

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

FILED

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EXECUTIVE SECRETARY
G.P.S.C.

GEORGIA POWER COMPANY,

Petitioner,

v.

DOCKET NO. 42509

THE WALTON ELECTRIC
MEMBERSHIP CORPORATION,

Respondent,

NESTLÉ PURINA PETCARE COMPANY,

Intervenor.

POST-HEARING BRIEF OF INTERVENOR
NESTLÉ PURINA PETCARE COMPANY

I. INTRODUCTION

COMES NOW, Intervenor Nestlé Purina PetCare Company (“Nestlé Purina”), and hereby submits its Post-Hearing Brief in the above-referenced docket. Nestlé Purina can choose its electrical service provider under the Georgia Territorial Electric Service Act (the “Territorial Act”) because it “destroyed or dismantled” the existing premises (a long idled textile mill purchased by Nestlé Purina for \$7 million) and has not reconstructed the premises in substantial kind. *See* O.C.G.A. § 46-3-8(b). Rather, Nestlé Purina has constructed an entirely new \$300 million wet pet food processing facility in Hartwell, Georgia (the “Hartwell Pet Food Facility”) creating a food-safe processing and packaging environment completely different than the shuttered textile manufacturing facility that previously existed on that site. Everything at the Hartwell Pet Food Facility has a foundation in the safe storage, handling, manufacturing and shipment of pet food ingredients and finished product, including the hygienic design of the facility necessary to meet the specific food-safe requirements of wet pet food processing and

packaging. Nestlé Purina's massive investment (forty-three times the seven million dollar purchase prices) has transformed the old textile mill into a new premises, as the record evidence from the September 4 and 5, 2019 hearing shows.

The construction of the Hartwell Pet Food Facility matches this case to the controlling facts and law from *Georgia Power Co. and Southwire Co., LLC v. Carroll Electric Membership Corp.*, Docket No. 38275 (Order Adopting the Hearing Officer's Initial Decision, March 30, 2015), ("*Southwire*"). In *Southwire*, the Commission upheld a finding of a new premises (and thus customer choice) under the Territorial Act where: (1) the product manufactured by the new owner of the building was different than that of the previous owner; (2) the interior environments between the two buildings were opposite – a closed clean environment for the previous owner as compared to an open industrial environment created by the new owner; (3) the labor operations changed from labor intensive to capital intensive; (4) the electrical loads between the new operations and its predecessors operations were of a different design or type; (5) the new building adopted a substantially different design, construction, and equipment used for operations; and (6) the electrical systems serviced the two operations in different manners.

Nestlé Purina's more than \$300 million dollars of investment in the facility have created a new premises with a completely different use and function than the pre-existing, idled textile mill. Similar to *Southwire*, Nestlé Purina: (1) is manufacturing a different product than the previous owner; (2) has changed the environment of the building to fit its specific needs tailored to wet pet food processing and operations; (3) shifted the operations from a more labor intensive process of textile manufacturing and warehouse to more of a capital intensive process of pet food processing; (4) increased the electrical load for the new operations as compared to the previous operations; (5) has adopted a different design, construction, and equipment tailored to wet pet

food processing; and (6) installed new electrical systems to service the facility. The Hartwell Pet Food Facility is a “new premises” under the Territorial Act, thereby making the grandfather clause inapplicable and authorizing Nestlé Purina’s choice of Walton EMC as its electric service provider.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Nestlé Purina’s Investment¹ of Greater than \$300 Million Has Changed the Function, Use, and Structure of the Hartwell Pet Food Facility.

1. *Nestlé Purina Changed the Use of the Hartwell Premises from Textile Manufacturing to Wet Pet Food Processing and Packaging.*

Nestlé Purina has completely changed the function and use of the existing premises in order to meet its pet food processing and packaging requirements. (Miller Test.², T-492-95, 509) At Nestlé Purina’s new Hartwell Pet Food Facility, everything will have a foundation in the safe storage, handling, manufacturing and shipment of pet food and finished pet food products (not textiles). (Miller Test., T-492) Nestlé Purina has plans for four production lines, and existing infrastructure is being installed to support future planned expansion to eight production lines. (Miller Test., T-509) Three processing and packaging lines will be brought on line at the initial full operation of the new premises in April 2020. (*Id.*)

Nestlé Purina’s manufacturing process includes receiving high-quality ingredients such as meat, grains, vitamins and minerals, fruits and vegetables. (Miller Test., T-492-95, 500, 512; Ex. MILLER-9) Nestlé Purina then mixes and prepares the ingredients according to recipes developed by Nestlé Purina nutritionists. (Miller Test., T-500) The product is then transferred into cans and is placed in a thermal cooking process (similar to a pressure cooker). (*Id.*) All of the ingredients are tested and tracked throughout processing and packaging, from the time they

¹ A breakdown of Nestlé Purina’s expenditures was submitted as an exhibit with the pre-filed direct testimony of Nestlé Purina’s Plant Manager, Ms. Rachel Miller, appended as MILLER-6.

² Ms. Rachel Ann Miller, Factory Manager for Nestlé Purina. (T-486)

arrive to the time they leave to the time they are placed on store shelves. (Miller Test., T-501)

Nestlé Purina's quality standards rely upon its internal processes, equipment, and building infrastructure to keep pests, pathogens and other contaminants out of the food stream, and to keep the appropriate temperature and humidity control necessary to ensure fresh ingredients are used in the mixing process. (*Id.*)

2. *Nestlé Purina Created and Added Significant Safeguards to Protect Against Pests, Pathogens, and Other Contaminants.*

Federal regulations require Nestlé Purina to keep the Hartwell Pet Food Facility in a condition that protects against the contamination of its pet food.³ (Miller Test., T-500)

Specifically, Nestlé Purina has to keep the Hartwell Pet Food Facility "in a condition that protects against the contamination of pet food, including building the factory to make it easy to clean, maintain and control pests, [pathogens and other contaminants] and thus reduce the potential for contamination of the pet food, pet food-contact surfaces, and pet food-packaging materials." (*Id.*) As Nestlé Purina's Plant Manager, Rachel Miller, explained during her testimony, Nestlé Purina made substantial modifications to not only protect against the entry of pests, pathogens and other microbial contaminants into the building, but also to make the facility easy for employees to keep clean. (Miller Test., T-490) The existing premises did not and could not meet any of these requirements while it was a textile factory or a storage warehouse. (Miller Test., T-500) The semi-open textile manufacturing environment that existed from 1991 until 2006 and the warehousing environment that existed from 2006-2017 are completely different than the closed, hygienic food processing environment Nestlé Purina has created with its investment constructing the Hartwell Pet Food Facility. (Miller Test., T-513)

³ Georgia Power Witness, Harold Daniel Lawson, President of Sterling Development and Engineering, testified he was not aware of any of the food-safe, federal requirements that are required to be followed by a wet pet food manufacturer. (Lawson Test., T-97-98)

B. The Background of the Existing Facility.

The site on which Nestlé Purina is constructing its \$300 million dollar wet pet food processing and packaging facility has had a varied history, but has never been used as a food processing and/or packaging facility. Dundee Mills built the existing facility in 1991. (Dyke Test.⁴, T-172) For its first eight years, the facility consisted of a 190,000 square foot warehouse and a 137,000 square foot towel manufacturing facility. (Dyke Test., T-173) In 1999, Springs Industries added a weaving facility to the existing premises, expanding the manufacturing space to 313,000 square feet. (*Id.*) Then, in 2006, Springs Industries ceased operations and abandoned the textile factory, removing much of its manufacturing equipment and laying off roughly 1,200 employees. (Sandhu Test.,⁵ T-335) The idled textile mill remained vacant for the next decade while it was listed for sale. From 2016 to late 2017, Springs leased parts of the premises to various tenants for storage, including: 225,000 square feet to Ryder, 30,000 square feet to Royston, and 40,000 square feet to Latexco. (*Id.*) The tenants used the existing facility for warehousing space – a storage facility with no manufacturing activities. (Dyke Test., T-176; Miller Test., T-533, 509)

C. Nestlé Purina Purchases the Hartwell Pet Food Facility for \$7 Million Dollars.

In 2017, Nestlé Purina purchased the existing premises for \$7 million dollars. (Sandhu Test., T-318) Nestlé Purina conducted an extensive review of ten (10) properties in the Southeastern United States region to site its first new pet food processing and packaging facility in the United States in 20 years, visiting five of those properties, including the Hartwell site. (*Id.*) Nestlé Purina evaluated those properties on five basic criteria: (1) a location close to major transportation arteries; (2) a property with substantial acreage, both in the site itself and adjacent

⁴ Glenn William Dyke, Customer Pricing Manager for Georgia Power (T-111)

⁵ Gopi Sandhu, Director of Engineering Sustainable Operations for Nestlé Purina (T-306)

acreage that would allow for future expansion; (3) a property with sufficient potable water for plant operations; (4) a property with access to sufficient power for a large new factory; and, (5) a location that provided the opportunity to power the new facility with 100% renewable energy. (Sandhu Test., T-320-21) Nestlé Purina determined the Hartwell property met many of these criteria. (Sandhu Test., T-318) The location allows Nestlé Purina to access almost the entire Southeast region. (*Id.*) The Hartwell property also includes significant acreage and access to sufficient sources of water, an incredibly important resource in the food manufacturing process. (*Id.*) During the selection process, Nestlé Purina representatives spoke with a Southern Company representative who mentioned Georgia's Consumer Choice program. (Sandhu Test., T-319) Although Nestlé Purina lacked knowledge about the program at the time, Mr. Sandhu, Director of Engineering Sustainable Operations for Nestlé Purina, noted "we understood that there could be some options for renewables through the [choice] program." (*Id.*) In support of its commitment to utilize 100% renewable electricity to power its facilities across its entire portfolio, Nestlé Purina must power the Hartwell Pet Food Facility with 100 % renewable energy at its initial full operation. (Sandhu Test., T-336) As stated by Mr. Sandhu, Director of Engineering Sustainable Operations for Nestlé Purina, the commitment to 100% renewables is "an essential policy decision for Nestlé." (*Id.*)

Since Springs had abandoned operations in 2006, the property was in a state of disrepair when Nestlé Purina purchased it. (Sandhu Test., T-319) It was also completely unsuited for wet pet food processing because it had not been designed as a hygienic premises. (*Id.*) Nestlé Purina determined that "[t]he existing buildings and systems, [], were dilapidated. The facility had been largely abandoned for about 12 years. In its condition at the time the property was

completely unsuitable for food manufacturing.” (Sandhu Test., T-318-19) As stated by Rachel

Miller, Nestlé Purina’s Factory Manager:

[a]ll water faucets, fixtures and drinking fountains had to be removed from use and replaced due to legionella concerns because the water was not potable, something absolutely necessary for food processing and packaging. In short, there was little, if any, usable fixtures or equipment remaining on the Hartwell Property and what was left from the former textile plant was not suitable for our purposes and removed.

(Miller Test., T-499) She added that

[w]e [had] purchased a dilapidated and run down warehouse that had not been used for any sort of manufacturing in over 10 years. From my observation, it was obvious that the old premises had never been suitable or usable for pet food manufacturing as designed and constructed.

(Miller Test., T-506)

Portions of the existing premises had to be demolished and replaced, including the existing electrical, storm water, wastewater, HVAC and air handling systems. (Sandhu Test., T-319) Physically, the site was overgrown and had many safety hazards. (Sandhu Test., T-321) The existing interior offices were stained and unusable, and thus had to be demolished. (DeMartino Test.,⁶ T-455) The existing facility was infiltrated with birds and pests, as well as exposed to the elements and outside air with none of the temperature control or proper air handling required for the processing and packaging of wet pet food. (*Id.*) In addition, the existing facility lacked sufficient utility systems to power, clean, and safeguard a new wet pet food manufacturing facility, or to maintain a chilled temperature to store ingredients. (*Id.*) Nestlé Purina was also only able to preserve and use some of the external walls and portions of the roof. (*Id.*) Specifically, the areas of the roof over the bleachery had water penetration issues and were replaced immediately, with the rest of the roof needing to be replaced in segments over

⁶ John Anthony DeMartino, Senior Engineer for Nestlé Purina (T-445)

the next several years. (*Id.*) John DeMartino, Nestlé's Project Engineering Manager, explained that the existing roof had a ballasted roof system; the mechanically fastened roofing system installed by Nestlé Purina is preferred because it is a more hygienic option than the existing ballasted system. (DeMartino Test., T-447) Furthermore, the new roofing material is a rubberized roof with a different membrane. (Lawson Test., T-83)⁷

Mr. DeMartino described the "[t]he Hartwell Project [as] essentially [] a property purchase with complete reconstruction. We acquired a nice piece of property, which we had to completely reconstruct it to make it suitable for our pet food processing and packaging factory." (DeMartino Test., T-460) Well before it closed on the purchase of the Hartwell property, Nestlé Purina understood a substantial investment would be needed to construct a food-safe premises, but it was willing to make that investment to construct its first new American pet food processing facility in over twenty years. (Sandhu Test., T-309; Miller Test., T-491)

D. Nestlé Purina Makes Significant Physical Changes to the Existing Facility.

A large portion of Nestlé Purina's \$300 million investment focused on changes to the physical structure and the electric, mechanical and utility systems. Dr. John Osteraas⁸, who clearly was unfamiliar with both wet pet food processing and the Hartwell Pet Food Facility, mistakenly estimated that the investment into the reconstruction of the facility was certainly "below \$100 million."⁹ (Osteraas Test., T-301) As the testimony from fact witnesses with knowledge of the Hartwell project made clear, Nestlé Purina has committed \$220 million to prepare the Hartwell Pet Food Facility for startup in the fall of 2019, and an additional \$80

⁷ Mr. Lawson was not able to give an opinion as to the type of roofing systems a wet pet food processing facility typically employs. (Lawson Test., T-84)

⁸ Dr. John David Osteraas, Vice President and Principal, Exponent Incorporated (T-277)

⁹ Dr. Osteraas's complete answer is as follows: "Based on the things that I've seen and the things that I've talked about, I would be shocked if the number was anywhere close to \$300 million. That the modifications to the structure are – you know, certainly in – below \$100 million. These are not substantial modifications." (Osteraas Test., T-301) Apparently, Dr. Osteraas did not understand all of what Nestlé Purina did when constructing the Hartwell Pet Food Facility.

million to reach initial full operation by the second quarter of 2020. (DeMartino Test., T-459; Miller Test., T-505) Nestlé Purina has: (1) replaced the wastewater treatment facility, (2) changed the overall structure and design of the existing facility, (3) constructed approximately 120,00 square feet of additional buildings, (4) replaced the existing electrical systems, (5) replaced the air handling systems, and (6) created a food safe environment by, among other things, sealing off and otherwise protecting the interior from pests and other contaminants, and (7) added a freezer in one of the new buildings. (See Ex. DEMARTINO-4; Ex. MILLER-4)

1. *Nestlé Purina Installed a New Wastewater Treatment Facility Specific to Nestlé Purina's Need to Dispose of Organic Wastes.*

The Hartwell Pet Food Facility required the design, construction and installation of a new wastewater treatment system specific to wet pet food processing and packaging. That work cost Nestlé Purina \$7 million dollars – an amount equal to the purchase price for the entire existing premises. (Sandhu Test., T-318, 330; NPPC Ex. 438, SANDHU-7) The existing wastewater treatment equipment that Springs had once used was demolished and dismantled because it was designed for textile operations and unsuited for food processing. (DeMartino Test., T-465; Lawson Test., T-72; Sandhu Test., T-318) Specifically, Nestlé Purina demolished the structural piers supporting the existing filter press and dismantled the filter press.¹⁰ (DeMartino Test., T-465) Then, it installed a new wastewater treatment system with a different unit operation. (Sandhu Test., T-318) Mr. Lawson explained, “Wastewater treatment equipment was replaced for the Nestlé Purina facility for a specific waste. The waste which Dundee Mills generated was totally different and so they had totally different equipment in the waste treatment facility.” (Lawson Test., T-72) Thus, the existing wastewater system, even if it had been functional, was not capable of treating the wastewater created from food processing, which contains biological

¹⁰ The testimony of Mr. Lawson and Dr. Cliff Bishop, Managing Engineer at Exponent, Inc., failed to mention this change to the wastewater treatment system.

waste and animal/vegetable oil. (Sandhu Test., T-331) The new system relies on screening, equalization, dissolved air flotation, biological treatment, and denitrification to treat the factory's discharge so that it is suitable for release per the local regulations. (*Id.*)

2. *Nestlé Purina Has Made Significant Changes to the Structure and Design of the Existing Facility.*

Nestlé Purina has made significant changes to the structure and design of the existing facility creating an entirely new premises that has a different form and function. The underground air handling duct system Springs used at the existing facility was comprised of large, main horizontal tunnels (84 inches in diameter) and smaller, horizontal branch ducts (18-24 inches in diameter), with the branch ducts connecting the large tunnels to recirculate the air. (DeMartino Test., T-462, 490) The horizontal branch ducts also had vertical inlets that penetrated the textile factory floor. (DeMartino Test., T-462) Nestlé Purina has welded steel plates at the end of the horizontal branch lines and filled all of the horizontal branch ducts with 4000 psi concrete – in addition to filling the vertical inlets that protrude to the food processing flooring area to prevent pest and air infiltration into its food safe environment. (Lawson Test., T-79; DeMartino Test., T-456-57) Reversing these changes would require demolition of the existing flooring and replacement of all of the horizontal branch ducts. (DeMartino Test., T-457, 509) One could not simply open the vertical lines and horizontal branch ducts without causing substantial structural damage to the concrete flooring, and thus necessitating its replacement. (DeMartino Test., T-447)

Nestlé Purina covered the machinery that powered the Springs' air handling system with a structural floor to support the office space that houses Nestlé Purina's employee center. (Lawson Test., T-92; DeMartino Test., T-449) As part of its complete replacement of the unsuitable existing air handling systems, Nestlé Purina dismantled and removed the existing air washing

equipment and HVAC equipment. (DeMartino Test., T-447-48) Mr. DeMartino noted that “[t]he Springs system could not be restored without destroying the entire floor [above the filled branch ducting], tearing down the offices in the Nestlé Purina employee center and spending substantial monies to rebuild the entire air handling/recirculation system.” (DeMartino Test., T-462)

Nestlé Purina also removed 75,000 square feet of flooring down to the dirt where it constructed its processing lines 1 and 2, and installed flooring that can drain and allow Nestlé Purina to clean the processing equipment to keep it free from contamination. (DeMartino Test., T-457) The new drainage systems allows for the easy and hygienic drainage of both the water released from the pressure cooking process and the water and chemicals used to clean the equipment. (Lawson Test., T-87)

Describing the construction work, Mr. DeMartino noted that two-thirds of the existing interior walls were removed along with any and all equipment that had been left behind. (DeMartino Test., T-457, 471; Miller Test., T-503; Ex. MILLER-4) He explained “[w]e stripped the old premises down to steel columns, removed the vast majority of interior walls, and removed any equipment that had been left behind. The site looks completely different from when I arrived.” (DeMartino Test., T-457-58) When asked if the “manufacturing equipment that was used to make the textiles and towels at the Springs factory” has been dismantled and removed, Mr. Lawson responded, “Yes. [Only] [t]he shop equipment, there may have been some of this equipment that was there but it wasn’t there when we made our visit.”¹¹ (Lawson Test., T-96) Nestlé Purina's structural construction work will include additional changes to the

¹¹ Despite visiting the Hartwell Pet Food Facility on July 29, 2019, Dr. Bishop, due to his lack of familiarity with the manufacturing equipment used in textile manufacturing as well as wet pet food manufacturing, was unable to answer whether the textile manufacturing equipment was still in place. Dr. Bishop stated, “I do not know.” (Bishop Test., T-262-263)

interior walls and exterior walls as new buildings (including but not limited to the buildings for lines 5, 6, 7 and 8) are constructed at the Hartwell Pet Food Facility. (DeMartino Test., T-471)

3. *Nestlé Purina Changed the Air Handling Systems So They Were Appropriate For the Hartwell Pet Food Facilities Food-Safe Environment.*

The existing, shuttered Springs textile manufacturing facility was more of an open manufacturing environment with far less temperature control than the Hartwell Pet Food Facility, and it lacked the air handling systems necessary for a food safe environment.¹² (DeMartino Test., T-455) Nestlé Purina dismantled and replaced the air handling systems because a food safe environment requires one to minimize the recirculation of air to avoid contamination, minimize pest infestation and minimize potential spreading of pathogen/microbial contaminants. (DeMartino Test., T-463-64) As noted above, the Springs temperature control and air handling systems included holes in the concrete factory flooring that allowed cool air from underneath the facility to circulate throughout the plant to cool it. (DeMartino Test., T-456) Since Nestlé Purina needed to construct a sealed environment, it had to fill those holes and dismantle and remove the existing air handling systems. (DeMartino Test., T-456, 509) Nestlé Purina's food safe air handling system reduces recirculation to avoid contamination, minimize pest infestation and minimize potential spreading of pathogen/microbial contaminants. (DeMartino Test. 463-64) To achieve these design features, the air flow across the entire building is hygienically designed to flow one way, here North to South, so that finished product is not contaminated by raw ingredients. (DeMartino Test., T-464, 479)

¹² Georgia Power's witnesses all lacked any meaningful experience or knowledge regarding food safe environments and food processing operations. (T-516)

4. *Nestlé Purina Constructed Three New Buildings, Including a New 100,000 Square Foot Building to House Additional Production Lines.*

Nestlé Purina built three new buildings as part of its construction of the Hartwell Pet Food Facility. Nestlé Purina constructed a new 100,000 square foot building for processing lines three and four. (DeMartino Test., T-458; Miller Test., T-505) Not surprisingly, Georgia Power's witnesses omitted mentioning the addition of the 100,000 square foot building in their pre-filed direct testimony. (Lawson Test., T-82; Bishop Test.¹³, T-264) Nestlé Purina also built a cooler and freezer building – an additional 13,000 square feet – to receive and store the raw ingredients prior to their use in the wet pet food processing process. (DeMartino Test., T-458-59; Miller Test., T-511) The existing facility did not have a freezer. (Dyke Test., T-194) The third building, a 5,200 square foot can-handling building that manufactures and feeds cans into the food processing lines, was also constructed at the Hartwell Pet Food Facility. (Miller Test., T-491)

In addition to the new waste water facility, a new employee center, a new retention pond, and new substations and transformers (to receive electric service from the substation built by Walton EMC) were all constructed by Nestlé Purina. (DeMartino Test., T-459) Two additional buildings, one for lines five and six, and a second building for lines seven and eight, are part of Nestlé Purina's plans for future expansion. (DeMartino Test., T-459; Ex. MILLER-3) Nestlé Purina is building these buildings in accordance with its plan, referenced by Ms. Miller, to supply the whole Southeast with its wet pet food for dogs and cats. (Miller Test., T-536-37)

¹³ Dr. Cliff Douglas Bishop, Managing Engineer at Exponent, Incorporated (T-242)

5. *Nestlé Purina Has Made Significant Changes to the Electrical Systems at the Hartwell Pet Food Facility.*

The existing power systems at the old premises were also unsuitable for supporting the new Hartwell Pet Food Facility. (Montgomery Test.,¹⁴ T-377) Nestlé Purina was forced to rip out the vast majority of the electrical systems – only leaving certain small portions of the system in and near the distribution center. (*Id.*) The transformers on the east side of the existing building that serviced the existing facility were inadequate for supplying Nestlé Purina's power needs, which include a connected load of 8.5 MW for two production lines and 11.2 MW for three production lines at initial full operation. (Montgomery Test., T-377, 397-98)

The existing electrical equipment was also unsuitable for Nestlé Purina's power needs. Several switchboards were rusted out and others were no longer serviceable by the manufacturer or were simply unsafe for use and the condition of several of the lighting and power panels was also extremely poor. (Montgomery Test., T-377) Many of the lighting and power panels were full of lint from the textile factory activities at the existing facility. (*Id.*) Due to the poor conditions of the existing electrical facilities, Nestlé Purina removed all but one of the old transformers at the facility and installed five new substations and related transformers. (Montgomery Test., T-378)

As Ryan Montgomery, Electrical and Controls Engineering Manager for Nestlé Purina, explained, Nestlé Purina has installed five new substations that will be serviced from a new 115kV substation built by Walton EMC. (Montgomery Test., T-378) Nestlé Purina's new 5KV substation will directly supply Nestlé Purina's new 5kV Variable Frequency Drives ("VFDs") and motors for eight large process equipment motors. (Montgomery Test., T-379) The new 5kV VFDs located in a new electrical room will be serviced through new underground conduit – the

¹⁴ Ryan Robert Montgomery, Electrical and Controls Engineering Manager for Nestlé Purina (T-368)

existing conduit has not been reused because the existing facility's electrical equipment was not capable of supplying power at 5kV to these motors. (Montgomery Test., T-382; NPPC Ex. 437, MONTGOMERY-2) The new electrical design also includes redundant power feeds throughout the power system in case of an issue with one of the main power feeders from the 115kV substation, or between Nestlé Purina's 15kV substation and the other four substations. (Montgomery Test., T-378) The new substations and electrical system have the ability to be expanded to support a connected load of up to 25 MW as the Hartwell Pet Food Facility potentially grows to eight production lines. (Montgomery Test., T-408-09)

Nestlé Purina has also installed all new motor control centers ("MCCs") (200+ sections), over twenty power panels, over seventy-five automation control panels, and thousands of feet of wire and wire baskets throughout the new process and packaging area of the Hartwell Pet Food Facility. (Montgomery Test., T-378) Mr. Montgomery testified that Nestlé Purina has spent over \$22 million dollars installing new electrical equipment at the Hartwell Pet Food Facility and over \$7 million purchasing that electrical equipment. (Montgomery Test., T-442; NPPC Ex. 448, MONTGOMERY-6) In comparing the Hartwell Pet Food Facility's electrical systems to the pre-existing systems, Mr. Montgomery stated, "The electrical systems look completely different and function much differently than when I arrived." (Montgomery Test., T-378)

6. *Nestlé Purina Has Created a Sealed, Food-Safe Environment for its State of the Art Wet Food Processing Operations.*

To bring the Hartwell Pet Food Facility to a condition where Nestlé Purina could perform its wet pet food processing purpose, Nestlé Purina had to destroy, dismantle, and reconstruct the Hartwell Pet Food Facility. In the words of Mr. Lawson, the existing premises "was not a food-safe environment." (Lawson Test., T-87) Ms. Miller described the environment as having "holes in the floor, missing doors, broken windows, pest control issues, a complete lack of

sufficient coving along the floor and wall joint lines and in other places to insure the building was sealed to protect against pest infiltration . . . and completely unusable office spaces.” (Miller Test., T-502) Wet pet food processing and packaging requires a clean, temperature-controlled environment in order to protect the end-product, its ingredients, and the surfaces in the processing and packaging area from contaminants – including pests and other airborne and waterborne contaminants. (DeMartino Test., T-457) Ms. Miller explained the significance of these changes:

[w]e are completely gutting and reconstructing the buildings that have remained to make them safe and suitable for that purpose. We are completely replacing and rebuilding every mechanical, electrical, and utility system A lot of the requirements needed for a food manufacturing process are far more stringent than a textile factory because the finished product will be ingested.

(Miller Test., T-506)

To create a food safe environment, Nestlé Purina had to replace many of the lighting fixtures, add interior walls, install a 75,000 square foot floor with slot drains, and work to seal the new premises from pests and other contaminants. Georgia Power witness Dr. Bishop could not testify about the extensive investment that Nestlé Purina made to create the food-safe environment at the Hartwell Wet Pet Food Facility because it was “[o]utside of the scope what [he] reviewed,” and thus he cannot credibly opine on the changes made to the facility. (Bishop Test., T-217) Mr. Bishop also made clear he could not offer an opinion regarding the requirements of a food-safe environment. (Bishop Test., T-272) In short, Mr. Bishop did not review much, if any, of the material information, and he is unqualified to opine on the changes in the fundamental nature of the facility.

The original lighting fixtures were replaced because they were obsolete and did not meet Nestlé Purina’s lighting standards for energy efficiency, hygienic design, Lumen levels,

materials of construction, or explosion ratings for wet food processing use at the Hartwell Pet Food Facility. (Montgomery Test., T-382) The original light fixtures also did not provide an adequate level of safety for working conditions for factory personnel or for food safety in open product areas because they contained glass, which can break, and were not sealed properly for wet environments and the prevention of insect harboring. (*Id.*; DeMartino Test., T-478) As a result, Nestlé Purina removed the lighting fixtures installed by Mr. Lawson, who noted after visiting the Hartwell Pet Food Facility: “[t]he lighting fixtures were not present that we installed, no.” (Lawson Test., T-90) Mr. DeMartino testified that “[t]here’s no glass in any of the [lighting] fixtures” at the Hartwell Pet Food Facility. (DeMartino Test., T-478)

To achieve a sealed, food-safe environment, Nestlé Purina added several walls to the process and packaging area to control the humidity levels and temperature in the area where raw materials are exposed to the elements. (Miller Test., T-501) Nestlé Purina also tore up the floor so it could add a drain system in the Meat Preparation and Kitchen area because the processing area requires frequent rinse downs with water and chemicals to keep the equipment clean and food safe. (*Id.*) In the packaging room, dehumidification is required to prevent the paper products from absorbing moisture. (*Id.*)

Nestlé Purina has installed sanitation strips, and sealed all doors, walls, cracks and crevices with a coving material to prevent pest and other contaminant infestation. (Miller Test., T-500, 552; Lawson Test., T-109) The coving material seals the joint where the wall meets the floor and runs along that joint for the entirety of the facility. (Miller Test., T-490; DeMartino Test., T-458; Ex. DEMARTINO-5) Towels and linens do not require the same protection from contaminants in comparison to a food safe environment, and thus no such protections existed in the Hartwell Pet Food Facility when it was acquired by Nestlé Purina. (DeMartino Test., T-455)

Moreover, Nestlé Purina has spent significant monies and effort to similarly seal the distribution warehouse, including adding coving to the joint between floors and walls. (DeMartino Test., T-466; Miller Test., T-510) This work sealed the facility and included the installation of pest and pathogen control measures to not only prevent infestation but also to monitor and kill any pests or other contaminants that infiltrate the facility. (DeMartino Test., T-466) Mr. DeMartino explained that “[w]e have to keep the Hartwell Factory in a condition that protects against the contamination, so it has to be easy to clean and maintain, and we have to control pests.” (DeMartino Test., T-457)

In the distribution center, Nestlé Purina had to completely reconstruct the entire area to make it suitable for animal food manufacturing. (DeMartino Test., T-458) Nestlé Purina had to install new lighting fixtures, a new fire protection system, new offices, new racking systems, new equipment designed to handle product, and new equipment for forklifts. (*Id.*) Nestlé Purina also installed extensive coving in the distribution center to limit pest infestation from where the walls and floors connect. (*Id.*)

Finally, Nestlé Purina installed all new utility systems because the existing utility systems did not allow for Nestlé Purina to create a closed, hygienic environment that would protect from outside contaminants. (DeMartino Test., T-456-57; Ex. DEMARTINO-8) Due to steam and air coming in direct contact with the pet food and its ingredients, these systems must be kept clean enough for a food safe environment. The boilers and air compressors that had been used in a textile manufacturing environment would be unsuited for Nestlé Purina's hygienic food processing environment and thus had to be dismantled and removed. (DeMartino Test., T-450) Nestlé Purina needs boilers that produce culinary quality steam, something the boiler system in the old textile factory could never do (nor would you pay for such unnecessary functionality).

(Lawson Test., T-98, DeMartino Test., 450) Nestlé Purina's processes also require compressors that use food-grade lubricants, and thus all of the existing air compressors had to be replaced.

(Lawson Test., T-99; DeMartino Test., T-464)

E. Nestlé Purina Opts to Exercise Consumer Choice and Select Walton EMC as its Electrical Service Provider.

Nestlé Purina lawfully selected Walton EMC as its electrical supplier under the Territorial Act. Nestlé Purina never entered into any agreement or contract with Georgia Power for the purchase of electrical services. (Montgomery Test., T-435). Nestlé Purina did not do so because it had concerns about Georgia Power's ability to meet the load requirements at the Hartwell Pet Food Facility in a timely manner and do so with competitively priced renewable energy. (*Id.*) Specifically, Nestlé Purina had concerns whether Georgia Power could adequately service the Hartwell Pet Food Facility at its 11.2 MW three-line peak load at initial full operation and beyond. (*Id.*) Georgia Power told Nestlé Purina that 11.2 MW of power might not always be available if a new or existing customer in the industrial park required additional power. (*Id.*) A short term solution which included a non-guaranteed supply of up to 9.9 MW was offered to Nestlé Purina, but this solution was inadequate because it only guaranteed delivery of 8 MW, not 9.9 MW. (Montgomery Test., T-383, 415)

1. *Nestlé Purina Exercised its Due Diligence in Choosing Walton EMC as its Electrical Service Provider.*

When Nestlé Purina first inquired of Georgia Power about renewable energy options, the only option offered was its "Simple Solar" program, which Nestlé Purina determined would be cost prohibitive for a facility the size of the new Hartwell Pet Food Facility. (Sandhu Test., T-322) Nestlé Purina, therefore, was essentially without any viable renewable energy source options (let alone a 100% option) if it chose Georgia Power.

There is no record evidence – testimony or exhibit – showing that Nestlé Purina ever signed any document or agreement for electric service with Georgia Power. (Sandhu Test., T-323; NPPC Ex. 403, SANDHU-5; NPPC Ex. 404, SANDHU-6) Nestlé Purina merely transferred the utilities into its name and continued to receive electrical services from Georgia Power under the PL rate to support its construction and logistical and equipment testing activities. (Sandhu Test., T-323, 326; Montgomery Test., T-404-05) The parties decided a potential retail agreement could be discussed at a later time – in late 2018 or early 2019, when construction neared completion. (Sandhu Test., T-323)

In February 2019, Georgia Power approached Nestlé Purina to discuss an electric service agreement. (*Id.*) During a meeting with Georgia Power, Nestlé Purina made it clear that it was (still) actively evaluating its options under Georgia’s customer choice law. (*Id.*) Nestlé Purina soon discovered that Walton EMC was able to offer: (1) the construction of a new substation and any other necessary infrastructure to supply Nestlé Purina with a connected load up to 25 MW; and, (2) a one hundred percent renewable energy option from startup – satisfying Nestlé Purina’s commitment as a member of the RE 100. (*Id.*) Nestlé Purina repeatedly notified Georgia Power of its intent to explore customer choice from November 3, 2017 forward. (Sandhu Test., T-329) When Nestlé Purina could not gain sufficient and reliable information from Georgia Power relating to how electric service would be provided to the Hartwell Pet Food Facility, Nestlé Purina communicated with Walton EMC. (*See* Lee Test.¹⁵, T-562-570) Nestlé Purina eventually entered a letter of intent for electric service with Walton EMC, and then executed a contract for the purchase of power from Walton EMC on September 3, 2019. (Ex. MILLER-7, Miller Test., T-570; WEMC Ex. 233)

¹⁵ Ronnie Lee, CEO of Walton EMC

2. *Nestlé Purina Began Testing Pet Food Distribution at the Hartwell Pet Food Facility in June of 2018.*

Nestlé Purina “started up the distribution center in June of 2018” to test its operations, including new employee performance, at the Hartwell Pet Food Facility. (Miller Test., T-537; Dyke Test., T-196) A public event around this time was held for the purpose of community outreach and employee recruiting for the future factory. Nestlé Purina had to begin building its “competencies in order to be able to service the whole Southeast region.” (Miller Test., T-538) The distribution center started with a group of employees who did not have prior knowledge of how to operate a pet food distribution center and, as a result, Nestlé Purina decided to begin testing the distribution center in June of 2018. (*Id.*) As part of this testing period, Nestlé Purina is shipping pet food product from its sister processing and packaging facilities into the Hartwell Pet Food Facility to begin building competency “around unloading inbounds.” (*Id.*) By shipping from one distribution center to another distribution center and then to its customers, Nestlé Purina is incurring a higher cost of shipping per unit than it otherwise would to allow the Hartwell Pet Food Facility to demonstrate that it can successfully deliver pet food product to customers. (Miller Test., T-559-560) Additionally, Nestlé Purina began establishing its transportation routes and carriers to service the Hartwell Pet Food Facility towards the end of 2018. (*Id.*) Currently, Nestlé Purina is still only shipping to “50 to 60 percent of the customers in the southeast region that [Nestlé Purina] need[s] to be shipping to” out of this location and will need to reach 100 percent in order to meet Nestlé Purina’s objectives, and will only do so at initial full operation in 2020. (Miller Test., T-540)

F. Procedural History

Georgia Power filed its Petition and Complaint of Georgia Power Company (the “Complaint”) with the Commission on April 26, 2019 contesting Nestlé Purina’s lawful choice

of Walton EMC as its electrical provider. Georgia Power seeks: (1) a determination from the commission that Walton EMC is in violation of the Territorial Act by attempting to provide retail electric service to the premises; and, (2) a determination that Georgia Power is the lawful supplier of electricity to the premises. (*See* Petition) Nestlé Purina filed its Petition to Intervene on June 13, 2019 asserting that Nestlé Purina had the right to choose its electric supplier pursuant to O.C.G.A. § 46-3-8(a), that it has a direct legal interest in this matter, and that its rights and interests will be substantially affected by decisions and orders made by the Commission in this proceeding.¹⁶ (*See* Petition to Intervene) The Commission assigned the matter to Hearing Officer Nancy Gibson and Ms. Gibson held an evidentiary hearing on September 4 and 5, 2019.

Prior to the hearing, the Parties entered into the following three stipulations: (1) Walton EMC and Georgia Power are electric suppliers as defined in the Territorial Act and are subject to the jurisdiction of the Commission; (2) the Premises is wholly located outside of the municipal limits of Hartwell, Georgia as those limits stood on March 29, 1973, and as those limits currently stand today; and, (3) at all relevant times the Premises had – and will have – a connected load in excess of 900 kilowatts.

III. BURDEN OF PROOF

Nestlé Purina and Walton EMC bear the burden of proof in establishing the Hartwell Pet Food Facility is a new premises or a premises not constructed in substantial kind from the existing facility. Georgia law provides that once an electrical service provider establishes its right under the “grandfather clause” of the Territorial Act to continue serving a premises, the burden shifts to the consumer asserting choice to establish the disputed premises qualifies for an exception under the Territorial Act, in that the building is a new premises or a premises

¹⁶ The Commission permitted Nestlé Purina to fully participate in the proceeding. Nestlé Purina, however, respectfully requests that an order explicitly granting its motion be entered since all parties consented to its intervention.

constructed not in substantial kind from the old premises. *Colquitt EMC v. Georgia Power Company*, Docket No. 12528 (Initial Decision, January 16, 2002), at p. 13; *Georgia Power Company v. Marietta Board of Lights and Water*, Docket No. 7545-U (Initial Decision, January 12, 1998) at pp. 5-6, (“*MBLW*”). Nestlé Purina and Walton EMC admit Georgia Power previously served the old premises, but the record evidence clearly shows they both have met their burden under the Territorial Act and its related case law. Specifically, they have proven that Nestlé Purina constructed a new premises not in substantial kind to the previous premises and thus had the right to lawfully choose Walton EMC as its electric service provider.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. **The Nestlé Purina Hartwell Pet Food Facility is a New Premises not Reconstructed “In Substantial Kind.”**

1. *Nestlé Purina Destroyed and Dismantled the Existing Facility.*

The record evidence establishes that Nestlé Purina destroyed and dismantled the existing facility. Nestlé Purina is not merely “retrofitting discrete portions of the interior” but rather it is “dismantl[ing] the prior premises and [] constructing a new facility with substantial electric service requirements.” *Southwire*, at 13. The hearing body should determine whether a sufficient amount of the Hartwell Pet Food Facility was dismantled, with “dismantled” constituting a lesser degree of the term to destroy to ensure that both words have real and practical meanings. In this case, the hearing body should distinguish between the terms “destroy” and “dismantle” so that, as defined and as applied, the words have meaningfully different significance as applied to the Territorial Act. Any other interpretation of these terms under the Territorial Act would effectively render the term “dismantle” without meaning.

Nestlé Purina’s demolition of the existing facility and construction of a completely different, and new wet pet food processing and packaging facility, supports a finding that the

Hartwell Pet Food Facility is a new premises under the Territorial Act. Nestlé Purina purchased the existing premises for \$7 million, gutted it, and invested more than \$300 million dollars to construct a closed, hygienic environment suitable for wet pet food processing. It is not necessary for the existing facility to have been completely dismantled or destroyed in order for the Commission to determine the disputed premises constitutes a “new premises” under the Territorial Act. *See MBLW*, at 11. Rather, significant changes to the structure and use of the old premises are sufficient to demonstrate a new premises “of substantially different kind.” *See MBLW*, at 9.

Nestlé Purina has made significant structural changes since purchasing the Hartwell Pet Food Facility. First, Nestlé Purina constructed a new 100,000 square foot building to house two production lines – a building that is becoming part of the existing structure and thus adding two new exterior walls. (DeMartino Test., T-458; Miller Test., T-505) Second, Nestlé Purina built a freezer and cooling room and a new canning building, both buildings specific to the wet pet food processing operations, and together adding another 18,200 square feet with additional exterior walls. (DeMartino Test., T-458-59; Miller Test., T-511) Third, Nestlé Purina has demolished and removed 75,000 square feet of flooring and replaced it with thicker flooring and a draining system suitable for Nestlé Purina’s need to regularly clean and maintain the food processing equipment. (DeMartino Test., T-457; Bishop Test., T-267-268) Installation of the new flooring included a installing a structural rebar. (Dyke Test., T-197) Other changes to the flooring include filling the horizontal branch and vertical ducting system with concrete, ducts that had been used by the previous tenants and Springs as part of an air handling and cooling system. (DeMartino Test., T-446-47) That system was incompatible with Nestlé Purina's food safe environment. (DeMartino Test., T-447)

These structural changes are more significant than the changes in *MBLW* and are most similar to the changes made in *Southwire*. In *MBLW*, the new premises only had an 11 x 23 area replaced of the original slab foundation while most of the core remained. In *Southwire*, due to the installation of the heavier machinery Southwire required for its manufacturing processes, roughly 125,000 square feet of concrete flooring was replaced with thicker concrete flooring. *Southwire*, at 12. In addition, Southwire removed certain walls and created new “openings to the outside.” *Id.* at 10. Here, Nestlé Purina removed the 75,000 square feet of concrete flooring and installed a slot draining system specific to its wet pet food processing, among numerous other significant construction changes. Nestlé Purina, by virtue of the additional buildings constructed adjacent to the existing facility, has also created new openings to the outside and removed both exterior and interior walls. (DeMartino Test., T-481) The newly constructed buildings house (or will house) a cooler and a freezer, can handling operations, and processing and packaging lines, all of which are necessary components for a wet pet food operation.

In *Southwire*, Southwire installed new electrical equipment for the purpose of manufacturing wire and removed the refrigeration components of the existing HVAC system. *Southwire*, at 7. Additionally, Southwire dismantled and removed portions of the ductwork and changed the ventilation systems to suit Southwire’s specific needs. *Id.* The Commission in *Southwire* found, “[a]s a comparison between [the exhibits] and as the photographs of the interior show, the Old Sony Plant has been taken apart and stripped of its furnishings and equipment, much of the floor broken up, walls and partitions removed, openings made – all actions that satisfy the plain meaning of ‘dismantled.’” *Southwire*, at 13. Nestlé Purina has similarly removed and replaced all of the existing electrical, mechanical and utility systems. (DeMartino Test., T-448-49; Lawson Test., T-77) Nestlé Purina has installed a new air handling

system, including dismantling and removing the lint removal system. (Lawson Test., T-78). The new system is designed to keep the pressure inside of the building higher than the pressure outside of the building to "push out" pests and contaminants and also to limit air recirculation in the food processing and packaging areas. (Lawson Test., T-77-79; DeMartino Test., T-446-447, 470-71) The air flow in the Hartwell Pet Food Facility is designed to prevent cross contamination because it flows in one direction, North to South. (DeMartino Test., T-470) The construction work undertaken by Nestlé Purina has dismantled the existing facility, and therefore, the Hartwell Pet Food Facility should be considered a new premises under the Territory Act.

Nestlé Purina also installed a new waste water treatment system specific to organic waste produced by the pet food manufacturing process. (Lawson Test., T-96; Sandhu Test., 309-10) Nestlé Purina has installed all new equipment (including new compressors) with food safe lubricants. (Lawson Test., T-97-98; DeMartino Test., T-464) Nestlé Purina dismantled the existing Springs facility when it took apart and stripped away the electrical infrastructure, the air handling and HVAC system, and removed various parts of the roof. Nestlé Purina made these changes to construct a food-safe environment for a whole new use, wet pet food processing and packaging. The scope and nature of these changes are most similar to the changes made by Southwire to the Sony facility, and thus have created a wholly different, and new, premises, the Hartwell Pet Food Facility.

2. *The Hartwell Pet Food Facility Was Constructed Not "In Substantial Kind" to the Existing Warehouse or the Idled Springs Textile Factory.*

Nowhere in the Territorial Act is the term "in substantial kind" defined. *Georgia Power Company v. Marietta Board of Lights and Water*, Docket No. 7545-U, Initial Decision, January 12, 1998, at p. 8 ("*MBLW*"). Under principles of statutory construction, the Commission applies

ordinary significance to the words in the Territorial Act. *Id.* After applying the ordinary meaning to the term “in substantial kind” the Commission explained:

“[S]ubstantial” as “being largely but not wholly what which is specified.” Similarly, the word “kind” is defined by the same dictionary as fundamental nature or quality; a group united by common traits or interests. Thus, according to past Commission decisions, the term “in substantial kind” means a facility which is largely, but not wholly, of the same fundamental nature or quality as the previous facility.

Id. (citing *North Georgia Electric Membership Corporation v. City of Dalton*, Docket No. 3941-U (Initial Decision, June 21, 1991); *Georgia Power Company v. Middle Georgia Electric Membership Corporation*, Docket No. 3626-U (Initial Decision, May 16, 1989); *Central Georgia Electric Membership Company v. Georgia Power Company*, Docket No. 3692-U (Initial Decision, May 9, 1988)). The Hartwell Pet Food Facility is not even remotely in substantial kind to the Springs’ premises.

a) *Nestlé Purina’s modifications to the Hartwell Pet Food Facility are proportionally significant such that Nestlé Purina has constructed a New Premises.*

In *MBLW*, the Commission found “[i]t is not just that the business of the tenant at the Disputed Premises changed or that the use of such Disputed Premises changed, but the size, configuration, appearance, and value of such Disputed Premises has changed substantially in quality and nature.” Here, Nestlé Purina’s total cost of construction at the Hartwell Pet Food Facility is over \$300 million, which dwarfs the \$7 million purchase price of the facility. The new construction efforts by Nestlé Purina have resulted in an investment that is forty-three times the purchase price of the building. In *Southwire*, the building was purchased for \$11 million and modifications to the building by Southwire only totaled \$47.6 million – roughly four times the purchase price. *Southwire*, at 8. In *MBLW* the modifications were only three times the cost to purchase the facility. *MBLW*, at 4-5. Nestlé Purina’s massive investment is further evidence of

the significant changes in form and function to the old premises such that a new premises, the Hartwell Pet Food Facility, has been constructed.

- b) *Nestlé Purina's different electrical and power requirements further demonstrate that it has constructed a New Premises.*

Similar to the change in power delivery in *Southwire*, the power delivery system required by the Hartwell Pet Food Facility “is substantially different from that which [was] in place.” *Southwire*, at 11. In *Southwire*, Southwire “identified the need to essentially remove the electrical system previously served by CEMC and replace it with a different system . . . undertak[ing] a wholesale replacement of the electrical infrastructure in order to install a . . . system that complies with its safety and reliability requirements.” *Southwire*, at 12. This is precisely what Nestlé Purina has done at the Hartwell Pet Food Facility. The existing power systems were unsuitable to support the Hartwell Pet Food Facility, and Nestlé Purina had to dismantle and rip out the vast majority of those systems. (Montgomery Test., T-377) Nestlé Purina removed all but one of the old transformers and installed five new substations and related transformers. (Montgomery Test., T-378) The five new substations will be serviced from a new 115kV substation built by Walton EMC. (*Id.*) The new electrical design also includes redundant power feeds throughout the power system in case of an issue with one of the main power feeders from the 115kV substation, or between Nestlé Purina’s 15kV substation and the other four substations. (*Id.*) Nestlé Purina has installed a new 5KV substation that will directly supply Nestlé Purina’s new 5kV Variable Frequency Drives (“VFDs”) and motors for eight large process equipment motors. (Montgomery Test., T-379) The new 5kV VFDs located in a new electrical room will be serviced through new underground conduit – the existing conduit has not been reused because the existing facility’s electrical equipment was not capable of supplying power at 5kV to these motors. (Montgomery Test., T-382; NPPC Ex. 437, MONTGOMERY-2)

The significant changes to the electrical systems further demonstrate that the Hartwell Pet Food Facility has not been constructed in substantial kind to the previously existing premises.

3. *The Hartwell Pet Food Facility Will Serve a Completely Different Function than the Shuttered Springs Plant.*

The new Hartwell Pet Food Facility is not “a facility which is largely . . . of the same fundamental nature or quality as the previous facility” because it is now a food-safe, hygienic facility that can be used for wet pet food processing and packaging. *Southwire*, at 10-11 (citing *MBLW*, at 8). Without the substantial changes to the old premises effected by its more than \$300 million investment, Nestlé Purina could not process and package wet pet food at the Hartwell site because the old premises was wholly unsuited for that use. In *Southwire*, the Commission found the “Old Sony Plant and new Southwire North Campus are not ‘united by common traits or interests.’” *Id.* at 11. The Commission has established a long line of case law “involve[ing] situations where the new, expanded or reconstructed facility is of a different nature and function from that of the old facility on the premises and is, therefore, deemed by the Commission to be a new or different premises not ‘reconstructed . . . in substantial kind’ and, hence, not subject to the protections of the ‘grandfather clause’ for the prior or existing service provider.” *Georgia Power Company v. Habersham EMC*, Docket No. 23781 (Initial Decision, March 26, 2007, adopted by the Commission in relevant part, September 20, 2007) (“*Habersham*”) at 14 (citing *Diverse Power, Inc. v. City of Lagrange*, Docket No. 13392-U; *Georgia Power Company v. Marietta Board of Lights and Water*, Docket No. 7545-U (Initial Decision, January 12, 1998); and *City of Calhoun v. North Georgia EMC*, Docket No. 50-90-U (Initial Decision, July 17, 1995). In *Southwire*, the Commission placed great weight on the different product manufactured by Southwire and the Old Sony Plant:

“Southwire is making a product very different from that which was made at the Old Sony Plant and is dedicating the Southwire North

Campus to its heavy manufacturing undertaking, as opposed to manufacturing, warehousing and distributing consumer goods. . . . The new Southwire North Campus is not ‘a facility which is largely . . . of the same fundamental nature or quality as the previous facility.’”

Southwire, at 10-11.

The Commission similarly focused on the fundamental differences between the existing premises and new premises in the *Habersham* case. In *Habersham*, the existing premises included a single-home family home, a hotel, and a drive-in theater. *Habersham*, at 15. It was changed into a “modern 28-unit senior independent living apartment/retirement complex” with plans to be expanded to 44 units during an additional planned phase of construction. *Id.* The total investment of the new construction and change to the apartment/retirement complex totaled more than \$2 million dollars. *Id.* After focusing its analysis on the fundamental differences of the new Premises, the Commission determined that the Premises was dismantled and reconstructed not in substantial kind. *Id.* at 24-25 (“To claim, as GPC does, that the Old House and CannonWood Village are both similar as residences is a gloss that it ignores the drastic differences in size, appearance, cost, profitability, employee staff, commercial use, nature and function between the old and new facilities on the Premises. . . .”).

Similarly, the new Hartwell Pet Food Facility is not “united by common traits or interests” with the previously existing and abandoned Springs facility. Nestlé Purina has reconstructed the plant into a state of the art wet pet food processing plant, nothing remotely similar to a textile factory. (Miller Test., T-491-92) Furthermore, Nestlé Purina has made significant changes throughout the facility to comply with food safety regulations and to protect against contamination, including new coving at the joints, incredibly robust pest/contaminant

control, a single flow air handling system, and designing and constructing all new systems for its food safe environment. (DeMartino Test., T-451)

Moreover, the Hartwell Pet Food Facility is no longer suitable for textile manufacturing. Nestlé Purina removed the bleachery equipment, lint removal systems, robust air handling (lint capturing) systems and entirely sealed and closed the Hartwell Pet Food Facility from the outdoor environment, amongst other substantial changes. (DeMartino Test., T-450) The boilers and air compressors that were previously used in the shuttered, textile manufacturing environment were completely unsuited for Nestlé Purina's hygienic food processing environment and were therefore removed. (*Id.*) All new equipment suitable for Nestlé Purina's use has replaced the equipment that remained in the existing premises at the time Nestlé Purina purchased the building. (DeMartino Test., T-451) As Ms. Miller testified, Nestlé Purina's "entire process from start to finish is a food safe environment." (Miller Test., T-492) The shuttered Springs textile factory was not (and could not be) such an environment. Like the Commission in *Southwire* and *Habersham*, this hearing body should focus its analysis on the fundamental differences between the existing facility and the Hartwell Pet Food Facility and find that the Hartwell Pet Food Facility is not a reconstruction in substantial kind to the previously existing facility.

4. Georgia Power's Reliance on the Greystone and the Jackson EMC Decision is Misplaced.

Georgia Power's reliance on *Greystone Power Corporation v. Georgia Power Company*, Docket No. 40803 (Initial Decision, March 23, 2018), is misplaced. As a preliminary matter, the *Greystone* decision rests on a set of facts bearing no similarity to Nestlé Purina's circumstances. In *Greystone*, Keurig purchased the building with a *reported* intention to produce coffee "pods" for one of its new appliances. *Id.* at 2. Keurig's changes to the building did not make any

changes to the extent, size, or aesthetics of the building. *Id.* at 3. Keurig only made changes to roughly one third of the building, simply installing pod making equipment in that section of the building and performing little, if any, other work. *Id.* at 9. Most importantly, the equipment Keurig installed to support the pod making at the facility was later removed when Keurig discontinued that pod product, so the building was never actually used as an operational beverage processing plant, and definitely was not one at the time of the hearing. *Id.* at 4. The Commission in *Greystone* noted, “[t]he Building as it exists today, like the Building as it existed before Keurig purchased it, has no ability to manufacture anything and is unsuitable for use in manufacturing without major renovations.” *Greystone*, at 9-10. In fact, Keurig was marketing the building as an open space, suitable for warehousing and distribution at the time of the hearing and thus ***never changed the building’s use***. *Id.* at 7, 10. Keurig never commenced manufacturing at the building and the equipment (which had never been in operation) was removed by another company after it acquired the facility. *Id.* at 4. Based on the facts in *Greystone*, there was no evidence that Keurig destroyed or dismantled even a portion of the Premises, so the application of the standard for determining a new premises under the Territorial Act in that case is not relevant to the facts in this proceeding.

Moreover, for similar reasons, this hearing body should place little weight on *Georgia Power Co. v. Jackson Electric Membership Corp.*, Docket No. 38658, (Initial Decision, October 20, 2015), (“*Jackson EMC*”). In *Jackson EMC*, the hearing body recognized there was very little difference in fundamental use of the old premises as compared to the use of the new premises. *Jackson EMC*, at 6, 10. The proposed use of the new premises was a wood pellet manufacturing operation as compared to the existing premises’s use as a wood manufacturing operation. *Id.* Both the old premises and the new premises “would use the same primary raw material (wood),

store the wood, debark the wood, reduce the size of the wood, dry the wood, press and re-form the wood into a final product, and then ship the wood product by rail or truck.” *Id.* The two processes were so similar that the new Premises planned on using some of the “very equipment” used in the old premises’s operations, “including in-feed chutes; debarking equipment; four or five dryers; regenerative thermal oxidizers (“RTOs”); and bark conveyors.” *Id.* Additionally, the much of the equipment removed at the old Premises was replaced with “more modern equipment that serves the same function.” *Id.* at 6, 11.

Unlike *Greystone*, none of the changes made by Nestlé Purina have been (or could be) reversed without costly and lengthy reconstruction efforts. Nestlé Purina has already begun testing its capacities and competencies “in order to be able to service” wet pet food for sale to consumers. (Miller Test., T-537-38) Nestlé Purina has completely transformed the facility into a state of the art wet pet food processing plant. This includes installing all new equipment specific to wet food processing, removing all existing equipment, changing the HVAC systems, electrical systems, existing utilities, constructing a cooler/freezer building, constructing a canning building, and constructing a 100,000 square foot building to house two additional processing lines. (Lawson Test., T-80; Dyke Test., T-176-77, 192-93; DeMartino Test., T-470-471) All of Nestlé Purina’s new equipment remains at the Hartwell Pet Food Facility. (Miller Test., T-540) Unlike the equipment in *Jackson EMC*, Nestlé Purina has installed all new equipment that is not a replacement of simply more modern equipment performing the same function, but equipment specific to wet pet food processing operations at the Hartwell Pet Food Facility. The newly constructed wet pet food processing and packaging facility in Hartwell is not suitable for the previous use of textile manufacturing. (Miller Test., T-557-58) For these reasons, the *Greystone* and the *Jackson EMC* decisions are not applicable to the set of facts

presented in this case and the analysis in the both decisions has minimal meaningful guidance for this hearing body.

5. *Georgia Power's Reliance on Building Code is Misplaced.*

Georgia Power for some reason presented expert testimony noting that the same building code applies to a textile operation and a pet food processing and packaging operation. That testimony is irrelevant. References to the building code are not found anywhere in the Territorial Act, or any case law interpreting the Territorial Act. Further, the purpose of the 2018 International Building Code is focused on safety, *International Building Code Section 101.3*, which is not a part of the standard in determining whether the Hartwell Pet Food Facility is a “new premise” not reconstructed in substantial kind pursuant to the Territorial Act. The Hartwell Pet Food Facility must be compliant with the requirement of the Food and Drug Administration, Food Safety Modernization Act, and all the regulations related thereto. These regulatory requirements could not be met by the shuttered textile factory at the time it was acquired by Nestlé Purina (nor is there any record evidence it did). In fact, the vast majority of the changes made by Nestlé Purina are in order to bring the Hartwell Pet Food Facility into compliance with these regulatory requirements.

B. Nestlé Purina Rightfully Selected Walton EMC as its Electric Supplier.

Nestlé Purina properly exercised its lawful choice under Georgia law. Georgia Power's suggestion that Nestlé Purina has already exercised its choice and chosen Georgia Power is contradicted by the record evidence and Georgia law. In Georgia, consumer choice can only be evidenced by a binding agreement reached through mutual assent and by meeting the requirements of contract formation. *Jackson Elec. Membership Corp. v. Georgia Public Service Commission*, 294 Ga. App. 253 (2008) (“[I]t would be unfair if large load customers could be bound to receive service from an allegedly chosen supplier absent a binding agreement reached

through mutual assent and meeting the other requirements for contract formation under Georgia law.”). Nestlé Purina never signed an agreement with Georgia Power, despite months of discussions about a possible agreement. Nestlé Purina did, however, sign an agreement with Walton EMC. Nestlé Purina thus never chose Georgia Power to supply power and never took any power from Georgia Power except to use for construction activities, equipment installation, and logistical and equipment testing. There is no record evidence of an agreement between Nestlé Purina and Georgia Power. Rather, the only evidence in the record shows Nestlé Purina has lawfully chosen Walton EMC as its electrical service provider. (WEMC Ex. 233)

1. *Nestlé Purina’s Load at “Initial Full Operation” Is Greater Than What Georgia Power Guaranteed to Nestlé Purina.*

Nestlé Purina’s load at “initial full operation” is 11.2 MW, greater than the short term solution Georgia Power offered which only included a supply of 9.9 MW. (Montgomery Test., T-383, 415) The Commission has interpreted the term “initial full operation” to mean “the load to be furnished the customer at the time the *customer commences full operation of the facility as designed*” and not when production commences. *Georgia Power Co. v. Carroll Elec. Membership Corp.*, No. 10517-U, 2001 WL 1021084 (Apr. 3, 2001) (citing *Douglas County EMC v. Georgia Power Co.*, Docket No. 3686-U (Initial Decision, June 8, 1988)). The Hartwell Pet Food Facility currently has approval for and is building three processing and packaging lines with a fourth line in the late stages of the approval process. The third line will be housed in the new 100,000 square foot building at the Hartwell Pet Food Facility. (Miller Test., T-536) While testing of the distribution center will precede processing and packaging operations at the Hartwell Pet Food Facility, lines three and four have been part of Nestlé Purina’s commitments and designs for the facility since its acquisition of the property, which was well before any distribution center operations began.

At initial full operation, Hartwell Pet Food Facility's three processing and packaging lines will have a peak load of 11.2 MW. (Montgomery Test., T-397) As explained by Ryan Montgomery, Georgia Power offered non-guaranteed electric service for a peak load of 9.9 MW, and of that 9.9 MW only 8 MW of it was guaranteed, with 1.9 MW "not [being] currently designated for Nestlé Purina and [thus its availability] could change at any time if a new customer comes into the area or an existing customer has an expansion." (Montgomery Test., T-434; GPC Ex. 74) In email communications, Georgia Power recommended to Nestlé Purina that it "immediately sign[] a contract and obtain[] full available eight megawatts from Georgia Power for the July 2019 startup." (Montgomery Test., T-435; GPC Ex. 87) Nestlé Purina did not feel comfortable with the maximum guaranteed load offered by Georgia Power and did not follow that recommendation. (Montgomery Test., T-435) Georgia Power cannot now argue that Nestlé Purina chose Georgia Power for purposes of customer choice under the Territorial Act.

2. *Georgia Power Only Provided Temporary Service to the Hartwell Pet Food Facility.*

Under the Commission's interpretation, providing temporary service to a construction site by one supplier of electric service does not preclude a large load consumer from exercising consumer choice as allowed by the Territorial Act. *City of LaGrange v. Georgia Power Co.*, 185 Ga. App. 60, 62 (1987) ("Under the PSC's interpretation, the providing of temporary service to a construction site by one supplier of electric service does not foreclose the large load consumer from choosing another authorized supplier for the permanent service to the completed site."). In *City of Lagrange*, the City of Lagrange provided electric service temporary construction and argued the extension of the service during construction provided it the exclusive right to provide service under the "grandfather clause" of the Territorial Act. *Id.* The Court rejected the City of Lagrange's argument finding that "customer choice would be eliminated whenever temporary

service is provided to construction sites under other parts of the [Territorial] Act.” *Id.* The service provided by Georgia Power is likewise temporary for Nestlé Purina’s construction activities and its testing of the Hartwell Pet Food Facility’s competencies and capacities. (Miller Test., T-537-38) The nature of the current service provided by Georgia Power to Nestlé Purina is only temporary service – service used for the construction and testing of the new premises. Georgia Power only claimed Nest Purina was receiving permanent service once Nestlé Purina decided to exercise its lawful choice. The signed letter of intent from April of this year evidences Nestlé Purina’s choice and is consistent with a customer exploring its legal options. Nestlé Purina at all times believed it had customer choice and did not make that choice until signing its letter of intent and agreement with Walton EMC. (Sandhu Test., T-361)

V. CONCLUSION

Nestlé Purina’s Hartwell Pet Food Facility is a new premises under the Territorial Act and thus Nestlé Purina lawfully chose Walton EMC as its electric service provider. Nestlé Purina invested over \$300 million dollars to create a food safe processing and packaging facility, a facility completely different than the shuttered textile factory that previously existed on the Hartwell site. Moreover, Nestlé Purina never entered into a signed agreement with Georgia Power and only received temporary service from it for construction and testing activities at the Hartwell Pet Food Facility.

For the reasons set forth above, the Commission should determine that Nestlé Purina has the lawful right under the Territorial Act to choose Walton EMC as its electric supplier for its new premise, Hartwell Pet Food Facility.

Respectfully submitted this 1st day of October, 2019.

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**BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA**

GEORGIA POWER COMPANY,

Petitioner,

v.

DOCKET NO. 42509

**THE WALTON ELECTRIC
MEMBERSHIP CORPORATION,**

Respondent,

NESTLÉ PURINA PETCARE COMPANY,

Intervenor.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **POST-HEARING BRIEF OF INTERVENOR NESTLÉ PURINA PETCARE COMPANY** in the above-referenced docket was filed with the Commission's Executive Secretary, an electronic copy of same was served upon all parties and persons listed below via electronic mail, or unless otherwise indicated, as follows:

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