility System,
12 which is where the generating facility --
13 facilities -- because there's going to be some
14 combination, we understand, of rooftop, and then
15 ground mounted, and then it will directly backfeed.

16 And, I think, that's established in the
17 record, that the intent is it will backfeed into Fort
18 Bragg, and they'll be by directional metering that
19 will capture that generation output.

20 And, as a result, Sunstone will be credited
21 for the power that's being essentially consumed, if I
22 understand it, based on patent loads elsewhere on the
23 base.

24 Whether it would actually backfeed Duke

1 Energy Progress' system is something that hasn't been
2 determined and would need to be studied, I think.

3 Sunstone has represented that they plan to
4 work with Sandhills Utility to ensure that backfeed
5 does not occur, and that's an important issue for Duke
6 Energy Progress, that they would do a study to -- an
7 interfaction study, presumably, or at least make a
8 preliminary determination that a study is not needed
9 to determine whether it potentially could backfeed
10 onto the DEP system and then would take steps to
11 ensure that didn't occur.

12 CHAIR MITCHELL: Thank you for that. Again,
13 just make sure I understand, Duke's concern about an
14 impermissible third-party sale does not hinge on
15 potential backfeed onto DEP's system, but sort of the
16 other mechanics of this deal, as you've described
17 them?

18 MR. BREITSCHWERDT: That's right.

19 CHAIR MITCHELL: Okay.

20 MR. BREITSCHWERDT: We feel like it would be
21 an impermissible third-party sale, whether it
22 backfeeds onto DEP's system, whether it backfeeds onto
23 the Sandhills Utility system within the base, or
24 whether it's simply -- I think that's the arrangement.

1 So this clearly will backfeed onto the Sandhills
2 Utility System, if I understand the facts correctly.

3 CHAIR MITCHELL: Okay. Mr. Breitschwerdt,
4 while I have you look at Duke's initial comments, do
5 you have those in front of you?

6 MR. BREITSCHWERDT: I do.

7 CHAIR MITCHELL: Okay. Footnote 32, the
8 Company describes this --

9 MR. BREITSCHWERDT: I'm sorry, Chair
10 Mitchell. Could you provide me with the page cite
11 again?

12 CHAIR MITCHELL: Yeah. I'm looking at
13 page 13 of the initial comments of DEP, and down the
14 bottom, footnote 32.

15 MR. BREITSCHWERDT: Sorry. Give me one
16 second. Okay.

17 CHAIR MITCHELL: The Company describes the
18 proposal as quasi self-generation. Just help me
19 understand the Company's use of that term, quasi
20 self-generation there.

21 MR. BREITSCHWERDT: It was perhaps an
22 inartful term, but I think the concept is that all of
23 this generation will be behind Fort Bragg's metered
24 delivery point. So from the perspective of the DEP

1 system, it's being generated behind the quote unquote
2 "retail meter" of Fort Bragg.

3 But, clearly, there is a sale, and the sale
4 is resulting in power flowing from generation owned by
5 Sunstone or proposed to be owned by Sunstone, back
6 onto the -- the Sandhills' utility distribution
7 system. And, potentially, although as we learn more,
8 we think it's less like likely that it would flow back
9 on the DEP system.

10 CHAIR MITCHELL: Okay. One last question.
11 Does Duke have concerns with the relationship or the
12 arrangement between FB, DPW, and BCL in terms of
13 whether it's a resale of electricity?

14 MR. BREITSCHWERDT: It's a good question,
15 and we've been talking about this recently. And the
16 fact that -- and this goes to some of your questions
17 earlier.

18 The rates being paid are the same rates.
19 It's simply as a pass-through, so we don't have a
20 concern that it violates the Statute or it violates
21 the exception for the definition of public utility as
22 a resale, because the cost of the power is just a
23 pass-through from DEP to DPW, and then DPW to BCL.

24 MR. BREITSCHWERDT: So your understanding is

1 similar to Mr. Risinger's, that it is a pass-through,
2 that FB, DPW is simply passing through the charges
3 from Duke?

4 MR. BREITSCHWERDT: That is our
5 understanding.

6 CHAIR MITCHELL: Okay.

7 MR. BREITSCHWERDT: Or that is my
8 understanding.

9 CHAIR MITCHELL: Okay.

10 COMMISSIONER HUGHES: When you said that you
11 weren't sure why they didn't do the model where it was
12 just owned and operated by BCL, are you aware of any
13 of that model of any of your other service areas?

14 MR. BREITSCHWERDT: The model where?

15 COMMISSIONER HUGHES: The model where
16 there's a private housing provider that has put Solar
17 on their property to scale and you suddenly noticed a
18 drop in your --

19 MR. BREITSCHWERDT: Well, I think that's
20 what the Army is doing through the Camp McCall
21 project. Is they're doing, owning, operating a
22 generating facility, and they're using it to
23 self-generate and meet the exception, the
24 self-generator exception of North Carolina law,

1 specific to other jurisdictions and how they're
2 structuring third-party owned Solar.

3 I'm not as familiar, and I would also say
4 it's highly dependent on what the statutory framework
5 is. So in other jurisdictions, you may not be limited
6 to self-generation in the same way you are in North
7 Carolina.

8 So what I would anticipate is when the
9 Federal Government provided what we call the
10 conceptual portfolio approval, they were not focused
11 on what State law required or limited in North
12 Carolina in terms of prohibiting third-party sales of
13 electricity, and so that is perhaps why these proposed
14 arrangements have been -- have progressed in other
15 jurisdictions but have been partly at a standstill for
16 the last five years in North Carolina, and we're here
17 today.

18 So I'd also say when we met with the folks
19 from Qorus (phonetic) early on, we asked for clarity
20 of how other states and other state utilities that
21 were interconnecting with the bases were considering
22 the proposed arrangement under Federal law and under
23 State law, and we didn't receive any detail or
24 documentation that would get the Company comfortable

1 that this was something that was not a violation of
2 Section 8093 under Federal law or, you know,
3 traditionally vertically integrated jurisdiction like
4 North Carolina or -- I'm not as familiar with Kansas
5 how it would be allowed there, so...

6 COMMISSIONER CLODFELTER: Mr. Risinger has
7 said Kansas is a franchise state like North Carolina.
8 Have you explored that?

9 MR. BREITSCHWERDT: I have not, no.

10 COMMISSIONER HUGHES: You're only
11 comfortable -- let me ask you: Are you as comfortable
12 with the BCL ownership model if they, in turn, then
13 actually charged their tenants electricity than then
14 they becoming third-party?

15 MR. BREITSCHWERDT: Yes, sir.

16 COMMISSIONER HUGHES: But you're comfortable
17 because BCL would put the electricity in the rent. Is
18 that -- I'm just -- you seem very comfortable of that,
19 yeah BCL only owning it I'm trying to get nuance as
20 all these ownership mods are similar with.

21 MR. BREITSCHWERDT: Understood. I'm
22 comfortable in the sense that reading our state's
23 Public Utility Act, it carves out from the definition
24 of public utility an entity that is self-generating,

1 so not entering into a third-party sale or a lease
2 that is beyond the scope of the leasing program
3 established in House Bill 589.

4 So if BCL were to self-generate and consume
5 the power, that would be consistent with North
6 Carolina statutory framework, so I'm comfortable in
7 that respect. I haven't looked at the applicability
8 or how the Public Utilities Act would treat a landlord
9 that is then including the cost of generation their
10 tenant's rent directly, but I recall -- I seem to
11 recall that was an issue a few years ago in another
12 American's Home for Rent or something to that effect,
13 so there is precedent out there applying the Public
14 Utilities Act to somewhat similar situations that
15 would be --

16 COMMISSIONER CLODFELTER: Which is the exact
17 issue of the Cube Yadkin case where the Court of
18 Appeals said we shouldn't have issued the Declaratory
19 ruling in the first place.

20 MR. BREITSCHWERDT: Well, there's that. If
21 there are no more questions, I'd like spend sometime
22 talking about the justiciability of any issues before
23 the Commission.

24 COMMISSIONER CLODFELTER: Before you do

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1 that, I do have further questions on the merits issue,
2 if I can, so I want to pursue with you a little bit
3 the question I asked Mr. Risinger.

4 MR. BREITSCHWERDT: Sure.

5 COMMISSIONER CLODFELTER: As I read 8093,
6 which is what you rely on, there's a specific
7 exception from that Statute for contracts entered
8 into, into what is now codified as 2294(a).

9 This Section does not preclude the Secretary
10 of the Military Department from entering into a
11 contract under Section -- what is now 2294(a) of Title
12 10.

13 So would you agree with me that if the
14 arrangement were that, as I asked Mr. Risinger, if the
15 arrangement were that the Fort Bragg Department of
16 Public Works contracted with Sunstone to buy the
17 energy output, and then turn around and resold it on
18 the Federal enclave, to BCL, that that would be
19 completely exempt from State regulation?

20 MR. BREITSCHWERDT: I think the Statute
21 could be read that way. I haven't seen any Department
22 of Defense guidance or case law that has interpreted
23 it that way, and so what I would point you to --

24 COMMISSIONER CLODFELTER: Well, they can buy

1 it. The Statute says they can buy it, right? They
2 can enter into a contract to buy from any facility
3 developed on the Federal enclave. They can buy the
4 electricity.

5 MR. BREITSCHWERDT: I think that is a
6 reasonable reading of the Statute.

7 COMMISSIONER CLODFELTER: Can -- 8093
8 doesn't then apply to any resales of that electricity
9 on the base. It only applies to purchases by the
10 department.

11 So once we've gotten past the purchase
12 exception, and now the Department says or the Fort
13 Bragg Water and Public Works says I want to resell the
14 electricity, but I'm reselling it on the base, not off
15 the base, I'm reselling it entirely on the base, to a
16 buyer on the base, 8093 doesn't apply to that, does
17 it?

18 MR. BREITSCHWERDT: I can't give you a
19 definitive answer, and the reason -- I understand your
20 reading of the Statute, and it's intuitive in a number
21 of respects.

22 COMMISSIONER CLODFELTER: It follows the
23 plain language.

24 MR. BREITSCHWERDT: I think it's intuitive

1 in a number of respects. What is interesting to me,
2 and one of the points I was planning to make in my
3 argument, is that if you look at the DOD memo, which
4 you would think that the DOD would carve out broadly
5 that they would have the right to do exactly what
6 you're identifying on the page 6 of the memo, which
7 I've shared with the Commission, General Counsel --
8 and just for context for the Commissioners, so this
9 memo was issued in the year 2000 after the Department
10 of Defense -- excuse me, Congress established a
11 directive for the Department of Defense to privatize
12 utility systems on military bases, so the distribution
13 transmission systems, so this was an issue across the
14 country.

15 Sandhills and Fort Bragg is the
16 owner/operator of that system, and it doesn't speak
17 specifically to the issue of that exception. It
18 doesn't call it out specifically, but what's notable
19 to me, Commissioner Clodfelter, is this second
20 statement that I've highlighted here, which says:

21 "Because Section 8093 waives the sovereign
22 immunity of the United States with the purchase of the
23 electric commodity, whether we can purchase or obtain
24 electricity from a generating facility, the Department

1 has transferred through Section 2688," which is the
2 utility privatization's section, "is dependent upon
3 State law."

4 So the Section 8093 was initially enacted in
5 1987, what is now 2922(a). This section you're citing
6 to was initially enacted in the early 80's.

7 And so if that's the way the Department of
8 Defense is reading this statutory framework, it's not
9 intuitive to me why they would make the point that
10 they would only be able to purchase from a generating
11 facility they've -- which presumably is on base, they
12 are purchase power from a generating facility that
13 they've sold to a non-utility through privatization
14 action if it's dependent upon State law.

15 So it doesn't seem, from this memo at least,
16 that DOD has taken that position, and I have not been
17 able to find any guidance or court cases that
18 interpret that Statute and provide that clarity.

19 I don't think it's determinative of the
20 issues here today, and I think Mr. Risinger would
21 agree with that, but I do understand the position that
22 you're articulating --

23 COMMISSIONER CLODFELTER: All right.

24 MR. BREITSCHWERDT: -- and why that would --

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1 COMMISSIONER CLODFELTER: Well, let's stay
2 with me for a minute, and I appreciate you're calling
3 2688 for my attention. I'll look at that, but,
4 clearly, we don't have that fact-pattern here because
5 this is not an energy production facility being
6 transferred by their Army to anyone. It's being
7 developed from scratch from Sunstone.

8 MR. BREITSCHWERDT: That's right.

9 COMMISSIONER CLODFELTER: So let's stay with
10 the line of questioning. I thank you for calling that
11 to my attention and I'll look at 2688 and think more
12 about that.

13 But let's stay with it for a moment and say
14 that the intuitive reading -- I understand you don't
15 agree with it, but let's follow it down --

16 MR. BREITSCHWERDT: I don't necessarily
17 disagree with it. I'm just thinking it's not
18 applicable of the mere facts here.

19 COMMISSIONER CLODFELTER: Follow it down the
20 road a bit and suppose the Army looks at that pattern
21 and says gee, we could do this. But you know what?
22 Why should we be the middle man here, unnecessary
23 middle man?

24 We could do it, it follows the Statute.

1 We're authorized to do it, but why don't we just sort
2 of get out of the middle and let Sunstone sell
3 directly to BCL, and we'll handle our role in this
4 through a crediting mechanism. And you say that's
5 objectionable because now the sale is to -- from
6 Sunstone to BCL.

7 MR. BREITSCHWERDT: That's correct.

8 COMMISSIONER CLODFELTER: Yeah. Aren't you
9 exalting form over substance here? Isn't that the
10 real problem with your argument?

11 MR. BREITSCHWERDT: I don't think so. I
12 think that we're applying the Public Utilities law in
13 saying that what Section 8093 directed the Federal
14 Government to do what Congress directed the Federal
15 Government to do in enacting Section 8093, was to
16 comply with State law in terms of how state Public
17 Utilities Acts and how Franchise and Territorial
18 Assignment Acts determined what entities could sell
19 and deliver power.

20 So under North Carolina law, that is a
21 third-party sale. Exactly what they've done is
22 precisely what NC WARN sought to do three, four years,
23 ago. And it went up to the Court of Appeals and the
24 Supreme Court, and they said that's a third-party sale

1 that's unlawful under North Carolina law.

2 COMMISSIONER CLODFELTER: Absolutely right,
3 under North Carolina law, but am I not called upon, in
4 this case, to construe Federal law? Isn't that the
5 point? And the task before me is to construe Federal
6 statutes here.

7 And one of the things I'm told to do is to
8 construe any exception to the authority of the Army to
9 do whatever it wants on the Federal enclave, and to
10 construe the exceptions very narrowly.

11 And, here, I have statutes that say to me
12 that, well, you know, if they simply push the
13 paperwork around a little bit differently on their
14 desks, as I read the statutes, as you say intuitively,
15 this is plainly authorized, and so they want to move
16 the paperwork around a little bit differently on the
17 Federal desks. And so I should hang the decision on
18 that?

19 MR. BREITSCHWERDT: I'm not sure that I
20 follow --

21 COMMISSIONER CLODFELTER: Under Federal law,
22 under Federal law, I should interpret Federal law to
23 make that fine distinction dispositive?

24 MR. BREITSCHWERDT: Respectfully, I think

1 the Company's position is that it's not that fine of a
2 distinction, and this clearly is a third-party sale.
3 And the question under State law --

4 COMMISSIONER CLODFELTER: Under State law.

5 MR. BREITSCHWERDT: Under State law, which
6 is what Congress, in enacting Section 8093, directed
7 the Federal Government to adhere to, with the
8 exception of when they are procuring power from an
9 on-base generating facility, and I think we've agreed
10 that's applicable here.

11 COMMISSIONER CLODFELTER: All right. I'll
12 let you get back to your argument and pick up where
13 you want to go. I think you see the issue for me is
14 whether I need to give that State law, the
15 construction under Federal law --

16 MR. BREITSCHWERDT: And I appreciate --

17 COMMISSIONER CLODFELTER: -- or whether --
18 Federal law requires me to interpret the transaction a
19 little bit differently.

20 MR. BREITSCHWERDT: Yeah. And I would
21 re-emphasize for the Commission that one of the things
22 that the Company has advocated for in our initial
23 Motion to Dismiss or to join the Army is that this is
24 a question where we don't have -- I mean, Mr. Risinger

1 made a lot of representations on behalf of the Army,
2 but the only thing we have are preliminary approvals
3 from 2015 or 2016, and there's no clarity on what the
4 Army's intent is, what their position is.

5 And there's nothing that Duke Energy
6 Progress has been provided that says the Army believes
7 Section 8093 should be applied in this manner, and
8 that there's no conflict between that Statute and the
9 North Carolina Public Utilities law or that's it's
10 inapplicable.

11 So we've highlighted in a number of
12 pleadings that there is a Federal regulation that
13 directs the Army to their contracting officer to
14 either with advice of legal counsel or advice of the
15 Commission, who is responsible for implementing State
16 Utilities law, to make a determination of whether they
17 can competitively obtain electric supply under
18 the Section 8093.

19 And to the best of our understanding, that
20 hasn't happened. We haven't obtained any clarity, and
21 I think Sunstone even opposed the Army being joined in
22 this proceeding on how the Army views this arrangement
23 and what their position is on how the project would go
24 forward.

1 So the documents speak for themselves on the
2 initial portfolio approvals and the initial conception
3 approvals, but I would submit that those were based on
4 the perspective of the housing administration, based
5 on my reading of them, and don't, in any way, address
6 how this proposed Solar project and power sales
7 arrangement aligns with Federal law or State law, so I
8 do think that's an important point to clarify.

9 We don't have any certainty on how the Army
10 views the applicability of Section 8093 or the
11 exception that you identified. And there is a
12 mechanism that, if I'm reading it correctly, the Army
13 could and perhaps should be undertaking to provide
14 that guidance before it allows competitive supply of
15 electricity.

16 COMMISSIONER CLODFELTER: Thank you for your
17 answers. I appreciate it.

18 CHAIR MITCHELL: And what mechanism is that?

19 MR. BREITSCHWERDT: It's 48 CFR 41.201(e).

20 COMMISSIONER CLODFELTER: I'm sorry. Give
21 it again.

22 MR. BREITSCHWERDT: Yeah. 48 CFR Section
23 41.201(e), and that Section of the Federal Acquisition
24 Regulations is essentially the Department of Defense

1 implementing Section 8093 of the U.S. Code.

2 CHAIR MITCHELL: Okay.

3 MR. BREITSCHWERDT: Or what is now 591, but
4 originally 8093.

5 CHAIR MITCHELL: All right.

6 Mr. Breitschwerdt, I'm going to ask you to do
7 something. I'm going to put you on the spot a little
8 bit here, but do you have the reply comments in your
9 hands, Sunstone's reply comments?

10 MR. BREITSCHWERDT: I should have left this
11 binder at my desk.

12 CHAIR MITCHELL: That would have been smart.

13 MR. BREITSCHWERDT: Always lessons to be
14 learned. I do.

15 CHAIR MITCHELL: Turn to page 7. And you
16 and Commissioner Clodfelter have been going around
17 this for a minute now, but just look at -- are you on
18 page 7?

19 MR. BREITSCHWERDT: I am.

20 CHAIR MITCHELL: Look at -- review Section A
21 there? Do you see Section A?

22 MR. BREITSCHWERDT: I do.

23 CHAIR MITCHELL: Review that and then rebut
24 that for me.

1 (Pause)

2 MR. BREITSCHWERDT: All right. So this is
3 the conversation that Commissioner Clodfelter and I
4 were just having. So I think if --

5 CHAIR MITCHELL: As clearly as you can,
6 Mr. Breitschwerdt.

7 MR. BREITSCHWERDT: Understood. This was a
8 conversation Commissioner Clodfelter and I were just
9 having. And if this was an arrangement where the Army
10 was contracting directly with the generating facility
11 within the Federal enclave, then I think intuitively
12 and reading the plain language, there is a reasonable
13 argument that this would not be subject to State
14 utilities law.

15 However, that hasn't been clearly stated by
16 the Department of Defense or in any case law that I've
17 been able to find interpreting Section 2922(a).

18 And reading the Department of Defense's 2000
19 memo, they seem to suggest that in the instance where
20 they're transferring a generating facility to an
21 unregulated entity as part of a privatization action,
22 that in that instance, they would have to follow State
23 law.

24 So, again, I think it is an intuitive

1 reading of the Statute. It's also not the facts that
2 Sunstone had brought before the Commission in their
3 petition because they are presenting a third-party
4 sale, and the Federal Government, the Army, is not
5 directly entering into the power purchase arrangement
6 that's between the two affiliates.

7 CHAIR MITCHELL: Okay. Thank you.

8 MR. BREITSCHWERDT: You're welcome.

9 CHAIR MITCHELL: You can return back to your
10 argument now.

11 MR. BREITSCHWERDT: All right. We've gone
12 all over the place. I'm trying to do my best to get
13 back to it, but one thing we haven't spoken about is
14 the issue of current case controversy.

15 Actually, before we do that, I'd like to
16 spend a minute -- you asked me about the policy
17 objectives, which I was excited to talk about because
18 that was one of the demonstrative exhibits that I
19 provided to the Commission.

20 But just briefly, if you take a look at Oral
21 Argument Exhibit 2, which I provided to the
22 Commission, Sunstone, in their briefing argument and
23 some of the court decisions, the limiting court
24 decisions that are interpreting this Section 8093,

1 have really focused on the question of abandonment of
2 utility systems and whether the -- and advocated that
3 that is what Congress was looking to solve for, was
4 whether or not third-party supplier would result
5 abandonment of the incumbent utility and result in
6 higher rates for other customers.

7 And the dissent in the West River case,
8 which was the case that was issued very soon after
9 Section 8093 was enacted, and we submit and it doesn't
10 seem like Sunstone has a differing opinion
11 necessarily, was overly restrictive.

12 And it is certainly the view of the
13 Department of Defense memo and its application of
14 Section 8093, the dissent in that decision emphasize
15 that the broader purpose of this provision was to
16 insure that the general regulatory framework between
17 the Federal Power Act and State regulation in terms of
18 who's responsible for retail electric service versus
19 Federal responsibility for wholesale and transmission
20 under the Federal Power Act, would be maintained in
21 this divided responsibility for serving customers,
22 would be preserved through Section 8093.

23 So I do think this is broader than the
24 concept of just abandonment and as applied through

1 North Carolina law through decisions like the North
2 Carolina WARN Court of Appeals decision where the
3 Commission determined that a third-party sale of
4 electricity would have -- would be contrary to State
5 law and would have adverse policy impacts in terms of
6 higher rates and insufficient service for customers.
7 That lines up well.

8 And so to the extent the Commission was
9 focused on this concept of abandonment as the policy
10 behind enacting Section 8093, I think it's important
11 to take a look at the broader policy that was
12 presented here, and it does demonstrate that it was
13 more focused on ensuring that State law and regulation
14 was followed, because that's the policy framework
15 between Federal regulation and State regulation of the
16 provision of retail electric service.

17 So turning to the issue that's most recently
18 before the Commission about whether this current case
19 or controversy, the justiciability of the issue before
20 the Commission, I think starting just briefly with a
21 little bit of background, that -- you know, the
22 Company filed its Motion to Dismiss the proceeding
23 because the initial discussions with Sunstone really
24 didn't provide any insights on the project status and

1 whether it was approved by the Army.

2 So, through discovery, we discovered that
3 the Company or Sunstone had obtained preliminary
4 approval five years ago, back in 2015, 2016, but there
5 was no certainty about the project in terms of its
6 size, location, or point of interconnection, and there
7 were no milestones for developing the project, no
8 milestones for seeking interconnections with Sandhills
9 or how BCL would amend the ground lease and usable
10 service agreement with the Army.

11 Sunstone admitted also that it had not
12 entered into any projects, specific contracts with
13 either BCL as the offtaker, Sunstone as the
14 interconnect utility.

15 And, again, there were no arrangements and
16 there continues not to be between Sunstone and the
17 Army or between BCL amending the agreement between the
18 Army as a counterpart in Riley's MSA. (sic)

19 So because there were no concrete
20 development plans, the Company submitted its Motion to
21 Dismiss and the Commission denied that. But we
22 appreciate that you're willing to reconsider that
23 determination in light of Cube Yadkin, so that's
24 really what I want to focus on briefly.

1 So the November 9th response to Commission
2 question 1 that Sunstone submitted, admitted that
3 there had not been any change in the project
4 development status, the contracts, contractual
5 relationship between any of the parties, no new
6 binding agreements.

7 Sunstone identified that it planned to enter
8 into an LOI with its affiliate, BCL, but that LOI, to
9 borrow the Court of Appeals basketball analogy from
10 the Cube Yadkin opinion, is essentially presents
11 Sunstone and BCL's affiliated entities that have
12 entered into the LOI to play on the same basketball
13 team, have made preliminary efforts to go to the arena
14 but will never be allowed to play against Duke if the
15 Army, which is the arena owner, refuses to allow
16 Sunstone on the court.

17 So, I think, from Duke's perspective,
18 Sunstone's response, and the issue before the
19 Commission on justiciability, continues to be whether
20 the project has made sufficient progress or whether
21 there remains impediments based on the unique
22 circumstance of Sunstone developing this project
23 within the Federal enclave that is subject to the
24 Army's approval and its jurisdiction to determine

1 whether or not the project can move forward.

2 As Company detailed in its brief, in
3 response to Sunstone's Commission to question 2, they
4 admit that the major decision approval to move forward
5 with the project is still required and has not been
6 issued by the Army.

7 So the only information we have about the
8 Army's position on the project are the 2015 and 2016
9 initial portfolio concept approvals, and then the
10 preliminary approval out of the Housing Department at
11 Fort Bragg back in 2016 of Qorus' (phonetic) proposal.

12 So the major decision approval, which we
13 believe should be issued and we also believe that
14 there should be more certainty around, from the Army's
15 perspective, under the Federal regulations that I
16 cited, 41 CFR -- or excuse me, 48 CFR 41.201(e) that
17 requires the Army's contracting officer to determine,
18 with the advice of counsel or by consultation with the
19 Commission, whether competitive supply would be
20 allowed.

21 There hasn't been any progress on that front
22 or any actions taken by Sunstone that would provide
23 certainty that the Army believes that this arrangement
24 would be able to move forward under the applicable

1 Federal and State procurement laws.

2 And so those factors, along with the fact
3 that the project has not progressed in developing the
4 contractual framework for the project in terms of
5 entering into an amended ground lease, modifying the
6 municipal service agreement between BCL and the
7 Department of Public Works, those support the
8 preliminary nature and the fact that there remain
9 impediments to moving forward with the proposed
10 project.

11 And so, as we stated in our brief to the
12 Commission, for that reason, we think it continues to
13 be not justiciable and not before the Commission
14 because those impediments remain under the Cube Yadkin
15 guidance, and so that's why the Company is renewing
16 its request for the Commission to dismiss the petition
17 on justiciability grounds.

18 So we spent a little bit of time earlier
19 talking about the 2000 memo, and I think -- I had a
20 couple points that I'm somewhat taking out of order
21 now, but I do want to empathize to the Commission that
22 it seems clear, and it may be something that Sunstone
23 agrees with, at this point, that the import of the
24 Department of Defense's position here is that as it

1 pertains to the electric commodity within procuring
2 the electric commodity, that that is subject
3 to Section 8093.

4 And that requires the Federal Government to
5 comply with State law, setting aside the exceptions
6 that Commissioner Clodfelter identified a few minutes
7 ago, so I do think that's important and that's what's
8 been identified highlighted on pages 4 through 6.

9 We spoke about the fact that the policy
10 objectives were not necessarily limited to
11 abandonment, but were, under North Carolina law, I
12 think, the third-party sales exception and the
13 Commission's -- or excuse me, the Court of Appeals
14 guidance in NC WARN hasn't been applied to say that
15 that extends both to the potential for abandonment,
16 but also for the potential for a retail extra
17 competition to adversely impact traditional monopoly
18 utility framework, and so that's something that I do
19 think aligns when you frame up how State law should be
20 applied and taken into account in applying Section
21 8093.

22 So Section 8093 says that in applying -- in
23 procuring the electric commodity, the Federal
24 Government, the Department of Defense, specifically,

1 should take into account and not take action
2 inconsistent with State law.

3 And so in North Carolina, that includes
4 ensuring that you're not just abandonment of the
5 utility by a competing supplier, but also
6 third-party sales where rooftop Solar projects, like
7 the NC WARN project, would be reducing the load that
8 would be served by Duke Energy Progress.

9 And that power would then be served by a
10 competing third-party supplier, which would
11 potentially reduce -- that the Court of Appeals said
12 would result in insufficient service and result in
13 higher rates for customers, so that's a concern that
14 we've identified in our pleadings as well.

15 I'd like to spend a little bit of time
16 addressing some of the discussion about the fact that
17 this procurement is not specific to the Federal
18 government purchasing the electricity and that
19 Sunstone is a private entity.

20 And that as characterized by Sunstone's
21 reply comment, Section 8093 is actor-specific and
22 applies only to purchasing power by DOD and other
23 department agencies, and does not apply to Sunstone
24 and BCL here as their private agencies or private

1 entities, excuse me, operating within the Federal
2 enclave.

3 DEP thinks this argument is misplaced and
4 the facts presented by Sunstone's petition demonstrate
5 that Section 8093 should extend to the proposed
6 third-party PPA between Sunstone and BCL.

7 First, we continue to think it will lead to
8 an absurd result to conclude that Sunstone, as an
9 independent power producer proposing to sell power at
10 retail, and BCL is a private eligible entity that's
11 its sole purpose, as authorized by Congress, is to
12 partner with the Department of Defense to provide
13 military housing for the Federal government, would not
14 be subject to the same congressional mandates to
15 adhere to State public utility law as the Department
16 of Defense itself. It simply doesn't make sense.

17 We've not found any case law to support that
18 because Sunstone is a QF or an exempt wholesale
19 generator, and BCL is an eligible entity specifically
20 focused on providing public housing within the
21 military bases that they would not be subject to the
22 same provision.

23 It doesn't intuitively make sense while
24 the Section 8093 is focused on Department's Agency's

1 instrumentalities. Those are big, broad areas of the
2 Government, and this is a very small, limited -- the
3 concept of eligible entity is a limited purpose
4 housing entity.

5 And so if that's the Army's position, then
6 they haven't made that known through any documents,
7 memos, or case law that we've seen over the last 20
8 years, and that would certainly have informed DEP's
9 position in the case, but that has not occurred.

10 So I think the other point that we touched
11 on a little bit earlier --

12 COMMISSIONER CLODFELTER: Are you moving to
13 another point?

14 MR. BREITSCHWERDT: I can pause there if --

15 COMMISSIONER CLODFELTER: I would have a
16 question about the point you just made about -- if
17 you're about to move to another one.

18 MR. BREITSCHWERDT: Please.

19 COMMISSIONER CLODFELTER: Okay.

20 Mr. Breitschwerdt, so you want us to extend 8093(a) to
21 cover purchases of electricity by an on-base
22 contractor such as BCL, but you don't want us to
23 extend 2294(a) to include purchase of electricity
24 by an on-base contractor such as BCL. Is there any

1 inconsistency you see in the way you're reading the
2 two statutes?

3 8093(a) is pretty specific. It applies to a
4 department agency or instrumentality of the Federal
5 government purchasing electricity, and you say, well,
6 we need to understand that more generally as it's also
7 including on-base contractors like BCL.

8 MR. BREITSCHWERDT: I think that --

9 COMMISSIONER CLODFELTER: If I said back to
10 you 2294(a) also authorizes the purchase of
11 electricity by the Department, from on-base
12 contractors who are providing and generating that
13 electricity, why shouldn't I also expand that to
14 include on-base contractors purchasing electricity
15 like BCL? Shouldn't that be consistent in my reading
16 of the Statute?

17 MR. BREITSCHWERDT: It's a fair
18 characterization. I think the distinguishing fact
19 here that is under the general provision of 8093, it
20 was focused on -- it was initially developed in an
21 appropriations provision, so they were focused on who
22 would be paying dollars out and what purchases would
23 be required. And so that's how it came to be enacted,
24 and that's ultimately how it's been applied.

1 The exemption for on-base generation
2 preceded that and was more generally applicable to the
3 Department of Defense purchasing or entering into
4 contracts for a generation that was sited on military
5 bases.

6 And so, historically, I think a lot of that
7 generation was owned by the military, and so it
8 intuitively made sense that that type of arrangement
9 would be limited in scope.

10 I don't -- I can't articulate a good
11 rationale for why the inconsistency would be
12 appropriate here, except to say that Section 8093
13 contemplates applying State law.

14 And under State law, the third-party sale of
15 electricity between two -- well, between two --
16 under -- between two legal entities of power purchase
17 agreement, as we have here, as was presented at NC
18 WARN, third-party sales case, is unlawful, so that's
19 how I can answer that question.

20 So the second point I'd like to make about
21 the --

22 CHAIR MITCHELL: All right,
23 Mr. Breitschwerdt, start wrapping it up.

24 MR. BREITSCHWERDT: Understood. The second

1 point to make about the proposed purchase of
2 electricity is that -- ultimately, the project is
3 going to impact the amount of power purchased by DEP
4 or from DEP by Fort Bragg Department of Public Works,
5 and so there's impacts to the amount of power that's
6 being purchased, even though it's technically
7 indirectly being impacted.

8 We talked earlier about the fact that the
9 power will flow back onto Fort Bragg -- load on Fort
10 Bragg and will have impacts to the amount of power
11 that Department of Public Works ultimately purchased
12 from Fort Bragg.

13 The third point, just very briefly, is that
14 we talked about the basic allowance for housing,
15 earlier, and our understanding is that's paid by the
16 Treasury to Sunstone.

17 There is an election, but that election
18 results in the power -- the funds being paid to BCL,
19 and BCL then uses that fund to pay for both the -- own
20 and operate the on-base housing, but also to pay for
21 the electricity that's consumed in that on-base
22 housing.

23 So, in effect, they're purchasing
24 electricity from the Department of Public Works who is

1 purchasing it from DEP. So by implication, it's
2 indirect, but they are impacting the purchase of
3 electricity from -- BCL's operations is indirectly
4 purchasing electricity from DEP.

5 So under Section 8093, we think that results
6 in the applicability of the State law even though they
7 are not technically a department agency or
8 instrumentality.

9 So I just close by saying thank you for the
10 Commission's time today. As we've stated in our brief
11 to the Commission, we believe that the Commission
12 should dismiss the petition on justiciability grounds.

13 And if the Commission decides to hear the petition on
14 the merits, we think that the appropriate result is
15 that Section 8093 applies.

16 It applies to North Carolina Public
17 Utilities Law. And, in doing so, a third-party sales
18 arrangement, as Sunstone presented in its position
19 here, would -- like the NC WARN third-party sale,
20 would be unlawful and should be denied by the
21 Commission. Thank you.

22 CHAIR MITCHELL: Mr. Breitschwerdt, one
23 question, and then I'll check in with others to see.
24 Just so I'm clear, kind of following up on a point I

1 think I just heard you just make. Is it Duke's
2 position that BCL is department agency or
3 instrumentality of the Federal government?

4 MR. BREITSCHWERDT: It is a uniquely defined
5 private eligible entity that, as you read the
6 definition of eligible entity, it is partnering with
7 the Department of Defense.

8 So it is a separately defined concept, but
9 it's a very small, unique especially purposed entity
10 that its sole purpose is to partner with the
11 Department of Defense to provide on-base military
12 housing.

13 So we think it's -- itself not a department
14 agency or instrumentality by definition. However, its
15 sole purpose is to facilitate the military's mission
16 and operations.

17 And so, in effect, it should be treated as
18 part of the Department of Defense for purposes of the
19 applicability of Section 8093.

20 CHAIR MITCHELL: Thank you. Commissioner
21 Duffley.

22 COMMISSIONER DUFFLEY: So could you answer
23 Commissioner Brown-Bland's question about how the
24 Commission should look at the policies that were being

1 advanced with Section 8093, and how that abuts or
2 comes into conflict with the goals of 2922(a).

3 MR. BREITSCHWERDT: Our policy objectives
4 of Section 8093, which we're focused on --

5 COMMISSIONER DUFFLEY: The abandonment
6 issues. And so we've heard Sunstone argue the goals
7 of 2922(a) were to promote, you know, self-generation
8 and promote renewable energy, and they argued that
9 it's only taking a small piece of the pie, okay.

10 And so Commissioner Brown-Bland, in her
11 question, asked well, the pie with technology and
12 technological advances could grow and the pie could be
13 not just 18 percent but could be 80 percent.

14 So could you just kind of discuss your views
15 on how the Commission should look at that issue.

16 MR. BREITSCHWERDT: Absolutely. And I
17 think -- and I probably did this inartfully, but I was
18 trying to analogize to the North Carolina Court of
19 Appeals' decision of NC WARN where they identified the
20 risk of allowing unregulated competitive supply, which
21 would have a much broader impact, potentially, if
22 it was replicated.

23 And I appreciate what Sunstone represented,
24 is that they're only developing this first 25-Megawatt

1 project within or up to 25-Megawatt project, but
2 that's a significant amount of load that would be
3 reduced from the purchase for Duke Energy Progress.

4 And so the concern is that if this is --
5 this on-base generation is allowed in a broad and
6 unregulated way, then it would have the effect of
7 shifting cost and resulting in duplication of DEP's
8 generation service, because the Company's going to
9 have to backstop, at least in this example of a Solar
10 facility, the on-base Solar system, because DEP's --
11 and DEP's customers, generally, their peak demand is
12 winter mornings when Solar's not available.

13 So I think that the on-base generation
14 Statute was initially enacted in the early 80's when,
15 I think, Mr. Risinger spoke to this when the military
16 was focused on geothermal and more targeted, limited
17 on-base generating resources.

18 And now, with the expansion of Solar and
19 other technologies, the risk is that it significantly
20 expands beyond what was initially contemplated in a
21 way that has adverse effects on the retail customers,
22 and so that's why Section 8093's policy, as I've
23 provided to the Commission, was really focusing on
24 aligning the State regulatory framework.

1 And so whether it's full abandonment through
2 competitive supply or just limited, partial reduction
3 in load, I think those concerns are equally aligned.

4 COMMISSIONER DUFFLEY: Thank you.

5 CHAIR MITCHELL: Additional questions?

6 COMMISSIONER BROWN-BLAND: Just a bit of a
7 follow-up. So, again, looking at the two statutes
8 together, the 8093, the 22 -- or 2922, I think, how do
9 you read those in tandem so that each makes -- neither
10 is necessarily superfluous. Both are given meaning or
11 are they naturally in conflict, in your mind?

12 MR. BREITSCHWERDT: Well, as I think as
13 Commissioner Clodfelter identified Section 2922(a),
14 allowing for on-base contracts for generation up to 30
15 years is an exception to the generally applicable
16 requirements in Subsection (a) of Section 8093, so
17 they do need to be read together.

18 And the import of doing that is that if
19 there's a contract between the base and the on-base
20 generating facility, then that exception would apply,
21 but that's not what we have presented here.

22 CHAIR MITCHELL: All right. Anything
23 further for Mr. Breitschwerdt?

24 COMMISSIONER DUFFLEY: Just one more

1 question. Could you tell me, again, do you think BCL
2 is an instrumentality or it's something other than an
3 instrumentality under 8093?

4 MR. BREITSCHWERDT: I think they fit within
5 the general parameters of being a partner of the
6 Department of Defense. And I haven't fully researched
7 whether the definition of instrumentality is
8 sufficiently broad to encompass a private, eligible
9 entity, but that could be the case.

10 And our key point is that the definition of
11 eligible entity means that they are a sole purpose
12 entity essentially responsible for partnering with the
13 Department of Defense to build on-base housing.

14 And so, as such, they should be treated in
15 the same way as the Department of Defense for purposes
16 of implementing the general policy objectives and
17 requirements of Section 8093 to purchase power by the
18 Federal government consistent with State law and
19 regulation.

20 COMMISSIONER DUFFLEY: Okay, but you do not
21 believe that that same type of connection should be
22 applied when looking at 2922(a)?

23 MR. BREITSCHWERDT: I haven't sufficiently
24 investigated it, and I understand the Commission's

1 point in trying to draw the consistency of those two
2 statutes in the same way. But at this point, the
3 general policy and principal is that this would be a
4 third-party saleable electricity.

5 They've presented a Letter of Intent that
6 would effectuate a proposed power purchase agreement.
7 And that, consistent with what was presented at NC
8 WARN, is unlawful under North Carolina's Public
9 Utility Law.

10 So I think the primary objective of Section
11 8093 was to align Federal procurement of electricity
12 across the Federal government with State regulation of
13 utilities and whether that -- and, essentially, if
14 you're under an RTO and you can go purchase from any
15 wholesale provider that you want, and use that at
16 retail, that would be allowed, but in North Carolina,
17 it works for a vertically integrated jurisdiction.

18 The objective of 8093 was to apply those
19 limitations on the monopoly provision of the utility
20 service or electric utility service in the same manner
21 for Federal customers as it's applied for other
22 customers.

23 COMMISSIONER DUFFLEY: Okay. So I hear you
24 saying that it's treated differently, and that's the

1 way that in North Carolina, can align 8093 and
2 2922(a). Is that correct?

3 MR. BREITSCHWERDT: I think that -- yes.

4 COMMISSIONER DUFFLEY: Okay. Thank you.

5 COMMISSIONER McKISSICK: Just to follow up
6 on Commissioner Duffley's questions and questions also
7 asked by other Commissioners. So you cannot really
8 point to authority that's definitive in stating that
9 BCL is a related Government entity. I mean, is there
10 any authority that you can definitively cite or state
11 that supports your contention?

12 MR. BREITSCHWERDT: The only authority
13 that's been pointed to by Sunstone is to cite to the
14 fact that under the U.S. Code, they're defined as an
15 eligible entity, which they assert means they're not a
16 department agency or instrumentality.

17 But, I think, our view is when you read the
18 definition of eligible entity, it says they're
19 partnering with the Department of Defense for the sole
20 purpose. It doesn't say sole purpose, but for the
21 purpose of providing military housing and achieving
22 the goals of the Military Housing Privatization
23 Initiative.

24 And so, in that sense, they should be

1 subject to the same requirements as the Department of
2 Defense because they're operating within a Federal
3 enclave, essentially on behalf of, and in partnership
4 with, the Federal government.

5 COMMISSIONER McKISSICK: Okay. Let's switch
6 gears for a second. In terms of the justiciability
7 issue, it's been pointed to the fact that the ground
8 lease exists. Do you think that's a sufficient bases
9 for distinguishing this from Cube Yadkin, in some
10 respects?

11 MR. BREITSCHWERDT: So the ground lease
12 exists between BCL and the Army.

13 COMMISSIONER McKISSICK: Yes.

14 MR. BREITSCHWERDT: Our new contracts
15 between the Army and Sunstone, who's the petitioner,
16 and would be the entity that construct the generation.
17 So the fact that the ground lease exists between BCL
18 and the Army, for purposes of implementing their roll
19 as to housing provider, to me, doesn't lend any
20 credence to the fact that they would then be able
21 to -- that Sunstone would have rights under that
22 ground lease. There's still a condition preceded to
23 moving forward with the generation project that the
24 ground lease be amended.

1 At this point, they're kind of lumping BCL's
2 rights and to provide to Sunstone to say we can build
3 this Solar project on the roof and in the areas of the
4 ground lease because that ground lease exists between
5 BCL and the Army, but what the ground lease also says
6 and what their initial approval, portfolio approval --
7 it may have been the initial conceptual approval --
8 said is that the ground lease would need to be amended
9 to provide -- it cannot be assigned without the
10 Department's acceptance and would need to be amended.

11 So, at this point, Sunstone has no rights
12 under the ground lease, and I think that is -- places
13 them more similarly to the situation of Cube Yadkin
14 than if they were able to move forward unencumbered,
15 let's say, because they weren't building a project
16 within the Federal enclave of the Army.

17 COMMISSIONER McKISSICK: So would it be your
18 contention that if there was a contract, even if it
19 was a contingent contract, that this issue would be
20 ripe for consideration rather than non-justiciable, at
21 this time?

22 MR. BREITSCHWERDT: Yes. I think that's
23 what the Court said in Cube Yadkin, that the parties,
24 instead of going to the courts for legal advice, they

1 draft contracts that incorporate contingencies and
2 ensure that if events don't progress, as they're
3 contemplated, then they can get out of that contract,
4 and so that's where I read the report to be saying in
5 Cube Yadkin.

6 COMMISSIONER McKISSICK: Let me ask you
7 this. You mentioned the basic housing allowance and
8 that it goes -- specifically, you said it did not go
9 to the service member. Is that what you're saying?
10 You said that you went back and researched it, and it
11 did not go to a service member, who would, in turn,
12 use it to pay for housing; that it would actually go
13 to BCL?

14 MR. BREITSCHWERDT: So my understanding is
15 the Treasury pays the basic allowance on housing to
16 BCL. Now, there's an election by the service member
17 to live within BCL housing versus living off-base.

18 And by making that election and living in
19 BCL-provided housing, they're effectively electing to
20 have Treasury pay BCL to provide that housing. That
21 payment for Treasury is then used to pay for the
22 electricity from Department of Public Works.

23 COMMISSIONER McKISSICK: So the service
24 member makes the selection to do so?

1 MR. BREITSCHWERDT: That's correct, but the
2 payment is from Treasury. The Federal funds are paid
3 by Treasury to BCL. That's our understanding of the
4 transaction.

5 COMMISSIONER McKISSICK: So is that not like
6 the service member making the election that rather
7 than go to them, they just pay direct to BCL? I mean,
8 they're making election to do that. I mean, I guess
9 they could receive it and then pay it back themselves?

10 MR. BREITSCHWERDT: Yeah. Based on the
11 information we have for Discovery and otherwise, I
12 don't know what the election means. It just means
13 that they're electing to live in BCL's provided
14 housing and making the -- I mean, I'm not aware based
15 on the information we have and what we've seen in
16 Discovery and what's in the record that there's an
17 option not to elect.

18 So put it another way, if a service member
19 elects to live on base in BCL provided housing and
20 they are making that election. So they're not
21 electing to pay -- they're not electing to have
22 Treasury pay the funds directly versus having the
23 election to have Treasury pay the funds to the service
24 member, and then the service member pays BCL.

If you live in BCL housing, you kind of are automatically making that election. Treasury's paying BCL, which practically makes sense, so they're making it more efficient to provide the on-base housing and making it more simplified for -- to me, it's like lives in the dorms when you're in college.

You essentially are paying the university to provide the housing, and you're paying it directly versus if you live off campus in an apartment.

You then have the funds and you pay the off-campus apartment out of your own checking account. That checking account just doesn't occur, at least is our understanding, in the scenario where the Treasury is paying BCL directly.

COMMISSIONER McKISSICK: Do you know, if for purposes of income, income being any net creation of wealth, would it be treated as the service member's income?

MR. BREITSCHWERDT: I don't have any insight on that.

COMMISSIONER McKISSICK: Okay. Thank you.

CHAIR MITCHELL: Any additional questions
for Mr. Breitschwerdt?

(No response)

1 CHAIR MITCHELL: All right. At this point,
2 we are going to take a five-minute break, so we'll go
3 off the record. We'll be back on at 4:05 and we will
4 hear from Mr. Risinger.

5 (Whereupon, a break was taken)

6 CHAIR MITCHELL: Mr. Risinger, you're up.

7 MR. RISINGER: So just briefly a couple of
8 grace notes, and I'm happy to -- I'm not going to use
9 my full five. I'm happy to answer any questions the
10 Commission has.

11 I just wanted to address the issue that
12 Commissioner McKissick and Commissioner Duffley raised
13 about the agency instrumentality issue.

14 The Federal Department of Justice has taken
15 the position in sort of semirelated litigations that
16 the privatized entities that are owner/operators of
17 housing on military bases across the country are not
18 agency's instrumentalities, and they site ineligible
19 entity as being different than an agency of the
20 Government, so I just wanted to add that grace note on
21 DOJ.

22 I did want to add one point on the 2000 DOD
23 memo. And, just for the record, I've referred to it
24 as the Dworkin (phonetic) memo because the guy who

1 wrote it was my mentor when I was young associate, so
2 he's on the record today.

3 We would disagree with the proposition that
4 the DOD memo, the design of the DOD memo was so that
5 State Utilities Law generally was meant to be hand and
6 glove. And there were -- you know, it was a freer
7 process I think as counsel's describing.

8 That's not what the DOD memo says. It says:
9 "The States may regulate the Federal government in
10 any" -- "The States may not regulate the Federal
11 government in any respect absent an unequivocal waiver
12 of sovereign immunity."

13 And in respect to this exception, they say,
14 "There's nothing in this section to indicate that
15 "purchase electricity," in quotes, should be read in
16 any way other than its plain language."

17 So we think that the DOD memo was perfectly
18 consistent with, you know, the design of the Statute.
19 And there have been a couple questions about sort of
20 reconciling, you know, what's going on in the Statute,
21 and abandonment, and generation.

22 And just to kind of try to tie that thread
23 off, I mean Sunstone's position is that those are, in
24 theory, reconciled because the abandonment ideas

1 behind 8093 are designed to prevent the Federal
2 Government from shopping to other external providers
3 in a way that would then mess over, you know, a
4 provider like Duke, another external provider, you
5 know, in the state, but it's not meant for the
6 behind-the-meter issues.

7 And I think that -- we think that is
8 represented by the drafting of 8093 that specifically
9 provides for the Government to be able to contract
10 directly with an entity to provide energy on site.

11 So I don't think, you know, in theory,
12 there's a lot of dissidence between the idea of not
13 wanting to allow the Federal government to, you know,
14 squirrel away Duke Energy's, you know, demand by
15 contracting with somebody outside, but still
16 preserving the opportunity, that internal generation
17 that's blessed by the Statute, still might reduce
18 their load, I think was the phrase counsel used, and I
19 think that's frankly envisioned by the plain text of
20 the Statute.

21 Um, the only other thing -- the only other
22 point for us is with regard to -- there are a couple
23 of issues that, you know, kind of arise to an issue of
24 sequencing, which the Commission sometimes gets to --

1 has to address when they issue an order and they say,
2 "Well, come back and give me" -- you say, "Come back
3 and give me a filing later to let me know this
4 happened or that happened or that happened."

5 I mean, you know, in this setting, you know,
6 if the Commission were to grant Sunstone's request, I
7 mean, in a sequencing kind of return filing, you know,
8 we could come back and make a filing with regard to --
9 that the system engineering study and the design of
10 the facility, you know, confirms that there's not
11 going to be backfeed.

12 I mean, you know, that would be, you know,
13 one example of a filing that we can come back and
14 make, or that counsel also mentioned the final leg,
15 the major decision approval, that the Federal
16 government will issue the third leg of approvals that
17 they issued for this base-specific progress.

18 You know, we can make a subsequent filing to
19 confirm that that happened as well, but so that was
20 just, you know, on a conditional filing issue, you
21 know, the way the Commissions addressed other issues.
22 That's all I have. I'm happy to entertain your
23 questions.

24 CHAIR MITCHELL: Questions, Commissioner

NORTH CAROLINA UTILITIES COMMISSION

1 Duffley.

2 COMMISSIONER DUFFLEY: Thank you for
3 mentioning the major decision approval. When do you
4 expect to receive that approval?

5 MR. RISINGER: Well, in sequence, after the
6 engineering -- the system engineering study.

7 COMMISSIONER DUFFLEY: But do you have a
8 general estimate?

9 MR. RISINGER: I mean given that we're kind
10 of in limbo here, you know, a year. I was getting
11 ready to say within a year. That's what the --

12 COMMISSIONER DUFFLEY: Okay. Thank you.
13 And can you explain, and you might have already
14 answered this today. Why have you not entered into
15 any type of contract with contingencies or do you
16 think you have?

17 MR. RISINGER: Who entering -- I want to
18 make sure I understand, Commissioner, which entities
19 you're talking about entering into a contract?

20 COMMISSIONER DUFFLEY: So your entity
21 entering in with BCL.

22 MR. RISINGER: With BCL?

23 COMMISSIONER DUFFLEY: Yes. Have you
24 entered into a contract with them?

1 MR. RISINGER: So I'll try to do a better
2 job than -- I didn't do a good job before.

3 COMMISSIONER DUFFLEY: Like I said, you
4 might have said it before.

5 MR. RISINGER: I'm going to try to do better
6 this time. So the relationship between Sunstone and
7 BCL is the one that's in the Letter of Intent issue,
8 and the --

9 COMMISSIONER DUFFLEY: Right. So that's the
10 Letter of Intent.

11 MR. RISINGER: That's the Letter of Intent.
12 And so those parties, looking at the series of
13 contracts they've entered in other places, we've
14 provided the Commission, under confidential cover, a
15 contract that was entered, for instance, at Riley, for
16 the second phase of Fort Riley in Kansas, and so all
17 those parties have looked at all those contracts, and
18 we have represented that to the Commission.

19 And then the Letter of Intent says oh, yeah,
20 that Riley contract that you told us that we were
21 going to enter, we've entered a Letter of Intent that
22 says here's the attachment that's, in sum and
23 substance, similar to the Riley contract, and that's
24 the one we would enter.

1 COMMISSIONER DUFFLEY: Okay. That's all I
2 have.

3 CHAIR MITCHELL: Commissioner McKissick.

4 COMMISSIONER McKISSICK: Yeah. In light of
5 Cube Yadkin, is there some reason why you didn't go
6 further and just have the Letter of Intent to point to
7 in terms of having a real agreement between Sunstone
8 and BCL?

9 MR. RISINGER: I mean, I think,
10 Commissioner, that gets to the -- I mean, at least our
11 broader feeling about what's at work in Cube Yadkin
12 and the extent to which we, at least, hopefully -- we
13 legitimately believe that we're different in what's
14 going on in Cube Yadkin essentially saying hey, I'd
15 like to maybe engage in these sort of things, and us
16 saying well, we're going to engage in the things that
17 we've engaged in all these other times with this party
18 who wants us to do it.

19 I mean the answer to the Letter of Intent
20 question is we thought that was a -- you know, in
21 response to Cube Yadkin, a sign in addition to all the
22 other things that distinguish us factually from Cube
23 Yadkin that were not like Cube -- we're not like Cube
24 Hydro in that oh, yeah, we're going to shop for

1 tenants or we're going to hope that the business plan
2 works out this way, and we'll deal with all that after
3 you give us the landlord/tenant exemption.

4 You know, we view that as another indicia
5 that distinguishes us like the other four or five
6 things that we think distinguish us from Cube Hydro's
7 posture in that case, Commissioner.

8 COMMISSIONER McKISSICK: And I understand
9 the distinctions you've made, and I think you made
10 them very artfully in a way that it's very succinct,
11 but would it not have eliminated that as a potential
12 issue if some type of agreement could not have been
13 entered into even if it was a contingent one, in light
14 of the posture of the case?

15 MR. RISINGER: Right. I mean, the Letter of
16 Intent says between those parties. It's essentially
17 the kind of potential arrangement that Commissioner
18 Duffley was talking about.

19 We're going to go do this. Here's our
20 agreement to show the Commissioner we're actually
21 going to go do this, just like we did it at Riley,
22 just like we did it at Meade, just like we did it at
23 Aberdeen. I mean, I think the Letter of Intent is
24 kind of a continuance of sort of that linear line of

1 activity that those bases carry to Bragg.

2 COMMISSIONER McKISSICK: I guess another
3 question is, is there any reason why you've not
4 obtained a document from the Army stating exactly what
5 its thoughts and beliefs are, as it concerns the
6 issues in this case?

7 MR. RISINGER: Well, so let me try to answer
8 that in a couple ways.

9 COMMISSIONER McKISSICK: Sure.

10 MR. RISINGER: And you holler at me if I
11 don't get there, okay?

12 COMMISSIONER McKISSICK: Right.

13 MR. RISINGER: The Army's communications to
14 us are we're the sovereign of this entity, of this,
15 you know, parcel of land. And we're not required, you
16 know, to get permissions from the Commissioner or
17 somebody else, and we're not required to come in and
18 raise our hand and say yeah, we're in favor of this.

19 The Army communicates to us we've approved
20 these projects, we've approved the portfolio, we want
21 you to do this just like we want you to do the other
22 six.

23 And if you have an issue, which we do with
24 facing the prospect of imminent litigation with, you

1 know, Duke, given -- I mean, our conversations with
2 Duke beforehand were, you know, cordial and
3 professional.

4 I mean, this was not one of those things
5 where the State bar says it was a cordial conversation
6 and they thought about it. They really did.

7 Duke just said if you want clarity on this
8 issue and protection from something or, you know, we
9 might later do it against you or sue you, you gotta go
10 to the Commissioner or go to court. So it's an all
11 above-board conversation so the Army doesn't feel it's
12 a part of that process.

13 The Army feels that, you know, us facing the
14 threat of litigation from Duke is our business to go
15 seek a Declaratory Ruling to ward off, you know, the
16 fear of that, if we have a fear of that.

17 The Army views that -- I mean, frankly, that
18 they have the authority as the sovereign at Fort Bragg
19 to do it, and they have done it in these other places,
20 and so, I mean, that is the Army's position as it's
21 communicated to us. Does that fairly answer your
22 question?

23 COMMISSIONER CLODFELTER: In those other
24 places, in Kansas, is there a territorial assignment

1 law comparable to that in North Carolina?

2 MR. RISINGER: In Kansas, yeah, there is,
3 you know, a version of monopoly jurisdiction, and that
4 franchisee has cooperated with us, as has the
5 franchisee in Louisiana, and that's not -- and we're
6 not saying, oh, you know, bad on Duke for not
7 cooperating with us.

8 That's why we initiated the dialog with them
9 to see if this wouldn't have to happen, to see if, you
10 know, they were willing to cooperate with us because
11 they shared our view of the statute and how it should
12 be interpreted. And if they don't share that, as they
13 obviously don't, then, you know, we find ourselves
14 here.

15 COMMISSIONER McKISSICK: And I guess my
16 thoughts are simply this: Considering the posture of
17 this case, I think Duke had sought to bring in the
18 Army as a party. That motion was denied. I think
19 you, on behalf of your clients, you didn't have any
20 objections to bringing them in, you just wanted the
21 Commission to bring them in.

22 In light of all of that that transpired, is
23 there a reason why once that issue emerged, there
24 wasn't some definitive document, be it an affidavit or

1 something to support your contentions, that could have
2 been provided to your client that would have, at
3 least, shared the Army's thoughts on the issues that
4 are pertinent in this proceeding?

5 And then I can get into each and every one
6 of those issues, but rather than to say it in
7 identifying each and every one, just something that
8 provided clarity and potentially support. Absent the
9 fact that you might not have been able to obtain one,
10 I mean, can you help me with that?

11 MR. RISINGER: Sure. And -- I mean, I
12 apologize that my answer is kind of the same one that
13 I was trying to give before, that the Army doesn't
14 feel like it's their fight.

15 The Army feels like it has a sovereign
16 dominion over the land and the Army feels like you
17 work with us, you work with the privatized federally
18 regulated distribution network on the system. You
19 interconnect with them, you work that out.

20 And if you're unable to secure the
21 cooperation of, you know, a utility in Kansas or
22 Louisiana or North Carolina, that's an issue for you,
23 not for us, and that's the fairest thing I can say
24 without speaking for the Army, which I can't.

1 COMMISSIONER McKISSICK: I understand.

2 Thank you.

3 COMMISSIONER DUFFLEY: And then one
4 follow-up. You're talking about linear actions?

5 MR. RISINGER: Um-um.

6 COMMISSIONER DUFFLEY: Do you need a
7 decision by the Commission before you obtain the major
8 decision approval? I mean, will you present that as
9 part of your approval process, what this Commission
10 determines, or are those not interdependent?

11 MR. RISINGER: Well, the Army, granting a
12 major decision approval, is not really related to the
13 Commission but related to the product of the system
14 engineering and the interconnection with the federally
15 regulated distribution system on the base.

16 I mean, this proceeding is directly related,
17 as you know, as we said on brief, and then the
18 petition too, the issue of whether meeting the
19 unavoidability of litigation, right?

20 I mean, are we going to, as we believe,
21 inevitably face the challenge if we'd gone and built
22 it as opposed to doing what we did, you know, as we
23 said on brief, that situation is a little bit like the
24 NC WARN issue where Duke said no, no, no, NC Ward, you

1 really did this wrong. You went and built instead of
2 waiting and getting the Commission to, you know, give
3 you, you know, support for the idea of what you wanted
4 to do here.

5 And I think our feeling is that the
6 appropriate thing to do -- I mean, it was to come to
7 the Commission and seek the relief that we've sought
8 from the Commission. Whether that ends up in the
9 Court of Appeals like Cube Yadkin, certainly a
10 possibility, but that seems to us the prudent
11 possibility to try to put to rest, you know, the issue
12 of dispute with a franchise folder.

13 COMMISSIONER DUFFLEY: So our decision will
14 not be part of the decision for the -- you won't
15 present this decision to the major decision approval.

16 MR. RISINGER: Yeah. The major decision
17 approval is kind of inherently of itself with relation
18 to the project, but I mean in sequencing, we're
19 unlikely to get there, you know, under threat of
20 litigation, you know, because of this sort of the
21 environment. Does that make sense?

22 COMMISSIONER DUFFLEY: Yes. Thank you.

23 COMMISSIONER BROWN-BLAND: So when you had
24 your exchange a minute ago with Commissioner

1 McKissick, and you expressed the Army's feelings about
2 their sovereignty and whether this was their fight or
3 not, in your opinion, and, you know, your personal
4 knowledge, did the army convey -- actually, do you
5 think the Army actually conveyed that to you or is
6 that your interpretation of your dealings?

7 MR. RISINGER: Um, fair. I'm trying to
8 think about how I'm allowed to word that. Um, the
9 Army has communicated to us through -- to Sunstone, so
10 I'm speaking on behalf of the knowledge of Sunstone,
11 not my personal knowledge as counsel.

12 The knowledge of Sunstone with regard to the
13 proceeding in the docket is that the Army favors the
14 project in the same way that it -- for the reasons
15 that it approved the portfolio that includes Aberdeen
16 and Meade, and Riley and Bragg, and Polk, it supports
17 the project for the same reasons that it approved it.

18 Sunstone has received no contrary guidance,
19 you know, from the Army that it has any different view
20 than it has ever had in the process of approving of
21 those projects.

22 The Army has, you know, not in a -- has
23 informally communicated to us that if you have a
24 dispute with a local, you know, utility, that's your

1 fight and not ours. I'm trying to be as fair as I can
2 based on what I -- we can say on behalf of the entity.

3 COMMISSIONER BROWN-BLAND: All right. And
4 then is Sunstone -- what's your position on whether
5 Sunstone is obligated, in any way, to move forward
6 with this project should Sunstone get the ruling from
7 this Commission that it wants?

8 MR. RISINGER: Well, I mean, the -- Sunstone
9 is ready to do the project and is going to do the
10 project, you know, if it is relieved of the threat of
11 litigation.

12 Look, I mean, Duke was very candid before us
13 and candid here today in saying we oppose, we think it
14 violates our franchise territory. That's a dispute
15 between one company and the statutorily franchised
16 monopoly, and that's a big deal, and --

17 COMMISSIONER BROWN-BLAND: But as it stands
18 today, is there an obligation on Sunstone's part to
19 move forward?

20 MR. RISINGER: I mean, the obligation is the
21 Letter of Intent that's been exercised to say we're
22 going to do it just like we did it at Riley, and
23 Meade, and Aberdeen, and those places, you know, when
24 we put to rest the concerns of the franchise holder in

1 the area.

2 COMMISSIONER BROWN-BLAND: And then my last
3 question is DEP has put forward other actions or
4 decisions that need to be made by the Army before this
5 matter might be one that involves actual -- or could
6 potentially involve actual litigation.

7 And so they mentioned the major decision and
8 then they mentioned other actions like having to agree
9 to amend the lease, the ground lease with BCL, those
10 kind of things.

11 If you recall, does Sunstone agree -- not
12 necessarily on the controversy part of that, but do
13 you agree that those decisions are yet to be made or
14 do need to be made ultimately by the Army?

15 MR. RISINGER: Commissioner, you described,
16 you know, a series of events that will need to happen,
17 but Sunstone's position is that they are, you know,
18 outside and not contributory to the issue of whether,
19 you know, any portions of the State Public Utilities
20 Act apply inside the enclave.

21 I mean, Sunstone's position -- those things
22 are going to happen, but they're governed by a
23 different set of rules, and contracts, and
24 relationships that are at issue in the question before

1 the Commission.

2 COMMISSIONER BROWN-BLAND: I understand, but
3 those things -- you don't take issue with the fact
4 that those things do need to occur.

5 MR. RISINGER: Yeah, no. I mean the Army's
6 going to issue a major decision approval, and we're
7 going to conduct -- in cooperation, Sandhills is going
8 to conduct a system impact study.

9 We're going to cooperate with them, and
10 we're going to deal with Sandhills on, you know, the
11 name plate, size, and, you know, the upgrades that
12 might be necessary to handle the size project we have,
13 so I don't challenge those at all. We don't challenge
14 those.

15 COMMISSIONER BROWN-BLAND: Thank you.

16 CHAIR MITCHELL: Commissioner Duffley.

17 COMMISSIONER DUFFLEY: Just one last
18 question. Let's take a hypothetical. I'm just trying
19 to see where it goes, whether the decision is one way
20 or the other.

21 Let's take a hypothetical that the
22 Commission rules in favor of Duke. And so what
23 happens next? I thought I heard you say that the Army
24 believes that it can fully contract with you.

1 So what happens next? Is it really on
2 Sunstone to determine whether it wants to move forward
3 with the litigation or do you move forward and risk
4 litigation?

5 MR. RISINGER: Yeah. That's a totally fair
6 question, and the answer is it's totally on us. If
7 the Commission rules against the relief
8 requested Sunstone's made, we're off to the Court of
9 Appeals on our piece of it.

10 And as it has always been, it's the risk of
11 lengthy protracted litigation with the franchise
12 holder. From a business perspective, that is the
13 issue, and so perhaps we'll have two tracks.

14 For instance, taking a hypothetical, if the
15 Commission rules against Sunstone, and Sunstone takes
16 that to the Court of Appeals, and Sunstone also says
17 okay, we're just going to go take a business risk
18 because we're right, then we face litigation from
19 Duke.

20 And the whole idea of coming to the
21 Commission and taking this path is try to limit, you
22 know, the exposure so we can actually, you know, get a
23 consensus position on what part, if any, of State law
24 actually applies inside this enclave, and can we

1 develop it inside the enclave the way the Federal
2 Government thinks we can and the way the statute is
3 written.

4 COMMISSIONER DUFFLEY: Okay. Thank you for
5 that.

6 COMMISSIONER CLODFELTER: To that point, I'm
7 sorry, and I apologize to all the parties that this
8 didn't sort of dawn on me earlier, but as the
9 afternoon has progressed and the more we hear about
10 this, what State law question are we being asked to
11 determine? Isn't every question before us a question
12 of Federal law?

13 MR. RISINGER: Yeah.

14 COMMISSIONER CLODFELTER: Yeah. Every
15 question before us is a question of Federal law, not
16 State law.

17 MR. RISINGER: Commissioner, you got me in
18 an inartful statement. The only issue that's really
19 State law is how much of State law does Federal law
20 allow inside the enclave.

21 COMMISSIONER CLODFELTER: That is a Federal
22 question.

23 MR. RISINGER: That's a Federal question.

24 COMMISSIONER CLODFELTER: That is not a

1 State question. That is a Federal question.

2 MR. RISINGER: That's correct.

3 COMMISSIONER CLODFELTER: And so I know that
4 the General Court of Justice in North Carolina does
5 have jurisdiction to consider Federal questions. I
6 mean, they could be removed to Federal Court,
7 obviously, or they can be commenced in Federal Court.

8 But it occurs to me that I ought to, at
9 least, ask someone. Maybe this has to be done in a
10 post-hearing briefing, but I'm not sure whether this
11 Commission, which normally issues interpretations of
12 Chapter 62 of the General Statute of North Carolina,
13 has the same broad jurisdiction that construe Federal
14 law as does the General Court of Justice. I just
15 don't know.

16 I mean, it occurred to me that rather than
17 going to the Court of Appeals, you should probably be
18 in Federal District Court. It's the Federal courts
19 that decide whether Federal law preempts State law,
20 and these are Federal statutes.

21 MR. RISINGER: Certainly, Federal statutes
22 are certainly fair. And I think from the standpoint
23 of the State law component, as sort of arbiter and
24 policer of the Public Utilities Act, the Declaratory

1 relief request to the Commission was designed to get
2 an assurance from the Commission, you know, that this
3 is not a State law, you know, thing for us. That was
4 the purpose of the request.

5 COMMISSIONER CLODFELTER: Well, I'll be
6 looking for some enlightenment, probably from our
7 staff, to the extent which we have jurisdiction to
8 decide pure questions of Federal law --

9 MR. RISINGER: And we'd be delighted to
10 supply a post-hearing briefing.

11 COMMISSIONER CLODFELTER: -- as I'm sure we
12 do. As I say, I apologize to all the parties for not
13 really focusing on what's at stake here, but there's
14 no State law question in this case.

15 COMMISSIONER BROWN-BLAND: On that point,
16 does there still remain, in your opinion, the issue of
17 whether there's a public utility here? Is that a
18 State law question?

19 MR. RISINGER: Yeah. The issue of --

20 COMMISSIONER BROWN-BLAND: They're all
21 combined and affected the Federal and State. They
22 have something to do with each other. But to the
23 extent of whether or not there's a public utility, if
24 that question needs to be answered, that's a State law

1 question, isn't it?

2 MR. RISINGER: Yeah, it is, but, I mean, our
3 position would be that the Commission doesn't have the
4 same question before it that it did in NC WARN. In NC
5 WARN, it had a different question to say is the
6 provision to the church, this entity, NC WARN acting
7 as a public utility, and our position is that, you
8 know, in the way we framed the request, that State law
9 doesn't allow, you know, for that decision to be made
10 inside an enclave, so you're hitting right on the
11 issue, Commissioner.

12 COMMISSIONER McKISSICK: One quick question.
13 In some of the other instances where similar projects
14 have been pursued, and, obviously, I've heard that
15 some of them didn't get contested, but did any of them
16 end up in Federal Court as opposed to being resolved
17 by Utilities Commissions or do you know?

18 MR. RISINGER: Yeah, within the portfolio --
19 I can only speak, Commissioner to --

20 COMMISSIONER McKISSICK: From the
21 portfolio --

22 MR. RISINGER: -- to the portfolio that
23 we're talking about.

24 COMMISSIONER McKISSICK: Yeah.

1 MR. RISINGER: Kansas and Louisiana were
2 worked out by cooperative discussions with the local
3 utility in this.

4 COMMISSIONER McKISSICK: Right.

5 MR. RISINGER: And in Maryland, it's a
6 different regulatory regime.

7 COMMISSIONER McKISSICK: Right.

8 MR. RISINGER: So we have not ended up in
9 Federal Court and those places.

10 COMMISSIONER CLODFELTER: Baltimore Gas &
11 Electric decision was Federal District Court too.

12 MR. RISINGER: BG&E is a Federal court
13 decision.

14 COMMISSIONER McKISSICK: But that's been
15 distinguished, both of it being used as authority, but
16 distinguish it on a separate basis, right?

17 MR. RISINGER: Yeah. I mean, our position
18 is that BG&E says similarly to what the 2000, you know
19 DOD memo says. BG&E says well, Congress said you can
20 regulate, you know, purchases of electricity by the
21 Federal government and that's it, and you don't get
22 anything else inside the enclave other than that
23 because that's all that Congress said you get. I
24 mean, that's Sunstone's position of what BG&E says.

1 COMMISSIONER McKISSICK: And that was in
2 District Court and it didn't go to the Court of
3 Appeals, so it's --

4 MR. RISINGER: I think it was affirmed. I'm
5 not sure, but I think it was affirmed.

6 COMMISSIONER McKISSICK: You think it was
7 affirmed?

8 MR. RISINGER: I think.

9 COMMISSIONER CLODFELTER: With or without
10 opinion?

11 MR. RISINGER: I think without, but I'm
12 happy to submit that. I don't know.

13 COMMISSIONER CLODFELTER: We can get it.

14 MR. RISINGER: I don't -- I don't know.

15 COMMISSIONER McKISSICK: It would be
16 insightful to help -- I mean, I was thinking since it
17 was at the District Court level, it really didn't have
18 the same precedential value, you know, as a precedent,
19 but thank you.

20 MR. BREITSCHWERDT: Madam Chair, I'm not on
21 camera. Could I just respond in one minute to a
22 concern raised Commissioner Clodfelter's question?

23 CHAIR MITCHELL: You may.

24 MR. BREITSCHWERDT: You know, I think a

1 concern we would have would be courts pointing their
2 fingers at each other and Federal Court saying, well,
3 you know, whether the North Carolina Commission has
4 authority or not is a decision for them.

5 I think we run into danger, and I do think
6 while it is the governing law, is Federal law, I think
7 that this Commission can interpret its own
8 jurisdiction under that Federal statute, and that
9 would be the only thing I would add there.

10 I understand the point that you're making,
11 but I do understand, am concerned that a Federal Judge
12 would say whether this -- that as a Federal Judge, I'm
13 not going to say whether a State Commission does
14 or does not properly determine its jurisdiction in
15 this context.

16 COMMISSIONER CLODFELTER: If we were the
17 General Court of Justice or the Court of Appeals or
18 the Supreme Court, I would agree with you. I just
19 want to be sure that as a special commission, we have
20 the same authority.

21 MR. BREITSCHWERDT: Understood. And that
22 was the point I wanted to make. Thank you.

23 CHAIR MITCHELL: All right. Anything
24 further for the petitioner?

1 (No response)

2 CHAIR MITCHELL: Mr. Risinger, you may step
3 down.

4 MR. RISINGER: Thank you.

5 CHAIR MITCHELL: I think I'm going to call
6 for proposed orders here, 30 days from Notice of the
7 transcript. I also would like for parties, both of
8 y'all, to brief the question posed by Commissioner
9 Clodfelter on Federal jurisdiction. Get them in
10 before 30 days if you'd like to, but do your best to
11 get them in by then. Anything before we adjourn?

12 (No response)

13 CHAIR MITCHELL: Hearing nothing, we're
14 adjourned. Thanks, everybody.

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C E R T I F I C A T E

I, TONJA VINES, DO HEREBY CERTIFY that the proceedings in the above-captioned matter were taken before me, that I did report in stenographic shorthand the Proceedings set forth herein, and the foregoing pages are a true and correct transcription to the best of my ability.



Tonja Vines