EVERSHEDS SUTHERLAND

Eversheds Sutherland (US) LLP
999 Peachtree St., N.E., Suite 2300
Atlanta, GA 30309-3996

D: +1 404.853.8578
F: +1 404.853.8806

jamesorr@
eversheds-sutherland.com

Via Alternative Electronic Filing

October 6, 2023

Ms. Sallie K. Tanner
Executive Secretary
Georgia Public Service Commission
244 Washington Street, S.W.
Atlanta, Georgia 30334

RE: North Georgia EMC v. City of Calhoun
Docket No. 55220

Dear Ms. Tanner:

On behalf of North Georgia EMC, I enclose for filing North Georgia EMC's Initial Brief in the above-referenced matter.

Please call me (404-358-4314) if you have any questions about this filing.

Sincerely,

/s/ James A. Orr

James A. Orr

cc: Ms. Nancy Gibson, Hearing Officer
Parties of Record

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

NORTH GEORGIA EMC,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 55220
	)	
CITY OF CALHOUN,	)	
	)	
Respondent.	)	

INITIAL BRIEF OF NORTH GEORGIA EMC

North Georgia Electric Membership Corporation ("North Georgia EMC") hereby submits its Initial Brief in this matter, demonstrating that it has the exclusive right to serve the premises located at the Michael's Carpet building at 980 Belwood Road, Calhoun, Georgia 30701 (the "Premises").

I. SUMMARY OF ARGUMENT

Respondent the City of Calhoun (the "City") has extended its electric lines and supplied electric service to the Premises in violation of a binding Territorial Agreement and in violation of North Georgia EMC's rights under the Georgia Territorial Electric Service Act, O.C.G.A. §§ 46-3-1 through 46-3-15 (the "Territorial Act").

The Premises is located in an area beyond which the City agreed in its Territorial Agreement with North Georgia EMC that it "shall not extend its lines at any time." That contractual prohibition is plain and unambiguous, and has been repeatedly enforced by the Commission despite the City's multiple efforts to avoid it. In the City's current attempt to evade its contractual promise, the City argues that a totally separate provision in the agreement overrides the "shall not extend its lines at any time" provision and permits the City to extend its

lines to the Premises because the City has annexed and provided municipal services to the Premises. But the City's interpretation flatly contradicts the plain language of the agreement and would completely negate the "shall not extend its lines at any time" provision. To support its theory, the City relies on non-binding dicta from Commission proceedings in which the Commission rejected prior attempts by the City to renege on its agreement with North Georgia EMC.

As explained below, the only correct construction of the Territorial Agreement is that the City (1) shall not extend its lines at any time beyond the geographical boundary set forth in the Agreement, and (2) within that delineated area, the City is permitted to serve new premises upon annexation and the provision of municipal services. Because the Premises is located in the area beyond which the City promised never to extend its lines, North Georgia EMC—not the City—has the exclusive right to serve the Premises.

II. FACTUAL BACKGROUND

A. The parties' Territorial Agreement contains two geographical restrictions applicable to the City.

After the passage of the Territorial Act in 1973, North Georgia EMC, the City, and Georgia Power Company entered into a Territorial Agreement on April 8, 1975 (the "Territorial Agreement"). Stipulation ¶ 2, Ex. 1.[1] In addition, the Public Service Commission approved a territorial assignment map on September 2, 1975, in Docket No. 2833-U. *Id.* ¶ 3, Ex. 2.

The Territorial Agreement was a bargained-for exchange of promises pursuant to which North Georgia EMC gave up some of its substantial rights under the Territorial Act. In exchange,

[1] North Georgia EMC and the City filed a Stipulated List of Undisputed Facts in this proceeding on September 19, 2023 (the "Stipulation"), stipulating to certain facts.

the City also gave up certain rights. These are reflected in two geographical restrictions applicable to the City.

1. The Outer Boundary

First, the Territorial Agreement delineated a large geographical area beyond which the City agreed not to "extend its lines at any time." The parties described the perimeter of this area in detail, using land lot numbers, named waterways, and state and federal highways:

> *The parties agree that the City of Calhoun shall not extend its lines at any time* north of the northern boundary of LL's #97, 96, 95; east of I-75; south of the southern boundary of LL's #303, 302, 301, 300, 299, and 298; and west of a line that extends along the west boundary of LL's #298, 279, 262 to the city limit line just below LL #243; thence west to the center line of Ga. 53 Spur, thence along the center line of Ga. 53 Spur to Terrell Farm Road; thence along the present city limit line to where it intersects center line of the Oothcalooga Creek as it presently exists; thence along center line of the creek to where it intersects center line of the Oostanaula River as it now exists; thence north along center line of the river as it presently flows to the center line of Georgia Highway 143; thence along the present city limit line to the center of the Oostanuala River; thence along center line of Oostanaula River as it presently flows to point of beginning where the center line of the river intersects north boundary of LL #97.

Territorial Agreement at 2 (emphasis added). This perimeter will be referred to as the "Outer Boundary."

The geographical area within the Outer Boundary is geographically different from the area assigned to the City under the Territorial Act. Under the Outer Boundary provision, the City agreed never to extend its lines "at any time" beyond the specifically delineated perimeter of this area.[2] (As discussed below, because the Premises is located east of I-75, it is beyond the Outer Boundary.)

[2] In prior proceedings, this perimeter has sometimes been referred to as "the Box." However, because this shorthand phrase has not always been used consistently (see III.G. below), North Georgia EMC will use the phrase "Outer Boundary."

2. The City Limits Boundary and the Annexation Provision

Second, the Territorial Agreement describes another geographical perimeter, namely, the boundaries of the City of Calhoun. Specifically, the Agreement provides as follows:

> The City of Calhoun agrees not to extend its electric facilities outside the boundaries of the City of Calhoun to serve any additional consumer.

Territorial Agreement at 2. This boundary will be referred to as the "City Limits Boundary."

Recognizing that municipal boundaries can be enlarged by annexation, the parties addressed the effect of the City's annexation on electric service rights. In the provision immediately following the sentence quoted above, the Agreement provides:

> The City of Calhoun further agrees it will not serve electricity to any area in Gordon County or the State of Georgia until said area has been legally annexed to the City of Calhoun and all municipal services provided including: fire protection, garbage collection, water, police protection, planning and zoning, city schools, and sanitary sewers. Also, property owners in such area must be paying, or subject to pay, city taxes. NGEMC agrees that sanitary sewer will only be provided where feasible and, if feasible, construction on said sanitary sewer services must be under construction within twelve months from date of annexation and must be completed in a reasonable period of time.

Id. at 2-3. This will be referred to as the "Annexation Provision."

The Annexation Provision is written in terms of a prohibition, *i.e.*, the City "will not serve electricity to any area . . . ." The prohibition remains in place "until" the City annexes an area, provides specified city services therein, and subjects the property owners in such area to city taxation. If and only if those conditions are met, then the "will not serve" prohibition is lifted, meaning the City is no longer prohibited from providing electric service in such an area within the new city limits.

The Territorial Agreement also addressed the effect of such annexation and provision of city services on North Georgia EMC's electric service rights: "After legal annexation and the

provision of services as provided above, NGEMC will relinquish all its corridor rights inside the annexed area, but will retain its right to serve existing customers." *Id.* at 3.

Accordingly, the City agreed *both* (1) that it was prohibited from extending its lines *at any time* beyond the Outer Boundary, and (2) that *within* that Outer Boundary, it was prohibited from extending service beyond the City Limits Boundary unless and until the City had annexed an area and provided certain delineated city services therein.

B. The Territorial Act restricts the City's right to provide service in areas assigned to North Georgia EMC.

In addition to the geographical restrictions set forth in the Territorial Agreement described above, restrictions applicable to geographic territories assigned under the Territorial Act also apply. In July 1975 (a few months after the Territorial Agreement was signed), the parties agreed to and signed the territorial assignment map (Stipulation, Ex. 2), which depicts the agreed-upon geographical areas assigned to the City, North Georgia EMC, and Georgia Power. The assignment of territory as depicted on the territorial map was approved by the Commission on September 2, 1975. Stipulation ¶ 3. As provided in O.C.G.A. § 46-3-3(1), inside an assigned area, "the assignee electric suppler shall have the exclusive right to extend and continue furnishing service to new premises, except as otherwise provided in this part."

C. The City improperly extended service beyond the Outer Boundary to the Premises.

The Premises at issue in this proceeding is a new Michael's Carpet building located east of I-75 and within the geographic area shown as having been assigned to North Georgia EMC on the territorial assignment map. Stipulation ¶ 4, Ex. 2. Under the Territorial Agreement, the City agreed "not [to] extend its lines at any time . . . east of I-75 . . . ." Territorial Agreement at 2. The Premises is therefore beyond the Outer Boundary of the Territorial Agreement.

Nevertheless, the City began providing electric service to the Michael's Carpet building on or about May 24, 2023 (Stipulation ¶ 7) on the ground that the City has annexed the building and provided municipal services thereto.

The City's position—that the Annexation Provision of the Territorial Agreement permits the City to serve the Premises, even though the Premises is outside of the Outer Boundary--contradicts the plain meaning of the Territorial Agreement, the City's own history of interpreting the agreement, and the Territorial Act. This case is the latest in a long series of attempts by the City to renege on the Territorial Agreement, and as explained below, the City's reliance on dicta in a prior Commission decision is misplaced. Accordingly, North Georgia EMC has the exclusive right to serve the Premises, and the City's extension of service to the Premises was in violation of the Territorial Agreement and the Territorial Act.

III. ARGUMENT

A. Matter at Issue

The question in this proceeding is whether the City of Calhoun has the right to serve the Michael's Carpet building located at 980 Belwood Road, Calhoun, Georgia, east of I-75. Notice of Hearing and Scheduling Order at 4. As explained below, the City has violated North Georgia EMC's territorial rights and the terms of the parties' Territorial Agreement by extending its lines beyond the Outer Boundary to the Premises.

B. The City continues a long history of trying to renege on its contractual commitments under the Territorial Agreement.

North Georgia EMC has consistently abided by its contractual commitments under the Territorial Agreement. The City, by contrast, has a decades-long history of trying to back out of its contractual commitments. In the process, the City has not hesitated to contradict both stipulations and representations it has made to the Commission. The City's arguments include:

- Even though the City relinquished its right to serve customer choice loads in the Territorial Agreement, it had no right to do so. (Docket No. 14496.)
- The Outer Boundary restriction is subject to the exceptions set forth in O.C.G.A § 46-3-8, including the large load exception. (*Id.*)
- The City's agreement to contract away the right to serve customer choice loads would violate federal antitrust laws. (*Id.*)
- The Commission never actually approved the Territorial Agreement, and the City's stipulations to the contrary should be disregarded. (Docket No. 42514.)

The Commission has rejected all of these arguments (and more).

Undeterred, the City is once again trying to back out of its agreement. Contradicting representations it has made to the Commission, and discarding its decades-long interpretation of the Territorial Agreement, the City contends that it has the right to serve the Premises located *beyond* the Outer Boundary—specifically, east of I-75—on the ground that the City has annexed the property on which the Premises is located. The City's newest theory is that under the Territorial Agreement, if the City annexes and provides municipal services to a piece of property, the Outer Boundary's restriction that the City "shall not extend its lines at any time" simply disappears. What's more, the City apparently contends that annexation of the property on which the Premises is located—which is within the area assigned to North Georgia EMC—results in the relinquishment not only of North Georgia EMC's corridor rights, but *all* of North Georgia EMC's service rights in this area, thereby giving the City the exclusive right to serve the Premises. Neither argument holds water.

C. The City's newest "interpretation" would totally rewrite the Outer Boundary provision and render it superfluous.

First, as discussed above, the City Limits Boundary and Outer Boundary are two distinct geographical restrictions set forth in the Agreement. They address different situations, using different terms, to effectuate different purposes. The Outer Boundary is a geographical perimeter

described by means of land lot numbers, named waterways, etc. The parties unambiguously agreed that the City "shall not extend its lines at any time" beyond the Outer Boundary. This fixed the outer limits beyond which the City may not extend its lines.

The City Limits Boundary is not described by means of land lot numbers, waterways, etc. Instead, it is described simply as "the boundaries of the City of Calhoun." Such municipal boundaries are, by nature, subject to annexation, since municipalities in Georgia can annex territory and thereby change their corporate limits. The parties therefore addressed the effect of such an annexation, agreeing in the Annexation Provision that the prohibition against serving beyond the City Limits Boundary would remain in place "until" an area had been annexed and municipal services provided therein. Unlike the City Limits Boundary, the Outer Boundary is fixed. It is not subject to change by annexation/provision of municipal services. Quite the opposite: the parties expressly agreed that the City would be prohibited from extending its lines beyond the Outer Boundary "at any time," which would obviously include at the time of any annexation.

Second, the City's new interpretation would eviscerate the "at any time" prohibition in the Outer Boundary provision. The Agreement states that the City "*shall not* extend its lines *at any time*" beyond the Outer Boundary. The meaning of that provision is clear: as the City has acknowledged, the parties agreed that the City would never, at any time, extend its lines "in any direction of the compass" beyond the Outer Boundary. *See* Proposed Order submitted by City of Calhoun at 2, *N. Ga. EMC v. City of Calhoun* (Docket No. 5628-U Dec. 21, 1995) (discussed below). Under the City's interpretation, this provision would be revised as follows:

Provision as written in Territorial Agreement

> "The parties agree that the City of Calhoun shall not extend its lines at any time north of the northern boundary of LL's #97, 96, 95; east of I-75 …"

Provision as revised by the City

> "The parties agree that the City of Calhoun ~~shall not extend its lines at any time~~ **has the right to extend its lines** north of the northern boundary of LL's #97, 96, 95; east of I-75 … **whenever it annexes property and provides municipal services therein**."

The City's "interpretation" obviously would totally rewrite the Outer Boundary provision. Under the City's interpretation, the phrase "*shall not* extend its lines" would become the polar opposite, *i.e.*: "*has the right* to extend its lines." And rather than being prohibited from extending its lines "at any time" beyond the Outer Boundary, the City's interpretation would give it the right to do so "whenever it annexes property and provides municipal services therein." Under this rewrite, the City would be free to extend its lines *anywhere* beyond the Outer Boundary at *many* times, namely, whenever it annexes property and provides municipal services therein. Such a construction is impermissible under bedrock principles of contract construction. The terms used by parties in a contract must be given their intended meaning; they cannot be rewritten through "interpretation." *See, e.g.*, *Bearhoff v. Craton*, 350 Ga. App. 826, 834, 830 S.E.2d 362, 372 (2019) (courts are "not at liberty to ignore the specific terms of the parties' written agreement and rewrite or revise a contract under the guise of construing it.") (internal citation omitted).

Moreover, if the City's interpretation were adopted, it would render the Outer Boundary provision meaningless. The City is restricted from extending its lines outside the 1975 City Limits Boundary until it annexes an area and provides municipal services therein. According to the City, it is likewise restricted from extending its lines beyond the Outer Boundary . . . but only until it annexes an area and provides municipal services therein. This interpretation would render the Outer Boundary provision entirely superfluous. If, as the City now contends, annexation and

the provision of municipal services permitted the City to provide electric service anywhere it annexes, including beyond the Outer Boundary provision, then that provision would serve no purpose whatsoever. The Agreement would operate exactly the same way with or without the Outer Boundary provision. Such a reading is contrary to fundamental principles of contract construction. *See, e.g.*, *Milliken & Co. v. Ga. Power Co.*, 354 Ga. App. 98, 100, 839 S.E.2d 306, 309 (2020) ("Courts should not render any language in a contract as superfluous.") (citations omitted).

The only construction of the Territorial Agreement that, as required under Georgia law, gives effect to both the Outer Boundary and Annexation Provision is that (1) the City shall not extend its lines at any time beyond the Outer Boundary, and (2) inside the Outer Boundary, the City may serve electric customers if within the city limits or upon annexation and the provision of certain delineated City services. *See Ga. Farm Bureau Mut. Ins. Co. v. Gaster*, 248 Ga. App. 198, 199, 546 S.E.2d 30, 31 (2001) ("The contract is to be considered as a whole, and each provision is to be given effect and interpreted so as to harmonize with the others."); O.C.G.A. § 13-2-2(4) ("The construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part.").

D. The City has previously recognized that its annexation service rights arise only within the Outer Boundary.

The City has long construed the Outer Boundary as an ultimate limit, beyond which the City cannot extend its lines "at any time." For example, in a case involving an Advance Auto Parts store, the City described the Territorial Agreement according to its plain meaning: "As between the City and North Georgia EMC, the City agreed to a service area, *outside of which it would not extend its lines* . . . and *inside of which* the City was entitled to serve electric

customers if in the city limits, or upon annexation and the City's provision of certain delineated City services." City of Calhoun Br. at 3, *City of Calhoun v. N. Ga. EMC* (Docket No. 5090-U Sept. 23, 1994) (the "*Advance Auto*" case) (emphasis added).)[3] Thus, the City made a clear distinction between its rights "inside" and "outside" the Outer Boundary. The City unequivocally represented to this Commission that it is only "inside of" the Outer Boundary that the Annexation Provision applies. Otherwise, the City agreed that "outside of" the Outer Boundary the City would not extend its lines.

In another case, the City extended electric service to a new Mohawk facility that was located beyond the Outer Boundary but inside an annexed area. The City initially argued that it could serve the new facility under the large load exception of the Territorial Act. After an evidentiary hearing, however, the City conceded that the connected load was less than 900 kW. In its proposed order submitted to the Hearing Officer, the City acknowledged that the question of which electric supplier had the right to serve the facility "is governed by the provisions of [the] Territorial Agreement," which the City described as follows:

> The Territorial Agreement provides, in part, that Calhoun has the right to serve areas annexed into Calhoun in which Calhoun is providing specified municipal services and property owners are subject to city taxes. *Calhoun also agreed not to extend its lines at any time, in any direction of the compass, beyond specifically described boundaries . . . .*

Proposed Order submitted by City of Calhoun, at 1-2, *N. Ga. EMC v. City of Calhoun* (Docket No. 5628-U Dec. 21, 1995) (the "*Mohawk*" case) (emphasis added). The City acknowledged in its proposed order that the new Mohawk facility "may only be served by North Georgia EMC" and proposed that the City be ordered to "discontinue the provision of electric service" to the

[3] The City qualified this statement by excepting customer choice loads above 900 kW, but in a subsequently decided case discussed below (Docket No. 14496), it was held that the City could not extend its lines beyond the Outer Boundary to serve such large loads.

facility and "arrange for the orderly transfer of service [to North Georgia EMC] as soon as practicable." *Id.* at 6. Thus, in that case—even where the Mohawk facility was located in an annexed part of the City—the City asked the Commission to *order the City to discontinue serving a premises beyond the Outer Boundary* and transfer service to North Georgia EMC. The City thus candidly acknowledged and represented to the Commission that its right under the Territorial Agreement to serve in annexed areas ends at the Outer Boundary, beyond which the City agreed not to extend its lines at any time "in any direction of the compass." *Id.* at 2.

E. The City's reliance on non-binding dicta in prior Commission decisions is wholly misplaced.

1. City's reliance on the Commission's *denial* of the City's request for a declaration of its purported right obviously cannot support the City's *assertion* of such right.

As ostensible support for the City's newfound interpretation of the Territorial Agreement, the City cites a recent Commission decision in which the City's request for declaratory relief on this point was *denied*. *See* Answer and Defenses of Resp't City of Calhoun at 1-2. Specifically, in *City of Calhoun's Petition for Declaratory Ruling*, Docket No. 42514, the City sought two declaratory rulings: (1) a declaratory ruling that the Territorial Agreement was not actually adopted by the Commission, and (2) if the Agreement had been adopted, then a declaratory ruling that under the Agreement, the City "has the right to extend electric service lines outside of the Box when it has (a) legally annexed the property; and (b) provided municipal services to the property." *In re: City of Calhoun*, Docket No. 42514 (City's Pet. for Declaratory Ruling ¶ 37) (filed May 1, 2019). The Commission explicitly *denied* both requests. *Id.* (Order Denying City of Calhoun's Pet. for Declaratory Ruling May 17, 2022) (the "Declaratory Ruling Order").

Thus, the purported right the City advances in the current dispute—the right, upon annexation/provision of municipal services to a property, to extend its lines beyond the Outer

Boundary to such property—was *denied* by the Commission. The Commission's decision *denying* the City's request for the declaration of a purported right obviously provides no support for a subsequent *assertion* of such right.

2. The City's reliance on dicta referred to in the Declaratory Ruling Order is likewise unavailing.

Instead of accepting that the Commission has *denied* the City the very right it asserts here, the City relies on references in the Declaratory Ruling Order to non-binding dicta from a prior Territorial Act case between the City and North Georgia EMC, namely, *North Georgia EMC v. City of Calhoun*, Docket No. 14496 (Initial Decision May 28, 2003) (the "*Kerry Foods*" case). That case—which was also decided against the City—concerned the City's extension of electric service to a new food manufacturing facility constructed by Kerry Foods. *Id.* at 16. The City acknowledged that the facility was located beyond the Outer Boundary and that the parties' Territorial Agreement clearly stated that Calhoun would not extend its lines at any time beyond such boundary. *Id.* at 11, 13. But the City argued nevertheless that the Outer Boundary was subject to the large load exception set forth in O.C.G.A. § 46-3-8. **The City represented to the Commission that, *except* for customers that could be served under O.C.G.A. § 46-3-8, the Territorial Agreement "*should be interpreted as precluding it from serving any electric customers located outside of the* [*Outer Boundary*].**" City's Post-Hearing Br. at 5 (emphasis added). This is consistent with the City's representations to the Commission in the *Advance Auto* and *Mohawk* cases described above.

The Hearing Officer in *Kerry Foods* rejected the City's argument that the Outer Boundary provision was subject to the exceptions set forth in O.C.G.A. § 46-3-8. He also ruled, alternatively, that the City had failed to demonstrate that the Kerry Foods building would have a connected load of 900 kW or greater. Initial Decision at 36-37. Unsurprisingly, the City does not

rely on the Hearing Officer's actual *rulings* in *Kerry Foods* for its current position, nor could it. Instead, the City relies on certain non-binding *dicta* in the 38-page *Kerry Foods* Initial Decision regarding "expansion" of "the Box" through annexation and the provision of municipal services.

Notably, no facts were presented regarding annexation or the provision of municipal services to the facility in the *Kerry Foods* case. No issue was presented as to whether annexation and the provision of municipal services to the Kerry Foods property, or any other property, eliminated or otherwise affected the Outer Boundary restrictions (or "expanded" the "Box"). No such issue was briefed by the parties. Nor was the "expansion" idea relevant to the issue to be decided: whether the Kerry Foods building could be served under the large load exception. The Hearing Officer's statements about "expanding" the "Box" were classic non-binding dicta, which is "inherently unreliable"[4] and "not binding on anyone for any purpose." *Alexander v. State*, 313 Ga. 521, 529, 870 S.E.2d 729, 737 (2022) (quoting *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1298 (11th Cir. 2010)). *See generally Zepp v. Brannen*, 283 Ga. 395, 397, 658 S.E.2d 567, 569 (2008) (defining dicta as "a statement in an opinion 'concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'") (citations omitted). Accordingly, the City's reliance on the Hearing Officer's "expanding" "Box" dicta in *Kerry Foods* is misplaced.

The Hearing Officer's references to "expanding" the "Box" in *Kerry Foods* were also internally inconsistent. He first used, and defined, "the Box" at page 11 of the Initial Decision.

[4] "[D]icta is inherently unreliable for what a court will do once faced with a question squarely and once its best thoughts, along with briefs and oral argument, are focused on the precise issue." *United States v. Teague*, 953 F.2d 1525, 1536 (11th Cir. 1992) (Edmondson, J., concurring); *see also McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1315 (11th Cir. 1998) (Carnes, J. concurring) ("Deciding real issues presented by real parties in real time focuses judicial decision making in ways that making speculative pronouncements about hypothetical questions cannot.").

He stated that Calhoun's representative had admitted that the City agreed not to extend its lines at any time "beyond *the City's territory* as defined in such Territorial Agreement and shown on maps presented at hearing (hereinafter 'the Box')" (emphasis added). Thus, the Hearing Officer's definition of "the Box" was "the City's territory." The "City's territory" manifestly was *not* the geographic area bordered by the Outer Boundary. The only "territory" that could be said to be "the City's" would be that territory assigned to the City by the Commission under the Territorial Act. That area is depicted on the territorial map. Stipulation at Ex. 2. As noted above, the area assigned to the City is geographically different from the area encompassed by the Outer Boundary. While the Hearing Officer in *Kerry Foods* first used and defined the term "the Box" as being the "City's territory," *i.e.*, the area assigned to the City by the Commission, elsewhere he apparently used "the Box" to refer to the Outer Boundary. *See, e.g.*, Initial Decision at 20. At other times, he seems to have used "the Box" to refer both to the City Limits Boundary and to the Outer Boundary. *Id.* at 16. This inconsistency had no bearing on resolution of the issue before the Hearing Officer because the Kerry facility was located beyond both the City Limits Boundary *and* the Outer Boundary.

In addition to the inconsistencies noted above, the Hearing Officer in *Kerry Foods* was not always clear in describing what he viewed to be the characteristics of "the Box." His Initial Decision included unequivocal statements that the City was prohibited from extending its lines beyond the Outer Boundary. For example, he stated, "Certainly, the Territorial Agreement itself (Exhibit P-2) contains *no provisos or exceptions* to or from the 'City of Calhoun shall not extend its lines' language on page 2 of such Agreement." *Id.* at 18 (emphasis added).

At other times, however, the Hearing Officer alluded to the idea of "expanding" the "Box." The words "expand," "expanding," and other derivations thereof do not appear in the

Territorial Agreement. His statements in this regard are an apparent reference to the Annexation Provision, which provides for the potential lifting of the prohibition on the City's right to provide service outside the 1975 City Limits Boundary upon annexation/provision of municipal services. Moreover, when the Hearing Officer's statements regarding his "expansion" idea are considered in context, it is clear that they pertain to the Annexation Provision. *See, e.g.,* Initial Decision at 16-17 (reference to "expansion of the Box by CALHOUN's *annexation of and provision of municipal services* to a new area") (emphasis added); *id.* at 6 (reference to "growth by annexation"); *id.* at 14 (reference to "ever-expanding Box as a result of Calhoun's annexations"); *id.* at 20 (reference to expansion "by future annexation and extension of other municipal services.")

As noted above, the words "expansion," "expanding," etc., do not appear in the Territorial Agreement. The only plausible basis for the Hearing Officer's references to this concept was the Annexation Provision related to the City Limits Boundary. Thus, it is not surprising that the Hearing Officer's dicta regarding "expansion" is repeatedly coupled with references to annexation and the provision of municipal services. While his use of the term "the Box" was at times inconsistent, and his statements regarding the "expanding" "Box" were not always clear, these statements plainly referred to potential changes in the City Limits Boundary through annexation of property and the provision of municipal services therein. Thus, in addition to being non-binding dicta, the Hearing Officer's statements regarding "expansions" would pertain only to the City Limits Boundary—*not* to the Outer Boundary.

3. The City itself has repeatedly acknowledged that under the Territorial Agreement, it is prohibited from serving beyond the Outer Boundary.

And that is how the City itself has read the Agreement and *Kerry Foods* Initial Decision. As noted above, the City acknowledged in its post-hearing brief in *Kerry Foods* that other than its assertion that the Agreement did not apply to large load customers (which was rejected by the Hearing Officer), the Territorial Act precluded the City from serving any customers located beyond the Outer Boundary. The City did not change its view after issuance of the Initial Decision in that case. In a brief to the Superior Court of Fulton County in support of its appeal of the *Kerry Foods* decision, the City, after defining "the Box" in reference to the "shall not extend its lines at any time" provision, stated that "[t]he Territorial Agreement limited Calhoun's *future expansion* of exclusive territory to territory annexed *within the Box* to which other city services have been provided." City's Initial Br. at 18, Fulton Co. Super. Ct., Case No. 2004-CV-84340, June 15, 2004 (emphasis added).[5] Thus, the City—both before and after issuance of the *Kerry Foods* Initial Decision—confirmed its long-held understanding that any "expansion" rights were limited to annexations *within* the Outer Boundary.

The City's penchant for contradicting itself is head-spinning. Over the span of nearly three decades, the City has repeatedly acknowledged that under the plain terms of the Territorial Agreement, any right it has to serve in annexed areas arises only within the Outer Boundary. In filings with both this Commission and the courts, the City has stated:

- "As between the City and North Georgia EMC, the City agreed to a service area, *outside of which it would not extend its lines* . . . and *inside of which* the City was entitled to serve electric customers if in the city limits, or upon annexation and the City's provision of certain delineated City services." City of Calhoun Br. at 3, *City of Calhoun v. N. Ga.*

[5] As discussed above and below, annexation and the provision of municipal services would simply lift the prohibition on the City's right to serve new premises in annexed areas (and result in the relinquishment of certain North Georgia EMC corridor rights). Thus, contrary to the City's characterization, it would not grant the City any new territory, much less "exclusive territory."

EMC (Docket No. 5090-U Sept. 23, 1994) (the "*Advance Auto*" case) (emphasis added).

- "The Territorial Agreement provides, in part, that Calhoun has the right to serve areas annexed into Calhoun in which Calhoun is providing specified municipal services and property owners are subject to city taxes. *Calhoun also agreed not to extend its lines at any time, in any direction of the compass, beyond specifically described boundaries . . .* ." Proposed Order submitted by City of Calhoun, at 1-2, N. Ga. EMC v. City of Calhoun (Docket No. 5628-U Dec. 21, 1995) (the "Mohawk" case) (emphasis added) (the City recommended that, because the facility was located beyond the Outer Boundary, the Commission order the City to discontinue serving it and transfer service to North Georgia EMC—even though the facility was located in an area annexed to the City).

- The Territorial Agreement "*should be interpreted as precluding [the City] from serving any electric customers located outside of the* [*Outer Boundary*] . . . ." City's Post-Hearing Br. at 5, filed with Commission in *N. Ga. EMC v. City of Calhoun*, Docket No. 14496 (Initial Decision May 28, 2003) (the "*Kerry Foods*" case).

- "The Territorial Agreement limited Calhoun's *future expansion* of exclusive territory to territory annexed *within the Box* to which other city services have been provided." City's Initial Br. at 18, Fulton Co. Super. Ct., Case No. 2004-CV-84340, June 15, 2004 (emphasis added).

The City's current position flies in the face of these prior representations to the Commission. This is yet another attempt by the City, in a long line of attempts, to renege on its contractual commitments. Just as before, the City's latest position of convenience contradicts the plain words of the Territorial Agreement and should be rejected.

F. In any event, annexation does not result in the re-assignment of territory from North Georgia EMC to the City.

Even if the City's annexation of the Premises could eliminate the Outer Boundary restrictions in that area (though it manifestly could not), the City still would have no right to extend electric service to the Premises. As demonstrated above, even when the Annexation Provision applies, it alters electric service rights in only two respects: (1) the City is no longer prohibited from extending electric service in an annexed area, and (2) North Georgia EMC relinquishes corridor rights as to new premises (but not existing customers) in the annexed area.

What the Annexation Provision does *not* do is effectuate a re-assignment of the annexed area from North Georgia EMC to the City.

O.C.G.A. § 46-3-7 of the Territorial Act addresses the effect of annexation on territorial assignments. Subpart (1) and subparts (2)(A), (B), and (C) address annexations to "wholly new municipalities" (coming into existence after March 29, 1973) and annexations that result from mergers, consolidations, or other combinations of municipalities. Neither is applicable here. Subpart (2)(D) provides that as to geographic areas annexed other than by merger, consolidation, etc., "so much of such geographic area, if any, as was already assigned to an electric supplier shall continue to be so assigned."

Thus, a typical municipal annexation results in no change to territorial assignments. The annexed area continues to be assigned to the electric supplier to whom it was assigned prior to annexation. Nothing in the Territorial Agreement purports to override this provision of the Territorial Act. Nor could it. The reassignment of territory is strictly limited under the Territorial Act. *See* O.C.G.A. § 46-3-8(d). First, only the Commission has authority to re-assign territory. *See* O.C.G.A. § 46-3-8(d) (if certain requirements are met, "the commission may . . . reassign" territory). Thus, any re-assignment of territory could only be accomplished by Commission order. This makes sense, because only the Commission had authority to assign territory in the first instance. *See, e.g.,* O.C.G.A. 46-3-4. Second, the Commission's authority to re-assign territory is strictly circumscribed. The Commission is authorized to re-assign territory only "[i]f it determines that an assignee electric supplier has breached the tenets of public convenience and necessity therein." O.C.G.A. § 46-3-8(d)(1). Obviously, the Commission has made no such determination here; nor would it have any basis for doing so.

Accordingly, the City's annexation of the Premises does not change the underlying territorial assignments. The Premises is located within North Georgia EMC's assigned area. Stipulation ¶4. This means that, absent some exception not applicable here, North Georgia EMC retains the exclusive right—before and after annexation—to serve the Premises. *See* O.C.G.A. § 46-3-3(1) ("'Assigned area' means an enclosed geographic area assigned to only one electric supplier by the commission or by this part, and inside which the assignee electric supplier shall have the exclusive right to extend and continue furnishing service to new premises, except as otherwise provided in this part.") Thus, even if annexation of the property on which the Premises is located had eliminated the Outer Boundary in that area—though it did not—North Georgia EMC would have retained the exclusive right to serve the Premises.

IV. CONCLUSION

For the foregoing reasons, the City's extension of service to the Premises is in violation of the provisions of the Territorial Act and the Territorial Agreement, and North Georgia EMC is the sole lawful supplier of electric service to the Premises. The Hearing Officer should grant North Georgia EMC's Petition and enter an Order that the City immediately cease and desist from furnishing electric service to the Premises and disconnect the electric service provided by the City to the Premises and transfer such service to North Georgia EMC.

Respectfully submitted, this 6th day of October, 2023.

/s/ *James A. Orr*
James A. Orr (Ga. Bar No. 554608)
Lee A. Peifer (Ga. Bar No. 367028)
Benjamin E. Reed (Ga. Bar No. 719210)
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, N.E., Suite 2300
Atlanta, Georgia 30309-3996
(404) 853-8000

jamesorr@eversheds-sutherland.com
leepeifer@eversheds-sutherland.com
benreed@eversheds-sutherland.com

Henry C. Tharpe, Jr. (GA Bar No. 703250)
THARPE LAW FIRM, LLC
225 W. King Street
Dalton, Georgia 30722
706-275-7326 (t)
706-270-9438 (f)
htharpe@daltongalaw.com

Attorneys for North Georgia EMC

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing **INITIAL BRIEF OF NORTH GEORGIA EMC** by email as follows:

Sallie K. Tanner
Executive Secretary
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, Georgia 30334
stanner@psc.state.ga.us

Nancy G. Gibson
Hearing Officer
Georgia Public Service Commission
244 Washington Street, SW
Atlanta, Georgia 30334
ngibson@psc.state.ga.us

Peter K. Floyd
Michael H. Shanlever
Hanna S. McLean
Christopher E. Johnson
ALSTON & BIRD LLP
1201 West Peachtree Street, Suite 4900
Atlanta, Georgia 30309-3424
peter.floyd@alston.com
mike.shanlever@alston.com
hannahmclean@alston.com
chris.johnson@alston.com

George P. Govignon
City Attorney
City of Calhoun, Georgia
GOVIGNON LAW OFFICE
109 North Wall Street
Calhoun, Georgia 30701
govignonlawoffice@gmail.com

Brad Carver
HALL BOOTH SMITH, P.C.
191 Peachtree Street, NE, Suite 2900
Atlanta, Georgia 30303
BCarver@hallboothsmith.com

I have also filed a copy of the foregoing with the Commission via the Commission's Alternative Electronic Filing Procedures.

This 6th day of October, 2023.

/s/ *James A. Orr*
James A. Orr (Ga. Bar No. 554608)
EVERSHEDS SUTHERLAND (US) LLP
999 Peachtree Street, N.E., Suite 2300
Atlanta, Georgia 30309-3996
(404) 853-8000

Attorneys for North Georgia EMC