BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

NORTH GEORGIA EMC,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 55200
	)	
CITY OF CALHOUN,	)	
	)	
Respondent.	)	

INITIAL BRIEF OF RESPONDENT CITY OF CALHOUN

I. INTRODUCTION

This matter involves a purely legal dispute between Respondent City of Calhoun ("Calhoun") and Petitioner North Georgia Electric Membership Corporation ("NGEMC"): whether Calhoun has the right to serve the Michael's Carpet building located at 980 Belwood Road, Calhoun, Georgia (the "Michael's Building") after legally annexing and providing all municipal services to the Michael's Building. This dispute is before the Public Service Commission (the "PSC") on NGEMC's Petition, which is the latest of many attempts by NGEMC to relitigate an issue that the PSC has explicitly resolved on multiple occasions, including most recently, just last year.

In 2022, the PSC confronted this same issue head on in Docket No. 42514. In that case, Calhoun submitted a Petition for Declaratory Ruling to the PSC seeking, among other relief, a declaration that under the parties' 1975 Territorial Agreement (the "Agreement," to which Georgia Power Company is also a party), Calhoun "has the right to extend service lines outside of the Box[1]

[1] As described in prior filings with the PSC, and as further addressed below, "[t]he Box is defined in the Agreement as an area with its easterly border as I-75 and its westerly border stretching to approximately the intersection of Beamer Road SW and New Zion Road SW. The northerly border of the Box stretches to

when it has (a) legally annexed the property; and (b) provided municipal services to the property." *See* Calhoun's 2019 Petition for Declaratory Ruling, pp. 14-15 (Docket No. 42514) (hereinafter "Calhoun's 2019 Petition"). In doing so, Calhoun sought necessary clarity from the PSC to finally resolve this ongoing dispute, and the PSC provided that clarity. In its final Order Denying Calhoun's Petition for Declaratory Relief, dated May 17, 2022 (the "2022 Ruling"), the PSC concluded that the matter had already been resolved in Calhoun's favor and on that basis, denied Calhoun's request for declaratory relief. NGEMC did not contemporaneously challenge or appeal the 2022 Ruling.

Since that time, Calhoun has been conducting itself in accordance with the 2022 Ruling. In 2022, Calhoun legally annexed the Michael's Building and provided all municipal services to the building. *See* Stipulated List of Undisputed Facts, p. 2, ¶¶ 5-6 (Docket No. 55200) (hereinafter the "Stipulations"). NGEMC does not dispute these facts. *Id.* Having met all prerequisites under the Territorial Agreement, Calhoun began providing electric service to the Michael's Building on or about May 24, 2023. *See id.*, at p. 2, ¶ 7.

Now, a year after the PSC issued the 2022 Ruling, NGEMC is, once again, trying to relitigate this issue by asking the PSC to overturn its own recent and established precedent. However, the PSC need look no further than the 2022 Ruling (and the prior decisions referenced therein) in order to quickly resolve this matter in favor of Calhoun. Calhoun asked the PSC for direction, and the PSC provided that direction. Although NGEMC is apparently displeased with that outcome, it failed to timely request reconsideration or appeal the 2022 Ruling and should not

approximately Damascus Road NE and the southerly border to Old Belwood Road. Notably this is not the same area as the City's assigned electric territory in the Territorial Map." *City of Calhoun's Petition for Declaratory Relief*, p. 9, fn. 1 (Docket No. 42514).

now be allowed to collaterally attack that decision. On this basis, Calhoun respectfully requests that the PSC deny NGEMC's Petition as unfounded and contrary to established precedent.

Moreover, to the extent that the PSC is inclined to revisit the 2022 Ruling (which it need not do), NGEMC's argument remains as incorrect now as it was before. Now, NGEMC attempts to paint the PSC's clear and longstanding interpretation of the Territorial Agreement as being premised on a misunderstanding of key terms – most notably, the concept of the "Box." Yet, a review of the PSC's prior decisions shows that NGEMC's argument continues to be without merit.

Calhoun asks the PSC to decline NGEMC's attempts to, once again, relitigate this issue in hopes of obtaining a different answer. The PSC has given due consideration to the Territorial Agreement – and specifically, the language addressing annexation – and provided the clarity sought by Calhoun via its 2022 Ruling. By bringing this same issue back to the PSC, NGEMC is wasting the PSC's valuable time and public resources (as well as Calhoun's). For these reasons, and as further set forth herein, Calhoun respectfully requests that the PSC find that Calhoun has the right to serve the Michael's Building after legally annexing and providing all municipal services, as authorized by the Territorial Agreement and decades of prior precedent.

II. FACTUAL BACKGROUND

The General Assembly passed the Georgia Territorial Electric Service Act in 1973 to regulate and standardize the electric service in Georgia, as described in O.C.G.A. § 46-3-1, *et seq*. (the "Territorial Act"). Under the Territorial Act, the PSC is authorized to assign monopoly geographic territories and work with electric service providers to identify historic corridor rights captured within those geographic territories. *See* O.C.G.A. §§ 46-3-4–8. The Territorial Act instructs that the territorial assignment process take the form of territorial maps showing clearly delineated boundaries and indicating which providers have primary service rights. See O.C.G.A.

§ 46-3-4(1) ("Assigned areas shall be described by defined boundaries on maps to be filed with the commission and incorporated by it in its orders.").

After passage of the Territorial Act, the PSC issued regulations encouraging electric suppliers to submit negotiated territorial assignments for approval.[2] *See* 2022 Ruling, p. 4 (citing Ga. Comp. R. & Regs. 515 11-1-.01–08). Pursuant to those regulations, in April 1975, NGEMC, Calhoun, and Georgia Power Company entered into the tripartite Territorial Agreement in order to establish their respective service rights in Gordon County. In relevant part, the Territorial Agreement states:

> 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 ofl-75; south of the southern boundary of LL's #303, 303, 301, 300, 299, and 298; and west of a line that extends along the west boundary of LL's #298, 297, 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 14 3; 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. . .
>
> The City of Calhoun agrees not to extend its electric facilities outside the boundaries of the City of Calhoun to serve any additional consumer. **The City 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**

[2] As described in Calhoun's 2019 Petition, Calhoun has challenged whether the Agreement has been fully approved and adopted by the PSC. In recognition of the PSC's 2022 Ruling that the PSC had previously determined that the Agreement was approved by the PSC, Calhoun does not raise that challenge again here. However, should the PSC decide to reverse its opinion in the 2022 Ruling related to Calhoun's rights to expand under the Agreement, Calhoun reserves its right to assert that challenge again in any subsequent appeals or proceedings.

> **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. . . .
>
> 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 rights to serve existing customers.

See Stipulations, Exhibit 1 (emphasis added).

The territory described in the first paragraph quoted above has been subsequently referred to by the PSC (and Calhoun) as the "Box." *See* 2022 Ruling, p. 4, fn.1; *see also* City of Calhoun's Petition for Declaratory Relief, p. 9 (Docket No. 42514). The bolded language in the second paragraph quoted above, referred to herein as the "Annexation Provision," authorizes Calhoun to serve electricity to an area upon legal annexation and provision of the listed municipal services.

In the nearly fifty years since execution of the Territorial Agreement, the interpretation of the parties' respective rights has been the subject of frequent disputes, particularly between NGEMC and Calhoun. For example, in 2001, the parties disputed Calhoun's right to expand outside of the Box to service a facility pursuant to the "large load exception" in the Territorial Act. *See* Initial Decision, pp. 1-2 (Docket No. 14496) (the "2003 Initial Decision"). In that dispute, the PSC also considered several arguments related to the enforceability of the Territorial Agreement and the intent of the Territorial Agreement. *Id.* In the 2003 Initial Decision, the PSC concluded that Calhoun had not satisfied its burden to prove its entitlement under the large load exception, and additionally made several Findings of Fact and Conclusions of Law pertaining to Calhoun's rights under the annexation provision.[3]

[3] *See* 2003 Initial Decision, Conclusions of Law, ¶ 6 (". . . the Agreement provides that the bounds of the Box may from time to time be expanded by CALHOUN' s annexation of, and extension of municipal service to new territory. . . . By such language, the parties clearly intended to keep CALHOUN from providing

Most recently, in May 2019, Calhoun sought the PSC's guidance on this exact issue in Docket No. 42514. In that case, Calhoun's 2019 Petition sought, among other relief, a declaration that Calhoun "has the right to extend service lines outside of the Box when it has (a) legally annexed the property; and (b) provided municipal services to the property." *See* Calhoun's 2019 Petition, pp. 14-15 (Docket No. 42514). Calhoun argued that pursuant to the plain language of the Territorial Agreement, and as supported by the PSC's prior rulings, Calhoun is entitled to expand its electric services to any area that it annexes and provides municipal services. *Id.* Essentially, Calhoun argued that the Annexation Provision authorizes it to expand its electric services outside of the Box, subject to Calhoun annexing the area and providing the requisite municipal services. *Id.* Calhoun further argued that although the PSC had already answered this question in the affirmative in prior matters, the added clarity afforded by a declaratory judgment would facilitate Calhoun's long-term growth planning. *See* City of Calhoun's Reply Brief in Support of Petition, pp. 18-21 (Docket No. 42514) (hereinafter "Calhoun's 2019 Reply Brief").

In opposition, NGEMC argued – like it does here – that the Annexation Provision only applies to the area inside of the Box. *See generally* NGEMC's Opposition Brief (Docket No. 42514). After briefing by both sides, the PSC entered the 2022 Ruling, denying Calhoun's request for declaratory relief on the basis that the PSC had ***already resolved*** the issue in Calhoun's favor in prior actions. Specifically, the PSC agreed with Calhoun that the matter had already been resolved – finding that Calhoun ***did*** have the right to extend its services when the conditions in the Annexation Provision are met – and for that reason, declaratory relief was not warranted. *See* 2022

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electric service outside the Box in Gordon County, although permitting the expansion of the Box by CALHOUN's annexation of and provision of municipal services to a new areas."); *see also* 2003 Initial Decision, Findings of Fact, ¶ 5 ("From the plain language above, CALHOUN has clearly limited its service in Gordon County to serving electric customers within the prescribed territory, except for specifically named customers and subdivisions and except for CALHOUN's growth by annexation and the provision of other municipal services, as well as electricity, in the annexed territory.").

Ruling, pp. 7-8 ("This question, too, has already been answered by the Commission. . . . Because the prior Commission Order has already addressed this issue, no declaratory relief is warranted."). Notably, NGEMC did not timely challenge or appeal the 2022 Ruling, and as such, it remains the law of the land.

Since that time, Calhoun has conformed its conduct with the 2022 Ruling. On May 1, 2022, Calhoun legally annexed the Michael's Building, which is located east of I-75 and is thus located outside of the Box. *See* Stipulations, p. 2, ¶¶ 4-5. After annexing the Michael's Building, Calhoun began providing the Michael's Building with all municipal services required by the Annexation Provision (i.e., fire protection, garbage collection, water, police protection, planning and zoning, city schools, and sanitary sewers). *Id.* at ¶ 6. These facts are not in dispute. Having satisfied all requirements in the Annexation Provision and acting in reliance on the 2022 Ruling and the prior precedent cited therein, Calhoun began providing electric service to the Michael's Building on May 24, 2023. *Id.* at ¶ 7. NGEMC filed its Petition shortly thereafter.

III. QUESTION PRESENTED

The parties jointly submit the following question to the PSC: whether Calhoun has the right to serve the Michael's Building located at 980 Belwood Road, Calhoun, Georgia, east of I-75.

IV. ARGUMENT

A. <u>The PSC has Already Resolved the Matter at Issue in Favor of Calhoun.</u>

To answer the question of whether Calhoun has the right serve the Michael's Building, the PSC must determine whether Calhoun has the right to serve an area that is located outside the Box after legally annexing and providing municipal services to that area, as contemplated by the Territorial Agreement. As described above, this *exact* question was considered by the PSC within

the last 18 months,[4] was briefed by both parties,[5] and was specifically answered by the PSC in Calhoun's favor.[6]

Again, in the 2022 Ruling, the PSC denied Calhoun's request for a declaratory ruling on the grounds that the question "has already been answered by the Commission." *See* 2022 Ruling, p. 7. To reach that conclusion, the PSC outlined the multiple times that it had previously found that Calhoun is entitled to expand its electric services to any legally annexed property that is outside the Box. For example, the PSC quoted from the 2003 Initial Decision as follows: "the Hearing Officer noted multiple times that the Territorial Agreement permitted 'the Expansion of the Box by CALHOUN's annexation of and provision of municipal services.'" *See id.* at p. 8. The PSC cited additional language in the 2003 Initial Decision that further supported the fact that the PSC had already decided this issue in favor of Calhoun:

> In Docket 14496, the Hearing Officer noted multiple times that the Agreement permitted "**the expansion of the Box by CALHOUN's annexation of and provision of municipal services to a new areas**." Initial Decision, Conclusions of Law Para. 6, pp. 16-17; see also Findings of Fact Para. 5, pp. 6-7 ("Calhoun has clearly limited its service in Gordon County to serving electric customers within the prescribed territory, . . . **except for Calhoun's growth by annexation and the provision of other municipal services, as well as electricity, in the annexed territory**"; Findings of Fact Para 25, p. 14 (The Hearing Officer **described the Box as "ever-expanding . . . as a result of CALHOUN's annexations**"); and Conclusions of Law Para 11, p. 20 (Calhoun's promise not to extend its lines applies to "outside the Box, as **expanded by future annexation and extension of other municipal services**").

[4] "[Calhoun] seeks declaratory relief that, under the Agreement, it 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." Calhoun's 2019 Petition, ¶ 37 (Docket No. 42514).
[5] *See* Calhoun's 2019 Petition, ¶¶ 17-25, 37 (Docket No. 42514); *see also* NGEMC's Opposition Brief, pp. 3-4, 15-17 (Docket No. 42514); *see also* Calhoun's Reply Brief in Support of Petition, pp. 2-3, 5-6, 17-22 (Docket No. 42514).
[6] *See generally* 2022 Ruling.

Id. (emphasis added). The PSC then noted that the 2003 Initial Decision had ultimately been adopted by the full PSC. *Id.* ("The Commission adopted the prior Hearing Officer's Findings of Fact and affirmed his Conclusions of Law as well as his ultimate conclusion in a Final Order on March 4, 2004.").

Calhoun has acted in accordance with the PSC's 2022 Ruling. There is no dispute that Calhoun has properly annexed this property and has begun providing all the services that have been laid out in the Territorial Agreement. *See* Stipulations, ¶¶ 5-7. Calhoun has followed the PSC's guidance exactly and has expended significant time and resources extending municipal services based on the PSC's ruling. NGEMC now looks to have the PSC reverse a decision it made less than a year and a half ago. However, NGEMC's Petition is based on mischaracterizations of the PSC's previous rulings and a procedurally improper attempt to appeal those rulings.

NGEMC was entitled to seek reconsideration by the full body of the PSC and, if needed, judicial review of the 2022 Ruling when first issued. Under O.C.G.A. § 50-13-17, in a contested case, when the initial hearing officer of the PSC makes an initial decision and that initial decision is not contested within thirty days from the date of notice of the initial decision, it becomes the final decision of the agency. Under O.C.G.A. § 50-13-19, a party who is aggrieved by the PSC's final decision must file a petition for judicial review before the Fulton County Superior Court within thirty days of the final decision. A party is "aggrieved" when they have "an interest in the agency decision that has been specially and adversely affected thereby." *See Georgia Power Co. v. Campaign for Prosperous Georgia*, 255 Ga. 253 (1985). Given that the 2022 Ruling recognized Calhoun's right to expand the Box based on the Annexation Provision, NGEMC was therefore aggrieved by that decision and thus legally permitted to seek agency reconsideration and judicial review.

NGEMC failed to do so, instead waiting until this year to levy a collateral attack against the 2022 Ruling in its Petition. Applicable law provides that an aggrieved party must exhaust its remedies at the agency level – here, requesting reconsideration of the 2022 Ruling by the full PSC within thirty days of the initial decision. *See, e.g.*, *Carnes v. Crawford*, 246 Ga. 677 (1980) (denying a request for judicial review on the grounds that the plaintiff had failed to first request an full agency review of the initial decision and thus had failed to exhaust their administrative remedies); *Dep't of Public Safety v. Maclafferty,* 230 Ga. 22 (1973) (same); *Alexander v. Dep't of Revenue,* 316 Ga. App. 543 (2012) (same). By failing to request agency review, NGEMC failed to exhaust its administrative remedies and is now precluded from relitigating this issue under the theory of collateral estoppel. *Macon Water Auth. v. City of Forsyth*, 262 Ga. App. 224, 227 (2003) ("Under Georgia law, administrative decisions may have a collateral estoppel effect in a subsequent judicial proceeding.").

As held in *Macon Water Auth.*:

> There are four requirements for application of the doctrine of collateral estoppel: (1) both proceedings must involve the same parties or their privies; (2) the issue must have been actually litigated and determined in the first proceeding; (3) that determination must have been essential to the judgment in the first proceeding; and (4) the party against whom the doctrine is asserted must have had a full opportunity to litigate the issue in question.

Id. Further, the Georgia Supreme Court has applied the Restatement of Law, Second, Judgments § 83, comment b, to administrative cases in Georgia. This comment states that:

> . . . [W]here an administrative agency is engaged in deciding specific legal claims or issues through a procedure substantially similar to those employed by courts, the agency is in substance engaged in adjudication. Decisional processes using procedures whose formality approximates those of courts may properly be accorded the conclusiveness that attaches to judicial judgments.

Lilly v. Heard, 295 Ga. 399, 402-03 (2014) (internal citation omitted).

Here, all four requirements established in *Macon Water Auth* are satisfied. First, the proceedings involve the same parties (NGEMC and Calhoun). Second, the question, as described above, was litigated and determined in the prior proceeding. Third, given that the question here is identical to the question posed by Calhoun in its 2019 Petition and was one of two independent issues ruled on by the PSC in the 2022 Ruling,[7] it is clear that the question of Calhoun's rights under the Annexation Provision was essential to the PSC's decision in the 2022 Ruling. Fourth and finally, NGEMC had the full opportunity to brief the issue and did specifically discuss it in its Brief in two separate locations. *See* NGEMC's Opposition Brief, pp. 3-4, 15-17 (Docket No. 42514). While NGEMC may now wish it had made different arguments before the PSC in 2022 or timely pursued reconsideration or appeal, that does not change the fact that NGEMC had the full opportunity to litigate the issue. NGEMC failed to do so and the 2022 Ruling is therefore binding.

For the foregoing reasons, the PSC has already ruled in favor of Calhoun on this issue. NGEMC failed to challenge that ruling and is now precluded from doing so via its Petition. The PSC need go no further in its analysis.

B. In the Event the PSC Considers NGEMC's Substantive Arguments, NGEMC's Interpretation of the Prior Rulings and the Territorial Agreement is Incorrect.

As described above, the PSC need not get to the substance of NGEMC's arguments, as this matter has already been decided. However, to the extent that the PSC decides to now reconsider this issue, NGEMC mischaracterizes and misinterprets the precedent underlying the 2022 Ruling

[7] Calhoun also requested declaratory relief in the form of a determination of whether the PSC had adopted, approved, and incorporated the Agreement in full.

and the PSC's interpretation of the Territorial Agreement. For the reasons below, NGEMC's substantive arguments fail to warrant reversal of the PSC's 2022 Ruling.

1. *The PSC's Prior Rulings on this Issue are Controlling Non-Dicta.*

NGEMC argues that the 2022 Ruling was erroneous because (1) it was premised on dicta, and (2) the PSC misconstrued and misapplied the definition of the "Box" within the Territorial Agreement. *See* Petition, ¶¶ 32-34. This argument fails for two reasons: (1) the language from the 2003 Initial Decision relied upon by the PSC in the 2022 Ruling was not, in fact, dicta; and (2) even if it was, that concept became law when it was adopted as the basis for the 2022 Ruling. Attempting to evade the PSC's clear direction in the 2022 Ruling and precedent cited therein, NGEMC seeks to misconstrue the 2022 Ruling by focusing solely on the form of the ruling and not the substance. NGEMC asserts that "the purported right the City advances in this current dispute—the right, upon annexation/provision of municipal services to a property, to extend its lines beyond the [Box] to such property—was *denied* by the commission." *See* Petition, ¶ 30. This patently misrepresents what the PSC held. The PSC did not deny Calhoun's request for declaratory relief on the ground that Calhoun was not entitled to that right. Quite the opposite, the PSC denied Calhoun's request for declaratory relief as unnecessary because the PSC had already so clearly decided the issue *in favor* of Calhoun.

NGEMC then attempts to paint the prior precedent cited in the 2022 Ruling as dicta. NGEMC argues that the language in the 2003 Initial Decision that the 2022 Ruling quotes and relies upon was dicta because it was not a necessary element of the PSC's ruling. *See* Petition, ¶¶ 28-43. This position is nonsensical: even if the language in the 2003 Initial Decision was dicta (it is not, as discussed below), it is not dicta in the 2022 Ruling because the PSC expressly based its decision on that prior precedent, holding that the 2003 Initial Decision squarely resolved the

question before the PSC in 2022 (which also necessarily means the PSC did not interpret the 2003 Initial Decision as dicta). Stated otherwise, in 2022 the PSC reviewed and adopted the 2003 Initial Decision, determining that it was the PSC's controlling opinion on the matter. If NGEMC believed the PSC erred in relying on nonbinding dicta in the 2022 Ruling, it should have challenged the decision at that time.

NGEMC seeks to depict the 2003 Initial Decision, cited extensively by the PSC in its 2022 Ruling, as being non-controlling dicta. NGEMC argues that the references in the 2003 Initial Decision to the Annexation Provision "were classic non-binding dicta," which it defines 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." *See* NGEMC's Petition, p. 13 (citing *Zepp v. Brannen*, 283 Ga. 395, 397, 658 S.E.2d 567 (2008)). However, a review of the 2003 Initial Decision and the subsequent 2003 Final Ruling demonstrate that this is not the case. The PSC's interpretation of the phrase "the City of Calhoun shall not extend its lines at any time" *was* necessarily involved in the determination of the case.

The 2003 Initial Decision dealt with a question of exceptions to the limitation on Calhoun's right to service different retail customers. The retail customer in question was outside of the Box. As part of the PSC's analysis into whether Calhoun had a right to provide that customer with electric services, it engaged in an extensive analysis of the terms of the Territorial Agreement and considered whether any exception applied. The PSC considered several different exceptions that Calhoun claimed applied and which would allow Calhoun to service the property in question. The PSC, in rejecting those arguments, considered the language underpinning NGEMC's Petition – that "the City of Calhoun shall not extend its lines at any time" outside the Box. The PSC repeatedly cited the limit's clear exception that the Box could be expanded from time to time by

Calhoun's annexation as the foil to Calhoun's arguments related to the other exception. The PSC ultimately found that unlike the annexation exception which was clear from a plain reading of the Territorial Agreement, Calhoun's positions involved reading in other exceptions that the PSC ruled were not present in the Territorial Agreement.

The PSC's reliance on the Annexation Provision in addressing Calhoun's arguments could not be clearer than on page 16 of the 2003 Initial Decision. The PSC, in explaining the basis for why it found the other exceptions to be inapplicable, stated:

> In the Territorial Agreement (Exhibit P-2) and on the Territorial Map (Exhibit P-1) in this proceeding, Calhoun clearly and unequivocally agree that it 'shall not extend its lines at any time' outside the clearly delineated border described in the Agreement and referred to in this proceeding as 'the Box.' Such contractual language is not ambiguous or otherwise open to multiple interpretations, even though the Agreement provides that the bounds of the Box may from time to time be expanded by CALHOUN's annexation of, and extension of municipal service to new territory. Moreover, on pages 2 and 3 of such Territorial Agreement, such restrictive language that 'the City of Calhoun shall not extend its lines at any time' beyond the Box is repeated and clarified further by the following statements: 'The City of Calhoun agrees not to extend its electric facilities outside the boundaries of the City of Calhoun to serve any additional customer. The City of Calhoun further agrees it will not serve electricity to any area of Gordon County or the State of Georgia until such area has been legally annexed to the City of Calhoun and all municipal services provided . . . .' By such language, the parties clearly intended to keep CALHOUN from providing electric service outside the Box in Gordon County, although permitting the expansion of the Box by CALHOUN's annexation of and provision of municipal services to new areas.

See 2003 Initial Decision, Conclusions of Law, ¶ 6 (Docket No. 14496). Additionally, in the next paragraph, the PSC goes on to rule that because of the clear language cited above, "the Commission need not and will not refer to parole evidence to elucidate such plain and clear meaning of the Territorial Agreement language." *Id.*, at ¶ 7. Thus, the discussion of the Annexation Provision is

specifically cited to demonstrate the core intent of the parties as being clear from the Territorial Agreement – a critical element of contractual analysis. The PSC's analysis of the Annexation Provision was fundamental to the determination that when the drafters intended an exception to apply, they made it clear. On request for reconsideration, the full PSC confirmed this reading of the language and cited to the above section of the 2003 Initial Decision as demonstrating the intent of the parties. *See* 2004 Final Ruling, p. 6 (Docket No. 14496). Accordingly, the PSC's 2022 Ruling correctly found that the PSC has already considered this question and issued binding precedent, not dicta, on the matter.

2. ***The PSC's Prior Rulings are Not Based on an Alleged Misunderstanding of What the Box Entails.***

NGEMC next argues that decades of PSC precedent are premised on a fundamental misunderstanding of the Box. In attempting to relitigate a prior issue, NGEMC draws a distinction between two boundaries – (1) the "Outer Boundary" (historically referred to as the Box), and (2) the "City Limit Boundary" – arguing that the PSC has mistakenly applied the Annexation Provision to the Box instead of the City Limit Boundary. In the 2003 Initial Ruling, the PSC stated that "Calhoun's Director of Utilities, also admitted that the plain language of the Territorial Agreement clearly states that Calhoun will not 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')." *See* 2003 Initial Ruling, p. 11, ¶ 19. NGEMC contends that this is an example of the PSC being clearly confused about what Box entails, because according to NGEMC, the "City's territory" should be understood to mean the City Limit Boundary (as newly defined by NGEMC in its Petition), not the Box.

NGEMC's argument is wrong for several reasons. First, and most simply, the language used by the PSC – will "not extend its lines at any time" – is a direct match to the language in the

sentence that NGEMC argues created the "Outer Boundary" (i.e., the Box). That language is also a direct match to the quoted language that the PSC again uses on page 16 of the 2022 Ruling when referencing the Box for the first time in its "Conclusions of Law" section. The notion that the PSC would use the exact same language in defining the Box while intending to define the City Limit Boundary strains credulity. It is also hard to imagine that the PSC would fundamentally misunderstand the meaning of the Box – a foundational element of the Territorial Agreement – after years of interpreting and applying the Territorial Agreement in numerous disputes between Calhoun and NGEMC.

Second, NGEMC simply ignores clear language from the 2003 Initial Decision by attempting to redefine the "City's territory." NGEMC argues that the only area that could qualify as the City's territory is the area assigned to it under the Territorial *Act*, and so the PSC must have been referring to that area when it defined the Box. However, even a cursory reading of the quote from the PSC demonstrates that the PSC was not referencing the area defined by the Territorial *Act*, but was instead referring to the "City's territory as *defined in such Territorial Agreement*." Upon adoption by the PSC, the Territorial Agreement became the controlling document defining NGEMC and Calhoun's respective rights. *See* 2003 Initial Decision, p. 16, ¶ 5. There is no reason for the PSC to base its ruling on the Territorial Act – a body of law overridden by the Territorial Agreement once approved by the PSC.

Finally, in the 2003 Initial Decision, the PSC plainly acknowledges the two different boundaries that NGEMC claims it treats interchangeably. *See* 2003 Initial Decision, pp. 20-21, ¶ 13. In describing the tradeoffs that each party made when entering into the Territorial Agreement, the PSC refers to the Annexation Provision as applying to the Box and then mentions both the "City" and the "Box" in the same sentence as separate concepts.

> . . . [T]he only consideration in the Territorial Agreement flowing from CALHOUN to NGEMC and Georgia Power is CALHOUN's promise not to extend its lines **outside the Box**, as expanded by future annexation and extension of other municipal services. . . . Otherwise, NGEMC would have had no incentive to enter into such Territorial Agreement and relinquish or waive its corridor rights in **the City or in the Box**.

Id. (emphasis added). Clearly, the PSC understood that the "City Limits Boundary" and the "Box" were two separate concepts and understood how to refer to each as appropriate.

For these reasons, NGEMC's argument that the PSC was somehow confused as to the definition of the Box is unsupported by the record. The 2003 Initial Decision – as later adopted in the 2022 Ruling – was neither dicta or in error.

V. CONCLUSION

NGEMC is attempting to relitigate an issue which the PSC has recently and conclusively decided. The PSC should deny NGEMC's Petition because it has already decided the issue, NGEMC waived its right to challenge the PSC's prior decision, and because the NGEMC's substantive contentions have no merit. Finding otherwise would reward NGEMC's attempts to serially relitigate this same issue in hopes of eventually obtaining a different result.

Respectfully submitted this 6th day of October 2023.

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BEFORE THE PUBLIC SERVICE COMMISSION
STATE OF GEORGIA

NORTH GEORGIA EMC,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 55200
	)	
CITY OF CALHOUN,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **INITIAL BRIEF OF RESPONDENT CITY OF CALHOUN** in the above-referenced docket was filed with the Commission's Executive Secretary via the Commission's Alternative Electronic Filing Procedures and via Certified Mail, an electronic copy of the same was served upon all parties and persons listed below via electronic mail, or unless otherwise indicated, as follows:

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